House of Commons

Constitutional Affairs Committee

Family Justice: the operation of the family courts

Fourth Report of Session 2004–05

Volume I

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1 Introduction

1. On 20 September 2004 we announced an inquiry into the operation of the family courts' system. Our decision was prompted by Government moves for reform as set out its Green Paper *Parental Separation: Children's Needs and Parents' Responsibilities*.[1] While examining the Government's own proposals, the inquiry focused on the way in which the courts dealt with child residence and contact cases, covering a number of key issues, namely:

- whether the family court system is being run effectively;
- whether family court judges have sufficient powers;
- court delays caused by the current system;
- whether people using family courts are getting the service they deserve.

2. This is an extremely complex subject. Many of the issues raised are the subject of heated debate. In the course our inquiry, we received a great deal of evidence from witnesses relating to the supposed bias of the courts against non-resident parents (usually fathers). We also were sent many submissions relating to the safety of children and the threat to them represented by one parent or another, as well as the threat of violence between parents. We received a large amount of evidence relating to problems associated with the enforcement of court orders.

3. The problems relating to domestic violence, and in particular the threat to children, produced some of the most difficult evidence during our inquiry. Although we deal with safety issues in Section 8 below, this inquiry is focused on contact and residence applications. For this reason, we have not concentrated closely on this very important subject except to the extent that is an issue in these disputes.

4. As our inquiry developed, we considered whether the family court system was too adversarial and whether greater use of mediation and out of court services could reduce conflict between parents. A number of submissions pointed out the lack of transparency in the family courts. The primary complaints were that both hearings and judgments were held in private and that media access to the family courts was unreasonably restricted. We deal with all these issues in some detail in this Report.

5. This Report focused on the system of family justice. Inevitably, we concentrate on the minority of cases which require active intervention by the judges or those acting on behalf of the courts. We do not focus on the majority of cases which are dealt with by agreement between the parties on a more or less amicable basis.[2] Only about 10% of family break-ups involving children result in contested court hearings about those children.[3] We are also

1 HM Government, *Parental Separation: Children's Needs and Parents Responsibilities*, Cm 6273, July 2004

2 The Department has conducted research which it believes illustrates that the courts are only dealing with cases that require external intervention. It concludes that reasonably effective filters appear to be in place preventing families being drawn into the court process that do not need to be there: see Liz Trinder, Jo Connelly, Joanne Kellet and Caitlin Notley, *A Profile of Applicants and Respondents in Contact Cases in Essex*, University of East Anglia; DCA Research Series 1/05, January 2005, esp. page v

3 See 'Introductory Notes' *Draft Children (Contact) and Adoption Bill*, Cm 6462, February 2005

aware that the evidence relates only to those who make an application to the courts and that there are many people whose cases do not come before the courts and whose interests are therefore not reflected in the evidence which we received.

6. The interests of children are a vitally important concern. We were unable to take evidence from children for practical reasons. We saw the video prepared by the Department for Education and Skills: *What Do The Children Think?* This succinctly set out examples of many of the complex and difficult issues involving the welfare of children and family break-up.

7. We received over 165 submissions in response to our call for evidence. We also received copies of all non-confidential responses to the Government's Green Paper consultation exercise.

8. We took oral evidence from the witnesses listed on page 53. We are grateful to all who contributed oral and written evidence. We also wish to thank our special advisers, Mr Andrew McFarlane QC and Professor Gwynn Davis.

2 Background

The family court system

9. The family courts deal with matrimonial proceedings and proceedings relating to children including Children Act 1989 matters (in particular inter-parental 'private law' disputes and 'public law' care proceedings), domestic violence and adoption applications. The Act introduced the Children (Allocation of Proceedings) Order, which came into force in October 1991, establishing for the first time movement of cases within the family jurisdiction across all tiers of court. The change towards a single system will be consolidated by the unified court structure to be introduced in April 2005.

10. The Family Division of the High Court has jurisdiction to hear all cases relating to children and exercises an exclusive jurisdiction in wardship and matters relating to the Hague Convention on child abduction. The High Court also hears applications for declarations in relation to children and vulnerable adults. The High Court hears appeals from family proceedings courts and cases transferred from the county courts or family proceedings courts. The Family Division is based at the Royal Courts of Justice in London and consists of the President of the Family Division and 18 High Court judges. High Court work is also dealt with at the Principal Registry of the Family Division (PRFD) in London and, outside London, by those district registries which have divorce jurisdiction.

11. Family county courts are a distinct group of county courts that have been designated by the Lord Chancellor to determine any matrimonial cause (i.e. divorce proceedings or matters concerning the annulment of a marriage). These courts can issue all private law family proceedings. In addition to this general jurisdiction in matrimonial matters, a number of these family county courts also have more specialised jurisdiction in other aspects of family business. For example, a Family Hearing Centre can issue and hear all private law family matters, whether or not they are contested, and a Care Centre has full jurisdiction in private and public family law proceedings (both contested and uncontested). The President of the Family Division has also developed the concept of specialised adoption centres with jurisdiction to issue, process and hear applications to free a child for adoption and make an adoption order.

12. Family proceedings courts' work is dealt with by lay magistrates and sometimes by district judges (magistrates' courts)[4] who occasionally sit with lay colleagues. The lay magistrates sitting at these courts are drawn from a specially selected family panel and have to undergo specialist, continuing training. The district judges (magistrates' courts) are also specially trained. There is currently only one district judge of this type sitting full time in family work (Mr Nicholas Crichton). Family proceedings courts have full private and public law jurisdiction as well as jurisdiction to hear and determine adoption proceedings. These courts are not able to hear divorce proceedings, but are able to make various orders related to separation (such as maintenance).

13. In order to hear family matters, particularly those under the Children Act, district and circuit judges in county courts must receive special family work training and guidance and

4 Previously known as stipendiary magistrates

be nominated for such work by the President of the Family Division. This is sometimes referred to as 'family ticketing' of judges. Training of judges is undertaken by the Judicial Studies Board (JSB). Judges who have not been nominated may still hear matrimonial and domestic violence injunctions. Despite the fact that judges are 'ticketed', this does not mean that they will work full time conducting family court business. Many judges, such as deputy district judges, deputy High Court judges and recorders, only sit part time in any event, which can lead to problems in respect of judicial continuity.

The Current Legal Position in England and Wales

14. Where parents are married each will have full parental responsibility for their child. All unmarried mothers and many unmarried fathers will also have full parental responsibility. Those unmarried fathers without parental responsibility may apply to the court for an order granting them parental responsibility if the mother declines to enter into a formal agreement to that effect.

15. The range of orders available to the court under the Children Act 1989 (s.8 orders) is designed not to give or remove parental responsibility from one parent or the other, but to vary the arrangements for the child when parents fall out over what is best for their child.

16. The orders which can be made are:

- Residence;
- Contact;
- Specific issue orders (e.g. orders determining education or medical treatment); and
- Prohibited steps orders (i.e. orders that prohibit a parent from exercising his/her parental responsibility in a particular manner).

17. A court may make a contact order and may enforce it through contempt proceedings, which can lead to a fine or imprisonment (which may be suspended). Where it is in a child's interests to do so, a court may vary the residence arrangements for the child in order to achieve appropriate contact. In an extreme case, the court may order that the child be taken into care where there is evidence that the contact dispute, or the lack of contact, is causing the child significant harm.

18. Over the past few years, wide concern has been expressed about the ability of the current system to meet the needs of children where parental contact and residence are disputed. A good deal of the evidence which we received reflected the views of those representing fathers' groups (such as Fathers 4 Justice and Equal Parenting Council), who argued that the current system discriminated against non-resident parents, and evidence from groups which emphasised the threat of violence to children or parents in cases of disputed custody.

Departmental responsibilities

19. The Department for Constitutional Affairs' prime responsibilities in family justice are the administration of the courts, the appointment of the judiciary and sponsorship of the

Legal Services Commission, which is responsible for the administration of the Community Legal Service (Legal Aid). The Department has joint responsibility for a number of key legislative policy areas, and in partnership with the Department for Education and Skills and the Department for Trade and Industry issued the *Parental Separation* Green Paper[5] in July 2004.

The *Making Contact Work* Consultation

20. In March 2001 a consultation paper was issued entitled *Making Contact Work: a consultation paper from the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law (CASC) on the facilitation and enforcement of contact*. A report was subsequently made to the Lord Chancellor's Department (as it then was) and a response was issued by the Department in August 2002.[6]

21. Amongst the recommendations made by the CASC were the following:

- The Lord Chancellor's Department should fund additional facilities for resolving contact disputes by negotiation, conciliation and mediation. Whilst there is plainly a role for the court in resolving contact disputes, there is a widespread perception that such disputes are better addressed outside the court system. There is also a widespread feeling that an application to the court should be the last resort;

- The judiciary and the court service need to promote a culture of judicial continuity avoiding time-wasting and inconsistency, by a more proactive management of judges' calendars and itineraries;

- Legislation must provide the powers the courts need. These are, essentially, the following: the power to refer a parent who disobeys an order for contact to a variety of resources including information meetings or meetings with a counsellor; parenting programmes; the power to refer to a psychiatrist or psychologist (publicly funded in the first instance); the power to refer a non-resident parent to an education or perpetrator programme; the power to place on probation with a condition of treatment or attendance at a given class; the power to award financial compensation from one parent to the other; and the power to impose a Community Service Order;

- A recommendation that judges and magistrates should be given the power to refer parties to mediation.

Many of these recommendations were accepted in whole or in part by the Department at the time. Lord Justice Wall has observed that many of these themes have found their way into the Government's *Parental Separation* Green Paper, although a number of the more radical options appear to have been dropped.[7]

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5 Cm 6273

6 Advisory Board on Family Law: Children Act Sub-Committee, *Making Contact Work*, Report to the Lord Chancellor, updated

7 Lord Justice Wall, *Are the courts failing fathers*, paper delivered to NAGALRO Autumn Conference, 11 October 2004. In relation to the missing options, see Section 6 below on enforcement

22. In evidence to us, Mr Justice Ryder also raised the implementation of the CASC recommendations, noting that:

> This has been a constant theme of the judiciary for a number of years. The commitment is welcomed but concern remains as to the timescale, the commitment of Parliamentary time (i.e. the priority of that commitment, the lack of engagement of the NHS… and the funding of the options which should be made available).[8]

23. Given the limited nature of the current consultation, many of these proposals could have been adopted much earlier. We regret that there has been such delay on the part of the Department in following up this previous initiative. One consequence of the Government's delay is that the clamour for change and reform has greatly increased in the intervening four years.

24. All of the Government's proposals now contained in the Draft Children (Contact) and Adoption Bill must be considered in the light of the five outcomes set out for children's services[9] and the policies designed to achieve those aims.

8 Ev 91

9 s. 10 of the Children Act 2004

3 The Green Paper

The Government's proposals

25. In its Green Paper *Parental Separation: Children's Needs and Parents' Responsibilities* the Government has acknowledged that "the current way in which the courts intervene in disputed contact cases does not work well". In particular, it has provided evidence to demonstrate that resident and non-resident parents are satisfied or very satisfied with informal arrangements in over 80% of cases, but that when the court becomes involved the picture is very different. In such circumstances resident parents are satisfied or very satisfied in 61% of cases; however, non-resident parents are only satisfied or very satisfied in 35% of cases.[10]

26. A number of key concerns were highlighted in the Green Paper and these include claims that:

- The current law, or its interpretation in practice, does not give non-resident parents the relationship with their child that they should have;
- The process for identifying and verifying safety issues is ineffective and slow;
- The Legal Aid structure rewards litigation rather than settlement;
- Adversarial court proceedings exacerbate acrimony between separating couples;
- Delay in court proceedings can be so protracted that it undermines the relationship with the non-resident parent to the extent that, by the time a decision is made, the court may take the view that it is no longer in the child's interests to grant contact;
- Relatives in the wider family context, particularly grandparents, lose contact following separation;
- Some resident parents feel that the courts allow contact in a way that puts their, or their children's safety at risk;
- Court-ordered contact is poorly enforced and in some instances the courts are unable to resolve this problem;
- The effect of these features is to create, in the words of some witnesses, a 'bias against fathers' (or non-resident parents).

27. The Green Paper describes the current legal position about contact in the following way:

> The broad effect of the current case law is that the general principle to be applied by the courts is that both parents have equal status as parents and that the court's expectation is that both parents should continue to have a meaningful relationship

10 Cm 6273, para 9

with their children following separation, as long as it is safe and in the child's best interest.[11]

Access to legal advice

28. The Government believes that on average parents who are eligible for public funding through legal aid use courts more often and for longer periods than those parents who fund their own legal representation. The paper concludes that "the availability of legal aid should not provide an incentive to go to the courts or to defy court orders".[12]

29. The Government has made a number of proposals to address this problem. These include:

- Introducing a system of accreditation for solicitors who provide advice on family matters concerning children;
- A review of relevant rules and Practice Directions so that the strongest possible encouragement is given to parties to agree to mediation or other forms of dispute resolution;
- Ensuring that publicly funded parents demonstrate that they have "at least explored the option of mediation" as an alternative before turning to litigation, in order to be able to access continued funding.

A changing role for CAFCASS

30. The Children and Family Court Advisory and Support Service (CAFCASS) provides the full range of services that support and represent children and family law proceedings. It brings together work previously undertaken in three separate services: the Family Court Welfare Service; Guardians ad Litem and Reporting Officers; and the Children's Division of the Official Solicitor. We discuss the Government's plans for CAFCASS below (Section 7). The Green Paper also proposes a major change to the role of CAFCASS, towards a "more active problem solving approach". The Paper acknowledges that in order for this to occur the judiciary will need to reduce substantially the frequency with which CAFCASS is commissioned to write reports.[13]

Improving case management by the courts

31. The Government has indicated that the judiciary is "keen to promote better case management practices in order that cases are managed as effectively as possible to deliver best outcomes".[14] The Green Paper lists a number of improvements which could be made, including:

- Earlier listing of cases;

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11 *ibid*, para 41

12 *ibid*, para 58

13 *ibid*, para 73

14 *ibid*, para 74

- Cases to be heard as quickly and effectively as possible;
- Greater judicial continuity, the aim being that wherever possible the same judge is used throughout a case;
- Rapid return to court where necessary.

32. The Green Paper recognises that court orders are of no value if the contact which has been agreed or ordered does not take place. The Government has stated that it wishes to develop several new ways to promote compliance with court orders noting that "CAFCASS and the courts will ensure the early and prompt return of relevant cases to the courts".[15] The Green Paper suggests a number of initiatives which could make agreements work. These are:

- Post-Order follow up by a CAFCASS officer to ensure that it is being implemented in practice;
- The use of Family Assistance Orders;[16]
- Extending current powers under s 11(7) of the Children Act 1989. The Government is seeking views as to whether the powers to impose conditions on parties could be used more vigorously or creatively;
- The establishment of child Contact Centres, in particular where safeguarding children from harm is an issue;
- Better enforcement by the courts.[17]

33. In February 2005 the Government published the *Draft Children (Contact) and Adoption Bill*[18] which aimed to implement some of the main recommendations set out in the Green Paper.

15 *ibid*, para 78

16 *ibid*, para 81. These orders provide for children and parents to be advised and assisted for up to six months. They may be directed to CAFCASS or to local authorities, but have not been used extensively. The Government is currently considering whether these orders might provide a more formalised support to children where contact or residence orders have been made. At present they can only be made in exceptional circumstances, but this may be reviewed.

17 *ibid*, para 85At present the courts already have considerable powers available to them to enforce court orders, including fines and the power to imprison those who have disregarded orders. They can also reverse residence. The Government is also considering the imposition of community based orders, with programmes specifically designed to address default in contact, the award of financial compensation from one parent to another, referral of defaulting parents to counselling, classes or programmes and the attachment of conditions to orders, requiring attendance at a given class or programme.

18 Cm 6462

4 The Court Process

The adversarial system

34. In her submission to the Committee, Dame Elizabeth Butler-Sloss, President of the Family Division, reflected the commonly held view that the adversarial court system itself leads to conflicts and is not suitable for resolving these sorts of issues; she said that "it has for many years been the practice of judges at all levels to encourage settlement at every suitable point in a case and to discourage the adversarial process so far as possible. The process is largely inquisitorial although it is made adversarial by the parties and their lawyers".[19] She emphasised the need for a culture shift:

> If we encourage conciliation and mediation both parents, and the child, can take ownership of the problem instead of being one step removed and leaving it up to their lawyers and judges to resolve. If we can achieve a culture shift in this direction then I can envisage invaluable progress.[20]

35. Lord Justice Wall noted that "unfortunately, the cases which have to go into this adversarial system are those least likely to benefit from it… the adversarial system is adult orientated. It focuses on the position of the parents, not of the child, and thus has the tendency… to entrench attitudes rather than encouraging them to modify".[21]

36. The West Yorkshire Family Mediation Service stated that:

> As professional mediators we are well aware of how damaging adversarial court proceedings can be…[In contrast] Mediation…helps parents reach their own decisions about the future. The mediator's role is to guide them through a decision making process and ensure that the discussion is equally balanced. By owning the agreement we know that parents will honour it. It is imperative that they own it and it is a fundamental principle in mediation that the mediator does not impose her solution on the clients.[22]

37. We summarise the main problems associated with the current usage of the adversarial system:

- Delay;
- Cost;
- The need for parents to rake over past difficulties;
- An expectation that parents will make allegations against each other and try to 'point score';

19 Ev 80

20 Ev 82

21 *Are the courts failing fathers? op cit*

22 Response to Cm 6273

- The need to involve lawyers.

38. Whilst it is easy to blame the court system, it should be recognised that only a small minority of cases reach the courts. Using the coercive powers of the court is not usually the most effective means of re-establishing parental contact, although recourse to these powers may still be necessary in some cases as a last resort.[23]

39. **The courts are not the best place to attempt to resolve complex family disputes. While their involvement will be required in some cases, particularly where there is evidence of domestic violence or abuse or where a consensual approach (including mediation) has failed, the use of the courts should be a matter of last resort.**

A presumption of contact and the issue of bias

40. A large number of witnesses made submissions in which they advocated that there should be a statutory presumption that both parents should have contact with their children. Some witnesses believed that the current system was biased against fathers. For example, the Equal Parenting Council suggested that the absence of such a presumption fuelled perceptions of gender bias:

> [The] lack of a legal presumption of contact (for all fit parents) and the existence of the no order principle are aggravated by the bias that exists in the system (especially within CAFCASS) against so called non-resident (i.e. non-custodial) parents. Because most non-resident parents are fathers, this is often perceived as gender bias.[24]

We also received evidence from witnesses who pointed out the risks inherent in forcing separating couples to share contact in all cases, because of the prevalence of domestic violence and the risks to children. (We deal with this issue in greater detail in Section 8 below).

41. Initially, a statutory presumption appeared to have the backing of the Solicitor's Family Law Association (SFLA), who had commented in its written evidence that it:

> …believes that there should… be a statutory presumption that children should have contact with both parents post-separation, unless there are reasons that militate against this, such as safety concerns.[25]

42. During our oral evidence session with the judiciary, difficulties were identified with this particular proposal and a potential compromise was identified. Dame Elizabeth Butler-Sloss commented that:

> …we can only have one presumption that the welfare of the child is paramount. If you have two presumptions, which takes precedence?[...] If you have a legal presumption, you have to apply it, except in exceptional circumstances. The legal presumption is the welfare of the child. I can see a case for something slightly less,

23 Q 12

24 Ev 135, para 13

25 Ev 124

> such as that the court should have regard to the importance of a relationship between the children and a non-residential parent.[26]

43. While Lord Justice Wall added that:

> I said in terms that there is no gender bias and we decide each case under Section 1 of the Children Act, and I think we have to keep the focus on Section 1. I am quite happy to see an expansion of it, but we must be very careful in our drafting because it could be seized on.[27]

44. In oral evidence from the legal profession it emerged that this compromise had support. Mr Christopher Goulden who appeared on behalf of the SFLA stated that:

> I have to deviate slightly from the SFLA line on [the proposal for a statutory presumption]. We have had subsequent discussions about that. I do not think that that is as well put as it might have been, with all due respect to my organisation. I think a better way would be perhaps to follow what the President said which is to have it as part of the welfare check-list and then it would get over that problem of there being, as it were, two conflicting presumptions. There is nothing wrong with having a presumption which is rebuttable, as was the recommendation in our written evidence, but as long as it came in perhaps by means of being part of the welfare check-list.[28]

45. The measure also had the support of the Law Society[29] and Families Need Fathers.[30] The Government, however, was resistant to any change on the basis that it might give "false promises and false hope to people who are really distressed".[31]

46. **The United Nations Convention on the Rights of the Child declares the right of a child to have direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.**[32] **We note that the present law already regards it to be in a child's best interests to sustain a full relationship with both parents, unless there are good reasons to the contrary. We consider that a clear statutory statement of this principle would encourage resident parents to assume in most cases that contact should be taking place.**

47. **We understand the problems which would be caused by conflicting legal presumptions.** The compromise proposed by the judges, to have a strong guideline that the court should have regard to the importance of a relationship between the children and a non-residential parent, has a great deal to recommend it. The simplest way of achieving this would be to amend the 'welfare checklist' in the Children Act 1989.[33] **We recommend**

26 Q 36

27 Q 37

28 Q 117 and see also Qq 118–120

29 Q 120

30 Q 309

31 Q 354

32 Article 9

33 This sets out a checklist of matters which the court should have particular regard to when making orders relating to the upbringing of a child or the administration of its property

the insertion of a statement in s 1(3) of the Children Act 1989 (the welfare checklist) indicating that the courts should have regard to the importance of sustaining a relationship between the children and a non-residential parent.

48. Groups representing non-resident parents (mainly fathers) made a number of robust submissions which alleged that in practice there was bias against the non-resident parent. In particular, Fathers4Justice commented that "mothers have a de facto veto (known as the 'gatekeeper' role) over the father/child relationship… [and that the] burden is placed on fathers to prove why they should be involved with their children".[34]

49. Ms Celia Conrad, a legal consultant who was formerly a family law solicitor, suggested that although there was not a direct bias against fathers:

> …the perception is that it looks as if it is more biased towards fathers because generally more fathers are the non-resident parent, so that is actually something which is probably just the way it looks from the figures because there are more fathers than mothers who are non-resident parents, so one would say that it is prejudiced against the fathers, but that is not so. My argument is that it is the non-resident parent who is the one who is actually disadvantaged by the system.[35]

50. While both lawyers and the judiciary rejected that there was any actual bias in the court system,[36] Ms Christina Blacklaws of the Law Society accepted that:

> Many, many children do live with their mothers and if that is the status quo that will often be upheld by the courts. The courts will not change that status quo unless there is good reason to do so. Hence sometimes there may be a perception that the courts are biased towards mothers in these circumstances.[37]

She recognised that this situation creates a real dilemma if the father has left the home because if "a status quo has been established with the children living successfully perhaps with the mother then it would be difficult for the courts to overturn that just because that is what the father wanted".[38]

51. It was, however, also pointed out to us that whilst only a small minority of contact cases result in an absolute denial of contact, it is more usual for there to be argument over the extent or timing of contact and over the form that this should take (whether, for example, contact should be 'indirect', involving letters or phone calls, or whether overnight stay should be permitted). These applications will generally not result in outright denial of contact, but that can still leave many disappointed non-resident parents.

52. We received very divergent views on contact rights. Some groups representing those who had suffered from domestic violence (see Section 8 below for a fuller discussion of safety issues) claimed that abusive former partners were granted contact with children too easily. Ms Hilary Saunders from Women's Aid stated that:

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34 Fathers4Justice, *Blueprint for Family Law in the 21st Century: the case for urgent radical reform*, 2004, p 13

35 Q 303

36 See for example Q 23 and Q 102

37 Q 102

38 Q 103

> We are frequently seeing cases where contact orders are granted where really it is unsafe to do so… Certainly, I think, if you want to have some idea of the scale of the problem, if you look at the judicial statistics they will show that last year more than 67,000 contact orders were granted and contact was refused in only 601 cases, less than 1%. The most exact… figure that we have for the number of domestic violence cases that go through the family court system where there are court welfare reports ordered was ACOP's Response to the Consultation Paper on Contact between Children and Violent Parents, where they said that domestic violence existed in almost 50% of the cases where court welfare reports were ordered. They quoted a figure of 16,000 cases a year, and I presume that will have increased simply because the number of contact applications has increased. I think, if you set that figure of 16,000 against 601 refusals, you can see that domestic violence is not considered to be a very serious problem in thousands of cases.[39]

53. We have highlighted these issues partly because problems relating to the establishment of a 'status quo' underline the importance of avoiding delay and the consequent need for early action before a lack of contact become entrenched. In some cases delay has brought about a situation in which, because of lack of contact over a long period, the Court's judgment about whether contact is in the child's interest may be different from what it would have been when the case began, perhaps several years earlier.

54. **There is a perception that non-resident parents are not fairly treated by the court system. We do not believe that the court system is consciously biased against either fathers or non-resident parents. Significant problems remain in a minority of cases following parental separation, often exacerbated by delays in the court process. We recommend the following: first, there should be a clear and unequivocal commitment to move as many cases as possible from the court system altogether; second, parents who do apply to the court should be given every encouragement and opportunity to resolve their differences through negotiation; and third, when there is no viable alternative to court resolution, the courts should be responsible for ensuring that the case is effectively managed and that delays are kept to a minimum (see paragraph 78 below).**

Shared Parenting and the views of children

55. Some of the groups representing non-resident parents also advocated 'shared parenting' and complained about the limited amount of time that some non-resident parents were permitted to spend with children. Families Need Fathers supported this:

> There must, however, be a proportion of parenting time that is so low that parenting can scarcely be said to be 'shared'. One could argue about at what level this applied. What seems to be the 'standard ration' that children are offered—a fortnightly visit to their non-resident parent, plus some time around holidays—cannot be said to be shared parenting. Nor can parents with so little parenting time be effectively involved in any decisions that need to be taken.[40]

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39 Q 187. These figures should be seen in the context of the fact that the figure of 67,000 refers to both contested and uncontested cases

40 Families Need Fathers policy of Shared Parenting, John Baker, 15 April 2002

56. This view was also supported by Mr Tony Coe of the Equal Parenting Council who suggested that the UK should move to a model whereby non-resident parents were granted contact amounting to at least a third of the year.[41] Other contributors, such as Mr Bob Geldof, argued in favour of shared parenting arrangements granting a 50/50 division of time.[42]

57. Depending upon the circumstances of an individual case, there are a number of serious practical difficulties which can preclude arrangements of that type. These include:

- Accommodation—the non-resident parent may be judged not to have adequate accommodation for the child or children, perhaps because they have voluntarily given over the family home to the resident parent or have been compelled to do so;

- Financial—where the non-resident parent is unable to afford suitable accommodation, there may be difficulties for them in housing the children overnight, or for holidays;

- The wishes of the children—it may be that they feel their lives become 'managed' through parenting agreements and that they are being cut off from activities and from friends if they are required to have their time divided between different homes, perhaps a long distance apart, to meet the requirements of their separated parents. This is particularly likely with older children.

58. There are difficulties where children do not wish to comply with the contact requirement, either fully or at all. The Equal Parenting Council took a forceful view on this issue, asking "what if the child says they do not want to go to school? What if the child says they do not want to go to the doctor? Fit parents are supposed to make decisions for their children".[43] This approach was not, however, advocated by our other witnesses. Mr John Baker from Families Need Fathers noted that:

> If a child does not want to see the other parent then this has to be explored, it is an issue. One of the things I would like to see is that there should be generally available and funded out of savings in Legal Aid a very widespread service which children and parents can have recourse to if there are issues. By and large it will not happen, it is a red herring. If it does happen then you need to explore why it takes place, whether that child has been abused—and some of them have been—or whether one of the parents is insufficiently child centred, things like that. It is an issue that needs addressing but preferably not in an adversarial system where one parent has used this as an argument to continue their fight against the other. There should be a child centred service to which these issues can be taken and the reasons explored and the appropriate responses made.[44]

59. **Many agreements settled outside the court amount, in effect, to shared parenting arrangements; these are usually the best course. We support agreements in which parents spell out how they will share parental responsibility.**

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41 Q 311

42 'The Real Love that Dare not Speak its Name: A Sometimes Coherent Rant', Bob Geldof

43 Q 321

44 Q 323

60. **The concept of a pre-determined statutory template for the division of time a child is to spend with each parent is not one that we favour. The welfare of the individual child should be the paramount consideration in each case. The application of the welfare principle means that a whole range of factors (not least the wishes and feelings of the child) must be taken into account. We have already recommended that the importance of sustaining a relationship between the child and the non-resident parent should be expressly considered as part of the welfare process. An arbitrary 'template' imposed on all families, whatever the needs of the child, would relegate the welfare of individual children to a secondary position.**

61. **There are significant practical objections to an automatic sharing of the time which children spend with one parent or another. In particular, an arbitrary apportionment of time does not take account of the views of children. The amount of contact a child will want with its parents will depend on a number of factors and is likely to change over the course of its childhood. Whatever arrangements are made, there has to be provision for the views of children to be taken into account, especially as they grow older.**

The position of grandparents

62. An issue which appears to have been ignored by the Government is the role of grandparents and the wider family. Ms Celia Conrad gave evidence that where resident parents fail to encourage contact with the non-resident party's parents, then such contact frequently does not occur.[45]

63. In oral evidence, Families Need Fathers agreed that grandparents should have a legal right to apply for contact without having to first ask the courts for permission. In particular, they stated that "they ought to be able to apply for contact in their own right and be treated under the same welfare and check list procedures as parents as to whether the children would benefit."[46] Arrangements of this sort already apply in adoption cases.[47]

64. **A change should be made in the law so that grandparents are granted the right to apply to the court for contact with their grandchildren, without having to apply for permission.**

Delay

65. Delays inherent in the current court system have been identified as a major problem by the vast majority of our witnesses. In evidence District Judge Nicholas Crichton put the issue in perspective: "two months is 1% of a child's childhood".[48] In this section we examine the three major reported causes of delay: the deliberate abuse of the system by

45 Q 334

46 Q 333

47 Section 26 of the Adoption and Children Act 2002 provides that an application for contact to the child may be made by as of right (without the leave of the court) by "any parent, guardian or relative". Relative is defined by s 144 of the Act as a grandparent, brother, sister, uncle or aunt, whether of full blood or half blood by marriage

48 Q 92

litigants or their lawyers for tactical reasons; the lack of resources in the Family Justice system; and, the delays consequent on poor case management.

Tactical delays

66. At the outset of the inquiry, it was suggested that delays were sometimes consciously used by parties as a tactic to avoid contact and that the legal profession were complicit in this abuse. As we mention above (Section 3), the Government's Green Paper suggests that on average parents who are eligible for public funding through legal aid use courts more often and for longer periods than those parents who fund their own legal representation. The paper concludes that "the availability of legal aid should not provide an incentive to go to the courts or to defy court orders".[49]

67. We put both arguments to the judiciary. Dame Elizabeth Butler-Sloss's response was:

> I do not think that is true. So long as you have the specialist Bar and the specialist solicitors, and I am talking about the Solicitors Family Law Association, the Family Law Committee of the Law Society and those who support it, they have that protocol as to how to behave and they, by and large, obey it. The Family Law Bar Association also has very much at the forefront the welfare of the children and the needs of the parties to settle. We do get of course people in who do not belong to those associations, but if there is the slightest view by the judiciary that this is someone trying to spin it out, then if you are any good as a judge you are going to stop it, and I do hope most of us are competent to do it.[50]

68. District Judge Crichton also denied that he saw any form of 'tactical delaying' in his courts, claiming that the quality of legal representation was very high and that practitioners were generally very committed to acting in the best interest of the children.[51]

69. The legal profession was equally forceful, stating that "there seems to be a myth going round that these cases are unnecessarily prolonged by practitioners using public funding".[52] Mr Christopher Goulden of the Solicitor Family Law Association added that "the delays in being paid are such that it is not good for your cash flow and therefore I do not again recognise this idea of these cases being abused simply because they have public funding".[53]

70. Ms Christina Blacklaws of the Law Society also rejected the accusation that solicitors used delay as a tactic against non-resident parents, stating that:

> We need to distinguish between what is good delay, planned and purposeful delay as we say, that perhaps enables a new regime of contact to be tried within the protective ambit of the court process or an assessment to be undertaken, and what is avoidable delay which is not in anybody's, particularly children's best interests. I think you will

49 *op cit*, para 58

50 Q 21

51 Q 58

52 Q 123

53 *ibid*

> see that there are some clear reasons for this delay (which we all accept does occur in our family justice system) and there are ways of resolving it. One of the ways is, as we have already said, to take out of the court process those cases which can be dealt with in another dispute resolution forum, and we all support that… it does not give any of us any family practitioner any joy to try and work through a case that should be a mediation case or should be in family therapy.[54]

On this issue there is a clear conflict of view between aggrieved parents who report experience of the use of delay and the professionals who argue that neither the court nor practitioners would countenance unnecessary delay. Given the strong animosity between the parties which is common in contested family cases, we find it hard to believe that tactical delay is not sometimes used to the advantage of resident parents. We would welcome research to clarify the situation, but such research is at present inhibited by the lack of transparency in court proceedings to which we refer below (see Section 9).

71. **The courts themselves have a continuing duty to ensure that parties and their legal advisers do not unnecessarily delay proceedings. Children's interests are frequently harmed by such delay. Legal advisers have a professional obligation to avoid unnecessary delay.**

Resources

72. A number of other areas were identified as causes of delay, including obtaining first court dates, the need for additional judges[55] (often referred to as 'judge power') obtaining reports from CAFCASS[56], judicial continuity and returning to court when orders have been breached. Criticisms were also raised about a lack of court rooms[57] and a shortage of CAFCASS officers.

73. Following evidence from the judiciary about resourcing, the Department provided statistics about the increase of family judges sitting in the High Court, also supplying figures on the operation and staffing of other divisions:

Number of High Court Judges

	1979	2004	% increase
Family Division	16	18	12.5%
Chancery Division	11	17	54%
Queen's Bench Division	47	74	57%

54 Q 128

55 Q 16

56 Q 22, Dame Elizabeth Butler-Sloss complained that it currently takes up to six months to obtain a report, due to a lack of staff and a habit of producing long reports, rather than focusing on the "issue that matters"

57 Q 31

74. The Department has noted that many judges only sit part-time in family cases and that therefore sitting days are a better judge of resources allocated to family work. This comment would, however, apply to each of the other divisions, which also have a complement of part-time judges.

75. District Judge Nicholas Crichton is the only full time Family Proceedings Court district judge in England and Wales who is designated to sit 100% on family cases. Other full time district judges sit on family cases as part of their annual sitting allocation. We have already identified the need for increased judicial continuity in these cases. A primary aim of the President's Private Law Programme in the county courts is to try to ensure judicial continuity if possible. In contrast, in the magistrates' courts the great practical difficulties in assembling the same bench of lay justices to sit on a private law case each time it comes back to a Family Proceedings court (particularly if that is at short notice) are obvious. The benefit to the parties in such cases of having a full time district judge holding the case are equally plain to see. There should be recruitment or allocation of far more full time specialist 'family' district judges (magistrates court) to this work.

76. It is clear to us that there are too few family judges at all levels in the system. The problem is not just one of numbers. The way in which the work of a family judge is approached is extremely important. Applications relating to children's welfare call for a wholly distinctive approach on the part of the court. Judges have to be prepared to explore painful and difficult issues with parents. In doing this, judicial authority has to be married to sensitivity and sympathy. This suits the style of some judges, but it does not suit others. The tendency, in consequence, is to leave all the problem-solving and negotiation in these cases to CAFCASS officers. That is to waste a hugely valuable resource, namely, the authority vested in the judge. It is a mistake to imagine that this can only be brought into play at the point of a court determination. Judicial authority and wisdom can be hugely influential at every stage.

77. **The Family Courts need judges whose style of work suits the difficult cases which come before them. This includes having the confidence to involve themselves in finding solutions to very difficult problems. We think that more effort should be made to recruit specialist judges who actively want to do family work; family work should not simply be an extra burden for those who wish to become judges.**

Case management

78. The approach of the family courts to the case management of public law child care cases has developed over a number of years and is now manifest in the *Protocol for Judicial Case Management in Public Law Children Act Cases*.[58] Judicial witnesses were keen to point out that the culture of case management existed in the Family Division well before its introduction for civil proceedings with 'the Woolf Reforms' and the Civil Procedure Rules. It was apparent to us that, whilst case management in public law child cases may be well established, that is not the case in the field of private law.

79. Lord Justice Wall conceded the need for better case management, stating that:

58 Lord Chancellor's Department *Protocol for Judicial Case Management in Public Law Children Act Cases,* June 2003

> Proactive judicial management is absolutely crucial. In the old days, the judges were reactive. The parties made an application, they came to the judge and they then made another application and came to the judge, but that has changed in family work. We were in fact case-managing well before Woolf [the introduction of the Civil Procedure Rules] and what is crucial is proactive case management where the judge calls the case back and that is one crucial point, but of course that has to go hand in hand with judicial continuity.[59]

80. In July 2004, the President of the Family Courts announced a new Private Law Programme (previously known as the Private Law Framework). The judiciary shared the details of this Programme during the drafting of the Green Paper and the Programme was issued on the 18 January 2005. It only applies to County Courts.[60]

81. The main features of the Programme include:

- Introduction of an early first hearing (a first hearing dispute resolution appointment);
- Gradual introduction of an in-court conciliation service with the attendance of CAFCASS officers at the first hearing;
- Development of locally available court directed referral opportunities for family resolution and other alternatives to court proceedings;
- Introduction of listing arrangements to provide judicial continuity and case management.

82. **Delay is a major factor in breakdowns in contact since it allows positions to become entrenched and for contact arrangements to fail. We are pleased that the judiciary has clearly recognised the need for proactive case management. We welcome the President's 'Private Law Programme' as a valuable attempt to achieve early dispute resolution and, if there is no resolution, to improve the judicial case management of private law cases thereafter. It is essential that the Government provides sufficient resources to enable the Private Law Programme to succeed.**

83. **One major cause of delay is reliance on long reports from CAFCASS in too many cases. This may often be the result of an automatic resort to a welfare report when attempts at preliminary negotiation by the parties' lawyers and CAFCASS have failed. This report takes several months to prepare. Even after it has been submitted there can be further delay in fixing a hearing date. Then the matter is usually settled on the basis of the CAFCASS officer's recommendation. There is scope for a much more focused CAFCASS investigation which need not culminate in an over-detailed report. Judges and CAFCASS, together, need to consider more effective and less cumbersome alternatives to the full-blown enquiry. For example, there is scope for oral presentation of the results of the CAFCASS officer's enquiries. The time taken to prepare such reports also leaves a way open for abuse of the system by legal advisers, who may encourage the preparation of such reports in circumstances where they are not strictly necessary.**

59 Q 17

60 The text of the Programme is available at www.dca.gov.uk and at www.courtservice.gov.uk

5 Mediation and other methods of dispute resolution

Mediation

84. Following the publication in 1990 of the Law Commission's Report on *The Grounds for Divorce*.[61] the Government accepted that mediation should have a central part in resolving matrimonial disputes.[62] The Family Law Act 1996 (FLA 1996) was firmly based upon the view that mediation had great potential for minimising the adverse consequences of marital breakdown. The Act made it a requirement that those in receipt of Legal Aid must first attend a meeting with a mediator.[63]

85. Section 13(1) of the FLA 1996, which has never been brought into force, gives a court power in divorce proceedings to give a direction requiring each party (whether legally aided or not) to attend a meeting "for the purpose of enabling an explanation to be given of the facilities available to the parties for mediation in relation to disputes between them and of providing an opportunity for each party to agree to take advantage of those facilities".

86. Section 13 is within Part II of that Act, which made widespread provision relating to new grounds for divorce and a structure to encourage reflection and consideration before a divorce case proceeds. After pilot studies, and for reasons unconnected with our present inquiry, Lord Irvine of Lairg (the then Lord Chancellor) announced in January 2001 that the Government no longer intended to implement Part II and would repeal it at the most suitable opportunity.[64]

87. The Committee received a great deal of evidence indicating that the adversarial nature of court proceedings was not the best way to get a helpful resolution of contact disputes and related issues (see paragraph 34ff above). In oral evidence, it was suggested that introducing a degree of compulsion to attend a preliminary meeting with a mediator, where it was safe to do so, did not necessarily lead to a reduction in the effectiveness of this method of dispute resolution.[65] Currently, although litigants who apply for legal aid have to explore the option of mediation, this is not the case with privately funded litigants. This can lead to problems where only one party is publicly funded, since the other party can opt out of exploring the option.

88. Dame Elizabeth Butler-Sloss highlighted another problem noting that:

> […]the trouble with mediation is it is means-tested, so if you are on Legal Aid you get it free but if the other parent is not legally aided, and quite often father is not, he is going to have to pay several hundred pounds to go to mediation, and if he is not

61 Law Commission, *The Grounds for Divorce*, No 192, 1990

62 See the 1993 Consultation Paper *Looking to the future: mediation and the grounds for divorce,* Cm 2424, and subsequent the White Paper issued in 1995 Cm 2799

63 The original provision—FLA 1996, s 29, inserting s 15(3F) into Legal Aid Act 1988—came into force in March 1997 and has now been replaced by provisions within the Access to Justice Act 1999 and the Legal Services Funding Code

64 Rayden on Divorce (17th Edn) updated note 18 to para 6.1

65 Q 295

> very keen it is not really an encouragement for him to do it. We live in a resource-restricted world, but if we are to make mediation work, at whichever stage, to have a money barrier… may not be the best use of [resources].[66]

89. It is clear that none of these proposals should be seen as an easy way of ending court-based litigation. Mr Anthony Douglas, the new chief executive officer at CAFCASS, commented that:

> I have visited 70 of our teams now and reviewed over 500 cases in the last three months and I think what has been happening is that the assumption of competence on behalf of both parents in private law cases, in other words, they could be mediated relatively easily with a good mediator, is just not borne out. What is there often in a case is one or both parents perhaps with a serious mental health difficulty, with an anger management or violence problem, man or woman, with very poor circumstances, socially and economically, with considerable deprivation, with a child who has already had poor parenting before the separation. These cases mean that often you are looking at the least detrimental alternative and trying to protect a child's long-term psychological well-being.[67]

90. The Government was not enthusiastic about promoting compulsion. The Under-Secretary of State at the DCA, Baroness Ashton of Upholland, told us that:

> Our conclusions at the moment are that there is a sort of almost contradiction in terms, if I can put it like that, between compulsion and mediation that we felt it was really important for the courts to give a very strong steer that couples should consider mediation, that they should be looking to do that, but we have not got as far as saying that they should be compelled. It would take primary legislation to do that. We are not convinced from those we have spoken to and, I agree, there have been some interesting very well considered views taking different views, if I might say that, around this, but our view at the moment is that we think it better to have a very strong steer, and the role of the courts in that is absolutely critical, but not to say, "You are compelled to sit in a room to try to find a solution to this."[68]

91. In its proposals the Government has not adequately distinguished between a compulsory exploratory meeting with a mediator and forcing people to mediate. Moreover, it could not adequately explain the differentiation between its treatment of publicly and privately funded litigants. Rt Hon Margaret Hodge MP, the Minister of State for Children, Young People and Families, Department for Education and Skills, commented:

> What we are saying is that where public money is strongly involved, it would be sensible to try and go down that route [of compulsion]. It is a judgment. It is whether it should be an expectation or compulsion, and you can play that either way. I think what you will find with the reforms that we have introduced today is that the expectation is now so strong that consideration of whether mediation will work in a

66 Q 37

67 Q 251

68 Q 362

particular set of circumstances will occur in, I would have thought, most cases, with the exception of domestic violence cases where it is not safe for that to take place.[69]

92. On the basis of the evidence we received, we support giving courts the power to direct parties to attend an introductory meeting with a mediator as established by s 13 of the Family Law Act 1996 (as we note above in paragraph 83, this provision has never been brought into force). This could result in a significant proportion of cases being diverted out of the court system and towards mediated settlements. We recommend the implementation of FLA 1996, s 13(1) in an amended form so that it applies not only to divorce cases but to all private law child disputes. Such a power could also help to create a general acceptance on the part of litigants and their solicitors that the court would expect them to have engaged in an exploratory meeting with a view to mediation and would not look favourably on litigants who had failed or refused to do so.

93. In our view, a process by which the court directed parties to a preliminary meeting with a mediator prior to agreeing to hear the case would not run counter to the sound argument that you cannot force people to mediate.

94. **The Government has recognised that mediation may be a good way to steer people out of the court system, but there remains an inconsistency whereby those who wish to claim legal aid are required to consider mediation first, but those who are privately funded can ignore this process. Where it is safe to do so (and subject to the court's discretion), we believe that all parties should be required to attend a preliminary meeting with a mediator on the basis described in section 13(1) of the Family Law Act 1996.**

The Family Resolutions Pilot Project

95. A major recent initiative established by the Government is the Family Resolutions Pilot Project. The general aim of this is to divert parents into a non-court process involving court issued information, parent education and an attempt to achieve an agreed parenting plan. The working method for this Pilot Scheme is that following an application to the court the parents will receive a letter from the judge advising them to take part in the project and explaining the process. Cases where there is a risk factor will then be filtered out and sent for a finding of fact and a recommendation as to whether they are suitable for the scheme. There will then follow a three stage process which was described by Ms Mavis Maclean CBE, Senior Research Fellow, Department of Social Policy and Social Work, University of Oxford (who was involved in designing the pilot scheme) in an article in the magazine *Family Law* as follows:

- Parents are separately invited to group meetings where a video *Hearing from Children* is shown in which the children describe their experience of parental separation. The video is followed by a discussion dealing with the impact of parental conflict on children;

- A session designed to work on 'conflict management', in which parents are separately invited to group workshops on managing family contact after separation. The session is

69 Q 364

designed to focus on learning skills for conflict management and the specific context of conflicted contact;

- A session designed to encourage 'planning post-separation parenting'. At this stage, parents would be invited together to meet with an adviser from CAFCASS. They might be given examples of parenting arrangements that work for other families with children at similar ages, similar geographical distances and work situations. Those parenting patterns would be provided as examples of what works for others and not as prescriptive options.

96. We received a substantial volume of correspondence concerning the planned Family Resolutions Pilot Project. Much of this focused on the Pilot Project's differences from the Early Intervention Project which had been established in Florida. For example, Ms Caroline Willbourne, a barrister who sits as a deputy district judge of the Principal Registry of the Family Division, raised this issue in an article in *Family Law* (November 2004). She said:

> …that (Early Intervention) lost its way in Whitehall bureaucracy—is borne out by the project's history. Put forward as a fully articulated concept ready for installation, it has not been seen since… How did this happen? One answer is that "Family Resolutions" is the name of an old CAFCASS project which was undefined and unfunded. From the moment that the EI project first went to DCA in the autumn of 2003. it became evident that EI would attract funding. CAFCASS was well placed to claim EI as its own project.[70]

97. In the House, the Minister for Children commented that:

> The family resolutions pilot project was developed by the Department for Education and Skills working with colleagues in the Department for Constitutional Affairs to ensure that it was amended to reflect British circumstances. That seems to me a common sense approach…[71]

98. This view was generally reflected in comments made by Mrs Justice Bracewell. In particular, she indicated that there were differences between Early Intervention as practised in Florida and the project which had been piloted. She noted that in Florida the scheme is compulsory, whereas Family Resolutions is not, stating that the reason for this is that primary legislation would be required to make the pilots compulsory and the inevitable delay in passing legislation would have prevented the start of the pilots, which were urgently needed.[72]

99. The main issue in question appears to be whether 'parenting plans' should be entirely advisory, or whether an element of compulsion should be introduced to ensure certainty. Mrs Justice Bracewell claimed that:

> The Florida project uses standard templates for parenting plans which have been devised by the courts and child experts. A parenting plan is presented to all parents

70 Caroline Willbourne, 'The Family Resolutions Project', *Family Law*, 687, 2004, p 687

71 HC Deb, 13 December 2004 col 1469

72 Ev 90-91

> who cannot agree, and they are required to adhere to it pending further negotiation and resolution of the problem. This format works well in Florida but there have been concerns within the steering committee, of which I am a member, that such a rigid approach might not suit the diverse and multi-ethnic families with many different styles of parenting in this jurisdiction.[73]

The Government's Pilot scheme has judicial support.[74]

100. There are dissenting views about this. In oral evidence, Mr Philip Moor QC, the Chairman of the Family Law Bar Association, commented that:

> We strongly support the Early Interventions Pilot Project (which has become the Family Resolutions Project). There is a slight problem with that and that is in our view the parenting plans were a good idea and we liked the idea that you have a sort of template for these cases and that the parents that went into the system knew that unless there was something pretty exceptional in the case the template was the sort of order that the court would be thinking of making. We thought that set things out pretty clearly for them at the beginning and that is a project that we would like to see carried through… We would like to see the parenting plans in there and we would like it to be pretty well known that that is what the judges are going to do if the mediation breaks down and there are no good reasons for a change from the parenting plans.[75]

101. In her written evidence Ms Celia Conrad echoed this view, stating that:

> The Pilot Project's aim is to reduce the number of families litigating in court by 75%. Having clearly defined contact guidelines, to be implemented in the event that the parents cannot agree a schedule of contact, and procedures for resolving most normal contact disputes months before they reach court would help achieve this. This is because if the parties know what order is liable to be made by the Court there is less point in litigating. These are all major plus points for such a system.[76]

102. In January 2005, the Department for Education and Skills issued a document entitled *Putting Children First: A Guide and Planner for Separating Parents*. This has sometimes been portrayed by the Government as the introduction of 'parenting plans'. While this document may well be of assistance to parents, and on that basis we welcome it, it is not the sort of template document that critics had in mind.

103. **Various groups told us that the Family Resolutions Pilot Project is not being operated as the originators of the project envisaged. The Government says that it is impossible to pilot a scheme based on the 'Florida Model', since any form of compulsion would require primary legislation. There is no current evidence as to the success or otherwise of the pilot project currently being tested in the UK. Nonetheless, the Committee has received evidence from the judiciary that they are broadly content**

73 Ev 90, para 2

74 See Qq 60–63; and Ev 90-91

75 Qq 158–159

76 Ev 129

with this pilot project. We emphasise the need for adequate resources to be dedicated to the pilot project and that the results be published at the earliest opportunity. It is disappointing that the potential of the 'Florida Model' remains untested in the UK.[77]

77 We have seen no evidence relating to the success or otherwise of the 'Florida model' based on research done in the United States

6 Enforcement

Problems in enforcing court orders

104. It is pointless for the courts to make orders if those orders are not then enforced. There is a legitimate public interest in ensuring that where an order is made by the court it is subsequently obeyed. Failure to enforce contact orders is the basis of some of the claims that the system is 'biased against fathers'. Furthermore, a failure of the State to enforce orders in this sphere has been held by the European Court of Human Rights to amount to a breach of the State's positive obligations under the European Convention on Human Rights.[78]

105. Nonetheless, enforcement of orders has always been fraught with difficulties. There are obvious practical problems with fining or imprisoning recalcitrant parents—especially those who live with the children in the case—since the main impact of doing so will be to injure the children's interests. Witnesses gave various reasons why parties to cases disobey court orders. Some, including Women's Aid, say that some orders are not obeyed because of fears of domestic violence (see section 8 below on Safety).

106. The Government has recognised that groups representing non-resident parents have substantial concerns about the failure to enforce court orders. Families Need Fathers has commented that:

> There is much debate, often lacking in detail, about enforcement procedures and vague promises to legislate. Whatever is done, this should be clear—that denying children the contact ordered is not acceptable and will not be permitted. Taking action for enforcement should not be the responsibility of the contact parent. The authorities should take responsibility for ensuring their decisions are complied with.[79]

107. One area of concern is whether the Government has gone far enough in its consultation to address recommendations which have already been made by the judiciary and other child law specialists. In particular, Lord Justice Wall has drawn attention to the fact that powers suggested in the CASC report[80] to allow judges to refer a parent to a psychologist or psychiatrist (publicly funded at the first instance) have been dropped; and that the power to refer a non-resident parent to an education programme or a perpetrator programme have been replaced with the words "a relevant programme".[81] We raised this with ministers in oral evidence. Baroness Ashton responded:

> You cannot make somebody go to a psychiatrist or a psychologist because that is not the way they work, nor can you have compulsory discussions with a doctor, it does

78 Sylvester v Austria [2003] 2 FLR 210; Hansen v Turkey [2004] 1 FLR 142

79 Ev 142, para 12

80 *Making Contact Work*, *op cit*

81 *Are the courts failing fathers*, *op cit*

> not work like that. I think they would find that unacceptable in terms of clinical practice.[82]

108. Dame Elizabeth Butler-Sloss set out a number of additional powers which she believed would usefully assist the judiciary, indicating that:

> What we need is community service, parenting plans, requiring people to go and get information to teach them how to be good parents and why the other parent matters because we want children to have both parents.[83]

109. The need to find alternative methods of enforcement is clear because it is recognised that imprisoning the non-resident parent or taking the child into care because of the failure to observe contact orders would almost always be to the detriment of the child. Even fines could in effect punish the children. It is a key point that the enforcement of court orders should not conflict with the interests of children. In written evidence NCH indicated that:

> For us the problem isn't really that judges lack sufficient powers to enforce orders: as a children's charity we endorse the view that it would be wrong for judges to 'punish' obstructive parents if this resulted in adverse consequences for the children, as it invariably would. The problems that come to court reflect the complexities of people's lives and there are no simple solutions to the conflicts between parents. An order for contact or residence alone cannot remove the animosity between the parents.[84]

Mr John Eekelaar, Reader in Law, Oxford University, summarised the position:

> If the only way in which the father's interests here can be protected is by a measure which the court has expressly found, and that is why I want to highlight this, has expressly found, will cause greater harm to the child by making it more real than the present situation of the child, that it will cause greater harm to take those steps, we have just got to make a decision, which person's interests are right, the child's, protection against harm to the child or the father's interest, and you have got a straight choice. I cannot solve that dilemma.[85]

110. On 18 January 2004, the Government indicated that it would be introducing draft legislation this Parliamentary term containing new policies in this area.[86] The draft Bill will offer the courts new and more flexible powers, including: power to direct parties in a contact case to attend information meetings, meetings with a counsellor, parenting programmes/classes or other activities designed to deal with contact disputes; and power to attach conditions to contact orders which may require attendance at a given class. Where a contact order has been breached, courts will be able to: impose community-based 'enforcement orders' for unpaid work or curfew; or award financial compensation from one party to another (for example where the cost of a holiday has been lost). We welcome

82 Q 400

83 Q 16

84 Ev 147

85 Q 237

86 See Cm 6452

the additional flexibility which the Draft Bill proposes to give the courts in dealing with recalcitrant parents.

111. **Disobedience of court orders and the flouting of the rule of law is unacceptable. Nevertheless, forcing parents to do things which they do not consider to be in their child's best interests may not work. We believe the emphasis should be placed on overcoming problems through CAFCASS intervention and education programmes, rather than by the traditional means of enforcing court orders through a system of punishments. This will involve CAFCASS monitoring the way in which court orders are carried out and fully engaging in questions of enforcement where necessary. This will require a whole new approach for CAFCASS, which up to now has not had a role in supporting court orders. CAFCASS case workers will need to take a much more proactive role as the first point of appeal where arrangements under the court order have failed.**

112. **The new role for CAFCASS was a major element in the Government's plans, set out in the Green Paper (see paragraph 30 above). Potentially, this is a revolutionary change. If this major new responsibility for CAFCASS is to be carried out successfully, the Government will need to ensure that sufficient resources are placed at its disposal. CAFCASS will need enough caseworkers with the relevant skills to carry out this ambitious new work. The organisation will need to accept that its former tradition of service will no longer apply, as the nature of its role will be radically different.**

113. **The range of enforcement methods to be used should not harm the interests of the children involved in the case: for example, imprisonment of a parent would generally harm the interests of children, whereas the imposition of a community service order might not. We would expect that punishment would only be appropriate in cases of wilful refusal to obey the court and as a last resort in exceptional cases.**

114. **The power of the court system is not in itself sufficient to resolve all child contact related issues. We note the efforts made by the Government to broaden the enforcement regime and we welcome a more inventive approach to this problem. Courts will only be in a position to enforce orders if they continue to engage with a case when it is obvious that orders which they have made are failing and where they are given adequate support by CAFCASS.**

7 The work of CAFCASS

Proposals to change the role of CAFCASS

115. The Children and Family Court Advisory and Support Service (CAFCASS) was set up on 1 April 2001 as a national executive Non-Departmental Public Body for England and Wales to provide the full range of services that support and represent children and family law proceedings. As we noted above (Section 3), CAFCASS brings together work previously undertaken in three separate services: the Family Walk Court Welfare Service; Guardians ad Litem and Reporting Officers; and the Children's Division of the Official Solicitor. CAFCASS was not an immediate success. In an earlier Report we severely criticised the operation of CAFCASS.[87] As a result, the Chief Executive and Board members resigned.

116. CAFCASS practitioners are trained to undertake both public and private law work. In practice, much of its work consists of writing reports on families in disputed cases. Preparation of these reports (which will often involve highly complex and sensitive matters relating to the care of children) can take three to four months.

117. The Government's Green Paper initially proposed a major change in the role of CAFCASS, towards a "more active problem solving approach". The paper accepted that in order for this to occur the judiciary will need to reduce substantially the frequency with which CAFCASS is commissioned to write reports.[88]

118. CAFCASS indicated that it fully supports these changes stating that:

> CAFCASS has the necessary skilled and experienced practitioners to undertake the new role envisaged in the proposals. We welcome the opportunity to redeploy our skilled social work practitioners away from the current one size fits all report-focused service, to a service that is more problem solving, resolution and outcome-focused. Indeed, many of our practitioners and teams work in that way already, so what is proposed will not come as a change. They are assessors and change agents more than they are 'reporters'. As soon as the courts are consistently able to reduce the number of reports ordered, we will be able to undertake the new roles in full. We are keen to work with all partners in the family justice system to achieve this as soon as possible.[89]

119. While it has been proposed that CAFCASS scale down its report writing, little clear information has been provided about how this will occur and what the timescale will be for changes to be implemented. In oral evidence the Minister for Children stated that, as the Minister responsible for CAFCASS, she did not want to:

> promise more than we can deliver. I have said as much very, very clearly both to the chair and the chief executive of CAFCASS. I think a bit of this is "Watch this space".

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

88 Cm 6273, para 73

89 CAFCASS Response to Cm 6273,

> We know the direction of travel we want to go in, we know where we want to get to, but we must not try to rush at something and then simply fail to deliver in the way that CAFCASS has done in the past. So you are completely correct to draw our attention to it.[90]

120. The President's Family Law Programme envisages a number of additional tasks for CAFCASS, including attending first appointments for conciliation in all county courts and taking proactive steps to keep in touch with the progress of contact, so that the CAFCASS officer can contact the court immediately if there is a need to get the parties back to correct some failures in the delivery of contact already ordered.

121. We received evidence suggesting that there are risks that if report writing is reduced there will be an impact on the ability of the court to obtain detailed evidence about the child's perspective in the dispute.[91] Other concerns were expressed by witnesses about the ability of CAFCASS to move towards a more problem solving approach and whether it issued guidelines so that parents knew how it would deal with their problems.

122. **The proposals to transform the work of CAFCASS are ambitious and are also likely to be resource-intensive. CAFCASS and many of our witnesses welcomed the proposed changes. Given the problems suffered by CAFCASS, on which we reported in 2003,[92] it is essential that strong leadership is displayed during this transitional period, and it is also essential that the Government provides CAFCASS with sufficient resources to ensure the success of its new role. Government needs to define that role and set a timetable for implementation. If the Government intends that CAFCASS is to become a problem-solving agency it should publish guidelines to ensure that consumers understand what service levels they can expect. Such guidelines would also allow monitoring of the agency's performance.**

90 Q 436

91 Response by Professor Jane Fortin of King's College London to the Government's Consultation Paper Cm 6273

92 *op cit*, HC 614

8 Safety issues

123. Domestic violence and other forms of abuse raise emotive and controversial issues. Unfortunately, the Department was unable to provide accurate statistics indicating how frequently such problems occurred in contact disputes. Other witnesses offered widely differing views. Groups representing victims of abuse, such as Women's Aid and the NSPCC, focused on the inappropriate grant of contact and the underreporting of domestic violence. Groups representing non-resident parents stated that false accusations were frequently made to frustrate contact and that this was not adequately recognised by the Court. Witnesses also pointed out that many child abuse cases arose while the child was at the home of the resident parent. Baroness Ashton acknowledged that "we do not have any statistics about unfounded allegations because, as they are unfounded, they are not pursued".[93] Anecdotal evidence based on case reports was produced by the judiciary demonstrating that unfounded accusations of domestic violence had occurred in some cases.

124. The Department accepted that the underreporting of domestic violence was a problem. Baroness Ashton stated that:

> What we are trying to do is to develop a systematic way in which we approach this, a process that from the beginning enables those who might be victims of domestic violence to bring that forward. We know from experience that those who suffer domestic violence sometimes do not know that they are even victims of domestic violence, it is how they live.[94]

125. Following the implementation of s 120 of the Adoption and Children Act 2002 the Department has announced a number of initiatives in this area, including the introduction of 'Gateway forms' to allow courts to be informed about allegations of domestic violence at the outset of a case. An evaluation of the number of applications with domestic violence will start in the summer of 2006.[95] Baroness Ashton told us that:

> We want to make absolutely sure that where [safety] could be a factor it is enabled to be raised at the beginning and throughout the process and that where it is raised the court makes a finding of fact looking at the evidence that might be available to the court to determine whether or not it is a factor and then, where it is a factor, it should be clear about the definition of harm and what the implications would be of that in terms of contact with the child.[96]

126. The introduction of further finding of fact hearings in every case where domestic violence or safety issues are raised would automatically lead to further delays. It may not be essential for a finding of fact hearing to take place in every case, since in some cases parents will admit to misconduct, whilst in others it may be plain that there is not a continuing safety issue in respect of the children. The Government should undertake research to assess

93 Q 439

94 Q 437

95 Cm 6452, para 19

96 Q 437

the percentage of claims of violence found to be upheld in findings of fact hearings in contact and residence cases.

127. Until the Department is able to present coherent statistics on the issue of domestic violence, there will continue to be a dispute as to the extent to which claims are underreported or are falsely made in order to exclude fathers from contact. Baroness Ashton acknowledged that this was a problem:

> One of the interesting aspects whenever a Select Committee does a piece of work is that one finds out what one does not know and certainly I would say to the Committee that one of the helpful things that has happened is that we need to think very carefully about the kind of statistics we collect and the sort of information we need without burdening, as you will appreciate, CAFCASS, the courts or others and it might well that be the Gateway process in a sense enables us to do that.[97]

After we finished taking evidence, we received the report *A Profile of Applicants and Respondents in Contact Cases in Essex* by a team at the University of East Anglia.[98] Part of this work considered the reasons given for domestic breakdown. This included domestic violence—cited by 24% of women as the first reason for breakdown of the relationship: 38% of women cited domestic violence or physical abuse as one of the reasons for breakdown of the relationship. Although this study is based on a relatively small sample (59 contact cases in Essex over a four month period) it is a useful and welcome addition to the research on this topic. The researchers concluded: "In terms of the overall sample there was no clear link between reports of physical abuse and domestic violence and child protection issues".[99]

128. **There is little accurate or credible research on the extent to which problems relating to domestic violence have a bearing on contact applications, although we accept that domestic violence is generally underreported. The Department is proposing to introduce 'Gateway forms' to identify whether domestic violence is an issue at the earliest possible stage. These will have to be closely monitored, both to assess the safety issues and to ensure that they do not give rise to additional legal argument. It is essential that where safety is an issue this is reported. Nevertheless, the Government will have to be careful to ensure that the use of these forms in every case does not provide parents with another weapon to use against each other, leading to more delay in deciding cases.**

129. **It is vital that important safety issues such as domestic violence and other forms of abuse are effectively addressed. Enforcement action by the courts should not occur while there are unresolved safety concerns. Equally, false accusations raised by parents as a mechanism to frustrate contact should not succeed. The Department should follow up the introduction of 'Gateway forms' by examining the proportion of cases where the courts conclude that violent or abusive conduct has actually occurred.**

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97 Q 440

98 *A Profile of Applicants*, *op cit*

99 *A Profile of Applicants*, para 8.4, p 89

Contact centres

130. The Government has indicated that new money will be found to increase the number of contact centres, where contact has been ordered in circumstances where there may be a risk of harm. On 18 January 2004, the Department made an announcement (in conjunction with the Department for Education and Skills and the Department for Trade and Industry) that the Government will be making a further £7.5m available over 2006/07 and 2007/08 to sustain and develop services to support contact between parents and children, including those delivered through child contact centres.[100] It has been suggested by some witnesses that use could be made of grandparents and other extended family in such circumstances,[101] whilst some fathers' groups believe that orders for contact restricted to contact centres are abused.[102]

131. **We welcome the extra funding which has been found for the provision of additional contact centres. Referral of cases to such centres should be a matter of last resort where there is no other safe way to facilitate contact. A wider range of options such as children's centres and extended schools would provide more opportunities for contact and supervised contact. There should be greater focus on creative and cost effective solutions, such as those involving grandparents.**

100 www.dca.gov.uk

101 See for example Q 58 where His Honour Judge Meston QC commented that in the context of providing interim contact orders: "If an interim order has to be made to get things moving you make an interim order, even if it means using a contact centre or something of that sort, or using grandparents to help contact, just to keep it going, so that the court process in itself is not an excuse for not allowing contact to resume on a proper basis" and also Q 90

102 Ev 81- 82

9 Transparency

Media coverage of the family courts

132. A major concern which was raised in evidence is the fact that the family courts conduct their business in private. Section 97(2) of the Children Act 1989 prohibits and makes it a criminal offence for any person to publish any material which would identify, or is likely to identify, a child as being involved in family courts proceedings. Furthermore, section 12 of the Administration of Justice Act 1960 has the effect of making it potentially a contempt of court to publish information relating to proceedings before any court sitting in private where the proceedings:

i. Relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

ii. Are brought under the Children Act 1989; or

iii. Otherwise relate wholly or mainly to the … upbringing of a minor.

133. In a recent judgment, Mr Justice Munby spelt out that the publication of any information about a child case, whether or not it would identify the child concerned, is almost always prohibited without the direct permission of the court.[103] Publication in that context covers almost all forms of communication whether by word of mouth or in writing.

134. The current effect of this judgment is that parents who raise issues with their constituency MP, social services department or other appropriate bodies, are unclear about their ability to access and use this information. They may well be committing an offence, and those receiving complaints are unable to examine them or take them up.

135. In a submission to the Committee, the legal correspondent Mr Joshua Rozenberg, suggested that there should be greater public access to the family courts. In particular, concerns have been expressed, following the recent case involving Professor Roy Meadows, that if the courts operate in an atmosphere of secrecy, injustice could occur and the public would be none the wiser. He commented that:

> In general, I would argue that the courts should be open to press and public, subject only to restrictions on identifying children involved in proceedings. It is patently in the public interest that justice should be done patently and in public.[104]

136. Mr John Sweeney, a reporter with the BBC, also criticised the current system, stating that:

> Secret courts are bad courts. In rape cases, the media is not allowed to name the victim and sometimes the accused. But we are allowed to report in full the evidence. In exactly the same way the media should be allowed to write and report the evidence

103 Re: B [2004] EWHC 411 (Fam)

104 Ev 199

> in a Family Court—so long as we don't identify the child. In the Family Courts, if the only evidence against a parent comes from an 'expert' then the parent suffers a grievous disadvantage if that evidence can never be brought to the public eye.[105]

137. The Committee also received a submission from Ms Sarah Harman, a solicitor who had been seriously criticised by Mr Justice Munby in the case of Re: B (see above) for disclosing documentation from the case to the Solicitor General (who happened to be her sister) as well as to the Minister for Children, Rt Hon Margaret Hodge MP, and members of the media. Ms Harman criticised the lack of transparency in proceedings relating to children:

> I believe that this 'secrecy' prevents society having any knowledge of the workings of our family court systems, ascertaining whether or not our family courts are fair and in touch with current mores, or knowing whether our family judges are serving society as a whole in the best way possible. I further believe that users of the family courts, particularly those who feel aggrieved (for instance where diagnoses of Munchausen's' syndrome by proxy, or non-accidental injury are made) are prevented from having reasonable discussions with close family and colleagues about their cases, are denied the right to obtain support from their communities, their churches and their MPs, and most importantly are denied the right to search for alternative diagnoses in difficult child protection cases[106]

138. The judiciary proved very receptive to this criticism. In particular, they acknowledged that the lack of transparency fuelled the notion that the courts were biased against particular groups of litigants. Mr Justice Munby commented that:

> The fact is, and I believe it is a fact, that the family justice system is under criticism today because it is perceived as being a secret justice system, and in that sense we are crippling public debate. As the President has indicated, a lot of the criticisms, whether they come from Fathers4Justice or the NSPCC, are necessarily anecdotal and nobody is able to see the relevant material. I think it is doing us serious harm, and I do not think that the existing system, the existing rules, are necessary.[107]

139. The witnesses representing the judiciary were unanimous in stating that something should be done to improve transparency and offered a number of solutions. These included the possibility of giving judgment in public (subject to the usual anonymity order) and some possible disclosure of medical evidence. Dame Elizabeth Butler-Sloss noted that this issue had been considered before:

> Could I just make two points? One is that this was discussed in a paper which came from the LCD about 10 or 12 years ago, and there was quite considerable consultation on whether the Family Court should be open, and then it died a death. It is quite an interesting paper and I think it would be worth, actually, looking at that. Secondly, I would not disagree with having the same system in the magistrates' court

105 Ev 200

106 Ev 167, para 7 and 8

107 Q 46

> and right the way through the county court and the High Court of allowing the press in under certain restrictions.[108]

140. This mood for change has not simply been expressed to the Committee. In a recent (public) judgment, considering international child trafficking, Mr Justice Ryder commented that:

> Aside from the public interests that I highlighted at the beginning of the judgment, there is also a public interest in knowing of the work that is done in the family courts an interest that is sometimes narrowly characterised and equated with one of its components i.e. public scrutiny of the fairness of family justice. Provided the private and family lives of people are respected, i.e. inter alia their personal confidentiality is protected from prurient interest and salacious comment and that the vulnerable are protected, a greater measure of public information about the work of the family courts may go some way to engender public confidence in the sensitive balancing of people's rights and needs that is an essential component of the social contract that is family justice. For my part I would welcome careful consideration of whether and if so in what way family proceedings should be more open to the press and to the public. The trust in the media has been amply re-paid in this case and I am grateful.[109]

141. In the course of that hearing, Mr Justice Ryder made a direction, which would protect the private and family lives of all private law litigants, whilst allowing far greater public understanding of the work of the family courts. The terms of the order were as follows:

> The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

142. The DCA was unwilling to commit itself to such an approach and, in oral evidence, Baroness Ashton commented that:

> What the President and the judiciary are looking for is to be able to be more open about their judgments and I think there is a general view that this could be a positive move and provide greater understanding of the way that the family courts work. So the proposal that she is looking towards is that there might be able to be a presence but that the normal reporting restrictions around children would apply, but there would be a more general understanding of the way the courts work. What we have said is that we want to look at this very carefully so that we address the issues that are coming from both directions, those of anonymity, those of making sure that we do not put those who are in court into a more difficult situation where they feel unable to give the evidence and that we do not just make this such an open situation that in a sense that risks justice being done.[110]

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108 Q 46

109 Re: C [2004] EWHC 2580 (Fam)

110 Q 414

143. The evidence from the President of the Family Division[111] shows that courts in other jurisdictions are able to be much more transparent when dealing with family law cases. The Scottish experience is particularly relevant, since it deals with a social background that is essentially the same as that in England and Wales. We note that the powers to admit people to the Court room who are not directly involved in the case are not even uniform in England and Wales: the powers of district judges in magistrates courts to admit people are different from those available to judges in county courts or the High Court.

144. **A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary. This would make it possible for the public to have a more informed picture of what happens in the family courts, and would give the courts the 'open justice' which characterises our judicial system, while protecting the parties.**

Children Act 2004

145. The Government is also attempting to create greater openness. It sought to amend the Children Bill (as it then was) to change the law in respect of the criminal offence created under s 97(2) of the 1989 Act and s 12(4) of the Administration of Justice Act 1960 and to provide that where the rules of court specify the circumstances in which information from court proceedings can be disclosed, such disclosure would not be a contempt of court unless anything else would make it so, such as a court order prohibiting publication.

146. That proposal would not allow the extension of disclosures of information from family proceedings to the media. The Department has recognised that some parties to family proceedings and others may have a legitimate interest, in limited circumstances, in sharing information. It has indicated that its broad policy intention is to permit the disclosure of information relating the family proceedings in order to allow:

- Parties to a case to obtain appropriate advice and support;
- MPs and Peers to undertake their official duties and Ministers to exercise their statutory functions;
- Statutory agencies, such as the police, the Crown Prosecution Service and Social Services, to obtain access to relevant information for child protection purposes;
- Complaints to be made to supervisory bodies and investigations to be carried out;
- Statutory bodies to undertake their regulatory and investigative functions; and
- Approved research to be undertaken.[112]

111 Cm 6452

112 Ev 192, para 3.8.7

147. A consultation paper has been issued on this subject[113] and the Minister for Children indicated in oral evidence that she would keep the Committee informed of developments in this area and that progress was expected by the summer of 2005.[114] The consultation itself, however, only relates to a restricted class of person and would not allow parents to discuss their case in a free and frank manner with people they chose. It seems to us that the main concern is to prevent press reporting of personal details; the Government could go much further than they have suggested if they wish to combat accusations of bias and secrecy.

148. **We welcome the proposed amendments foreshadowed by s 62 of the Children Act 2004. Parents must be able to seek advice from constituency Members of Parliament and make complaints to the relevant supervisory bodies. We think that this reform should go further. The current rules relating to publication also hinder legitimate research. For example, even parents who wished to respond to the Government's Green Paper consultation exercise may have inadvertently broken the law. We think that the simplest approach is that the restriction on the discussion of their cases by parents should be removed entirely (unless a specific order is made to the contrary). The press should continue to be restricted to publishing those matters which have been made public by the court.**

113 Department for Constitutional Affairs, *Disclosure of information in family proceedings cases involving children*, [CP 37/04], December 2004

114 Q 420–422

10 Conclusion

149. **The evidence which we took during the course of our inquiry showed that the court system was not best suited to deal with many of the complex and difficult matters relating to the break-up of families. This is not a criticism of the judges or of the many dedicated public servants who work within the courts' system. There are limitations to the court process itself. A clear example of the difficulties associated with a traditional court approach to these problems is shown by the frequent failure of the current enforcement system of court orders.**

150. **We support the Government's proposals contained in the *Draft Children (Contact) and Adoption Bill* (Cm 6462) relating to extension of the courts' powers of enforcement. On the wider issue of use of the courts, the Government's plans rely heavily on a new role for CAFCASS and would involve a completely new approach for the agency. Case workers would no longer simply prepare long reports but would have a much closer continuing relationship with these families. This ambitious change may well require considerable extra resources in terms of numbers of officials and the development of new skills. Without the provision of extra resources, this potentially revolutionary initiative is unlikely to succeed.**

151. **There is a widespread perception that non-resident parents (often fathers) are not treated fairly. We conclude that, although the courts rigorously avoid conscious bias, there are considerable grounds for accepting that non-resident parents are frequently disadvantaged by the system as it is administered at present. Delay is a major factor. The resident parent who is involved in the contact dispute will be advantaged by any delay, even if the resident parent is behaving unreasonably.**

152. **This situation will continue until solutions are found to the following problems:**

- **delay;**
- **lack of judicial continuity;**
- **inability to come back to the judge promptly;**
- **ability of the courts to make orders that are obeyed.**

The combination of these factors have produced a situation that allows a new 'status quo' arrangement for the children to become established by default.

153. **One of our key recommendations is an amendment of the 'welfare checklist' in the Children Act 1989 to ensure that the courts have regard to the importance of sustaining a relationship between the children and a non-resident parent. Such an amendment would send a clear message to the courts, to parents and to their professional advisers about the importance of maintaining links between both parents and their children. Although this will not satisfy those who believe that there should be an absolute rule about the extent to which parents share responsibility for their children, it will reassert the rights of non-resident parents to contact with their children, as well as the rights of**

children to contact with both their parents, while maintaining sufficient flexibility to cope with issues of safety.

154. **Lack of transparency has been a major factor in creating dissatisfaction with the current Family Justice system on the part of those involved in cases. In our view, the current rules relating to communication of the details of particular cases are too strict. The restrictions on communicating details of family cases to those not involved (which may apply to Members of Parliament handling constituency cases) have served to fuel the perception of bias and unfairness. Some of the evidence we received was that the lack of openness prevented proper scrutiny of the work done by family judges or court officials, and made it impossible to prove or disprove perceived unfairness.**

155. **While there is disagreement as to whether all the criticism of the system of Family Justice is justified, it is widely agreed that reform is needed. There is some divergence of opinion about whether the proposals contained in the Government's Green Paper are an evolution of previous policy rather than a major change. We welcome the Government's acceptance of the general need to remove as many cases as possible from the court system. It is not clear that the Green Paper proposals will by themselves achieve this. A coherent statement of the Government's overall strategy is needed combining established initiatives, such as mediation, with experimental approaches. The system at present is focused on the resolution of disputes between adults: the interests of children should be paramount.**

Conclusions and recommendations

The Court Process

The adversarial system

1. The courts are not the best place to attempt to resolve complex family disputes. While their involvement will be required in some cases, particularly where there is evidence of domestic violence or abuse or where a consensual approach (including mediation) has failed, the use of the courts should be a matter of last resort. (Paragraph 39)

A presumption of contact and the issue of bias

2. The United Nations Convention on the Rights of the Child declares the right of a child to have direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. We note that the present law already regards it to be in a child's best interests to sustain a full relationship with both parents, unless there are good reasons to the contrary. We consider that a clear statutory statement of this principle would encourage resident parents to assume in most cases that contact should be taking place. (Paragraph 46)

3. We understand the problems which would be caused by conflicting legal presumptions. (Paragraph 47)

4. We recommend the insertion of a statement in s 1(3) of the Children Act 1989 (the welfare checklist) indicating that the courts should have regard to the importance of sustaining a relationship between the children and a non-residential parent. (Paragraph 47)

5. There is a perception that non-resident parents are not fairly treated by the court system. We do not believe that the court system is consciously biased against either fathers or non-resident parents. Significant problems remain in a minority of cases following parental separation, often exacerbated by delays in the court process. We recommend the following: first, there should be a clear and unequivocal commitment to move as many cases as possible from the court system altogether; second, parents who do apply to the court should be given every encouragement and opportunity to resolve their differences through negotiation; and third, when there is no viable alternative to court resolution, the courts should be responsible for ensuring that the case is effectively managed and that delays are kept to a minimum. (Paragraph 54)

Shared Parenting and the views of children

6. Many agreements settled outside the court amount, in effect, to shared parenting arrangements; these are usually the best course. We support agreements in which parents spell out how they will share parental responsibility. (Paragraph 59)

7. The concept of a pre-determined statutory template for the division of time a child is to spend with each parent is not one that we favour. The welfare of the individual child should be the paramount consideration in each case. The application of the welfare principle means that a whole range of factors (not least the wishes and feelings of the child) must be taken into account. We have already recommended that the importance of sustaining a relationship between the child and the non-resident parent should be expressly considered as part of the welfare process. An arbitrary 'template' imposed on all families, whatever the needs of the child, would relegate the welfare of individual children to a secondary position. (Paragraph 60)

8. There are significant practical objections to an automatic sharing of the time which children spend with one parent or another. In particular, an arbitrary apportionment of time does not take account of the views of children. The amount of contact a child will want with its parents will depend on a number of factors and is likely to change over the course of its childhood. Whatever arrangements are made, there has to be provision for the views of children to be taken into account, especially as they grow older. (Paragraph 61)

The position of grandparents

9. A change should be made in the law so that grandparents are granted the right to apply to the court for contact with their grandchildren, without having to apply for permission. (Paragraph 64)

Tactical delays

10. On the use of delay as a tactic against non-resident parents there is a clear conflict of view between aggrieved parents who report experience of the use of delay and the professionals who argue that neither the court nor practitioners would countenance unnecessary delay. Given the strong animosity between the parties which is common in contested family cases, we find it hard to believe that tactical delay is not sometimes used to the advantage of resident parents. We would welcome research to clarify the situation, but such research is at present inhibited by the lack of transparency in court proceedings to which we refer in Section 9. (Paragraph 70)

11. The courts themselves have a continuing duty to ensure that parties and their legal advisers do not unnecessarily delay proceedings. Children's interests are frequently harmed by such delay. Legal advisers have a professional obligation to avoid unnecessary delay. (Paragraph 71)

Resources

12. The Family Courts need judges whose style of work suits the difficult cases which come before them. This includes having the confidence to involve themselves in finding solutions to very difficult problems. We think that more effort should be made to recruit specialist judges who actively want to do family work; family work should not simply be an extra burden for those who wish to become judges. (Paragraph 77)

Case management

13. Delay is a major factor in breakdowns in contact since it allows positions to become entrenched and for contact arrangements to fail. We are pleased that the judiciary has clearly recognised the need for proactive case management. We welcome the President's 'Private Law Programme' as a valuable attempt to achieve early dispute resolution and, if there is no resolution, to improve the judicial case management of private law cases thereafter. It is essential that the Government provides sufficient resources to enable the Private Law Programme to succeed. (Paragraph 82)

14. One major cause of delay is reliance on long reports from CAFCASS in too many cases. This may often be the result of an automatic resort to a welfare report when attempts at preliminary negotiation by the parties' lawyers and CAFCASS have failed. This report takes several months to prepare. Even after it has been submitted there can be further delay in fixing a hearing date. Then the matter is usually settled on the basis of the CAFCASS officer's recommendation. There is scope for a much more focused CAFCASS investigation which need not culminate in an over-detailed report. Judges and CAFCASS, together, need to consider more effective and less cumbersome alternatives to the full-blown enquiry. For example, there is scope for oral presentation of the results of the CAFCASS officer's enquiries. The time taken to prepare such reports also leaves a way open for abuse of the system by legal advisers, who may encourage the preparation of such reports in circumstances where they are not strictly necessary. (Paragraph 83)

Mediation and other methods of dispute resolution

Mediation

15. The Government has recognised that mediation may be a good way to steer people out of the court system, but there remains an inconsistency whereby those who wish to claim legal aid are required to consider mediation first, but those who are privately funded can ignore this process. Where it is safe to do so (and subject to the court's discretion), we believe that all parties should be required to attend a preliminary meeting with a mediator on the basis described in section 13(1) of the Family Law Act 1996. (Paragraph 94)

The Family Resolutions Pilot Project

16. Various groups told us that the Family Resolutions Pilot Project is not being operated as the originators of the project envisaged. The Government says that it is impossible to pilot a scheme based on the 'Florida Model', since any form of compulsion would require primary legislation. There is no current evidence as to the success or otherwise of the pilot project currently being tested in the UK. Nonetheless, the Committee has received evidence from the judiciary that they are broadly content with this pilot project. We emphasise the need for adequate resources to be dedicated to the pilot project and that the results be published at the earliest opportunity. It is disappointing that the potential of the 'Florida Model' remains untested in the UK. (Paragraph 103)

Enforcement

Problems in enforcing court orders

17. Disobedience of court orders and the flouting of the rule of law is unacceptable. Nevertheless, forcing parents to do things which they do not consider to be in their child's best interests may not work. We believe the emphasis should be placed on overcoming problems through CAFCASS intervention and education programmes, rather than by the traditional means of enforcing court orders through a system of punishments. This will involve CAFCASS monitoring the way in which court orders are carried out and fully engaging in questions of enforcement where necessary. This will require a whole new approach for CAFCASS, which up to now has not had a role in supporting court orders. CAFCASS case workers will need to take a much more proactive role as the first point of appeal where arrangements under the court order have failed. (Paragraph 111)

18. The new role for CAFCASS was a major element in the Government's plans, set out in the Green Paper. Potentially, this is a revolutionary change. If this major new responsibility for CAFCASS is to be carried out successfully, the Government will need to ensure that sufficient resources are placed at its disposal. CAFCASS will need enough caseworkers with the relevant skills to carry out this ambitious new work. The organisation will need to accept that its former tradition of service will no longer apply, as the nature of its role will be radically different. (Paragraph 112)

19. The range of enforcement methods to be used should not harm the interests of the children involved in the case: for example, imprisonment of a parent would generally harm the interests of children, whereas the imposition of a community service order might not. We would expect that punishment would only be appropriate in cases of wilful refusal to obey the court and as a last resort in exceptional cases. (Paragraph 113)

20. The power of the court system is not in itself sufficient to resolve all child contact related issues. We note the efforts made by the Government to broaden the enforcement regime and we welcome a more inventive approach to this problem. Courts will only be in a position to enforce orders if they continue to engage with a case when it is obvious that orders which they have made are failing and where they are given adequate support by CAFCASS. (Paragraph 114)

The work of CAFCASS

Proposals to change the role of CAFCASS

21. The proposals to transform the work of CAFCASS are ambitious and are also likely to be resource-intensive. CAFCASS and many of our witnesses welcomed the proposed changes. Given the problems suffered by CAFCASS, on which we reported in 2003, it is essential that strong leadership is displayed during this transitional period, and it is also essential that the Government provides CAFCASS with sufficient resources to ensure the success of its new role. Government needs to define that role and set a timetable for implementation. If the Government intends that

CAFCASS is to become a problem-solving agency it should publish guidelines to ensure that consumers understand what service levels they can expect. Such guidelines would also allow monitoring of the agency's performance. (Paragraph 122)

Safety issues

22. There is little accurate or credible research on the extent to which problems relating to domestic violence have a bearing on contact applications, although we accept that domestic violence is generally underreported. The Department is proposing to introduce 'Gateway forms' to identify whether domestic violence is an issue at the earliest possible stage. These will have to be closely monitored, both to assess the safety issues and to ensure that they do not give rise to additional legal argument. It is essential that where safety is an issue this is reported. Nevertheless, the Government will have to be careful to ensure that the use of these forms in every case does not provide parents with another weapon to use against each other, leading to more delay in deciding cases. (Paragraph 128)

23. It is vital that important safety issues such as domestic violence and other forms of abuse are effectively addressed. Enforcement action by the courts should not occur while there are unresolved safety concerns. Equally, false accusations raised by parents as a mechanism to frustrate contact should not succeed. The Department should follow up the introduction of 'Gateway forms' by examining the proportion of cases where the courts conclude that violent or abusive conduct has actually occurred. (Paragraph 129)

Contact centres

24. We welcome the extra funding which has been found for the provision of additional contact centres. Referral of cases to such centres should be a matter of last resort where there is no other safe way to facilitate contact. A wider range of options such as children's centres and extended schools would provide more opportunities for contact and supervised contact. There should be greater focus on creative and cost effective solutions, such as those involving grandparents. (Paragraph 131)

Transparency

Media coverage of the family courts

25. A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary. This would make it possible for the public to have a more informed picture of what happens in the family courts, and would give the courts the 'open justice' which characterises our judicial system, while protecting the parties. (Paragraph 144)

Children Act 2004

26. We welcome the proposed amendments foreshadowed by s 62 of the Children Act 2004. Parents must be able to seek advice from constituency Members of Parliament and make complaints to the relevant supervisory bodies. We think that this reform should go further. The current rules relating to publication also hinder legitimate research. For example, even parents who wished to respond to the Government's Green Paper consultation exercise may have inadvertently broken the law. We think that the simplest approach is that the restriction on the discussion of their cases by parents should be removed entirely (unless a specific order is made to the contrary). The press should continue to be restricted to publishing those matters which have been made public by the court. (Paragraph 148)

Conclusion

27. The evidence which we took during the course of our inquiry showed that the court system was not best suited to deal with many of the complex and difficult matters relating to the break-up of families. This is not a criticism of the judges or of the many dedicated public servants who work within the courts' system. There are limitations to the court process itself. A clear example of the difficulties associated with a traditional court approach to these problems is shown by the frequent failure of the current enforcement system of court orders. (Paragraph 149)

28. We support the Government's proposals contained in the *Draft Children (Contact) and Adoption Bill* (Cm 6462) relating to extension of the courts' powers of enforcement. On the wider issue of use of the courts, the Government's plans rely heavily on a new role for CAFCASS and would involve a completely new approach for the agency. Case workers would no longer simply prepare long reports but would have a much closer continuing relationship with these families. This ambitious change may well require considerable extra resources in terms of numbers of officials and the development of new skills. Without the provision of extra resources, this potentially revolutionary initiative is unlikely to succeed. (Paragraph 150)

29. There is a widespread perception that non-resident parents (often fathers) are not treated fairly. We conclude that, although the courts rigorously avoid conscious bias, there are considerable grounds for accepting that non-resident parents are frequently disadvantaged by the system as it is administered at present. Delay is a major factor. The resident parent who is involved in the contact dispute will be advantaged by any delay, even if the resident parent is behaving unreasonably. (Paragraph 151)

30. This situation will continue until solutions are found to the following problems:

- delay;
- lack of judicial continuity;
- inability to come back to the judge promptly;
- ability of the courts to make orders that are obeyed.

The combination of these factors have produced a situation that allows a new 'status quo' arrangement for the children to become established by default. (Paragraph 152)

31. One of our key recommendations is an amendment of the 'welfare checklist' in the Children Act 1989 to ensure that the courts have regard to the importance of sustaining a relationship between the children and a non-resident parent. Such an amendment would send a clear message to the courts, to parents and to their professional advisers about the importance of maintaining links between both parents and their children. Although this will not satisfy those who believe that there should be an absolute rule about the extent to which parents share responsibility for their children, it will reassert the rights of non-resident parents to contact with their children, as well as the rights of children to contact with both their parents, while maintaining sufficient flexibility to cope with issues of safety. (Paragraph 153)

32. Lack of transparency has been a major factor in creating dissatisfaction with the current Family Justice system on the part of those involved in cases. In our view, the current rules relating to communication of the details of particular cases are too strict. The restrictions on communicating details of family cases to those not involved (which may apply to Members of Parliament handling constituency cases) have served to fuel the perception of bias and unfairness. Some of the evidence we received was that the lack of openness prevented proper scrutiny of the work done by family judges or court officials, and made it impossible to prove or disprove perceived unfairness. (Paragraph 154)

33. While there is disagreement as to whether all the criticism of the system of Family Justice is justified, it is widely agreed that reform is needed. There is some divergence of opinion about whether the proposals contained in the Government's Green Paper are an evolution of previous policy rather than a major change. We welcome the Government's acceptance of the general need to remove as many cases as possible from the court system. It is not clear that the Green Paper proposals will by themselves achieve this. A coherent statement of the Government's overall strategy is needed combining established initiatives, such as mediation, with experimental approaches. The system at present is focused on the resolution of disputes between adults: the interests of children should be paramount. (Paragraph 155)

Formal minutes

Wednesday 23 February 2005

Members present:

Mr A J Beith, in the Chair

Peter Bottomley	Mr Hilton Dawson
Ross Cranston	Mr Clive Soley
Mr Jim Cunningham	Dr Alan Whitehead

The Committee deliberated.

Draft Report [Family Justice: the operation of the family courts], proposed by the Chairman, brought up and read.

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

Paragraphs 1 to 45 read and agreed to.

Paragraph 46 and 47 read, as follows:

"We note that the present law already regards it to be in a child's best interests to sustain a full relationship with both parents, unless there are good reasons to the contrary. The United Nations Convention on the Rights of the Child also lays down the right of a child to have contact with both parents. We consider that a clear statutory statement of this principle would encourage resident parents to assume in most cases that contact should be taking place.

We accept that there cannot be conflicting legal presumptions which the courts are obliged to follow. The compromise proposed by the judges, to have a strong guideline that the court should have regard to the importance of a relationship between the children and a non-residential parent, has a great deal to recommend it. The simplest way of achieving this would be to amend the 'welfare checklist' in the Children Act 1989. We recommend the insertion of a statement in s 1(3) of the Children Act 1989 (the welfare checklist) indicating that the courts should have regard to the importance of sustaining a relationship between the children and a non-residential parent".

Amendment proposed, to leave out the last sentence in paragraph 46 and to leave out paragraph 47.—(*Mr Hilton Dawson.*)

Question put, That the amendment be made.

The Committee divided.

Ayes, 1	Noes, 3
Mr Hilton Dawson	Peter Bottomley Mr Clive Soley Dr Alan Whitehead

Paragraph 46 to 153 read and agreed to.

Conclusions and recommendations read and agreed to.

Resolved, That the Report, as amended, be the Fourth Report of the Committee to the House.

The Committee divided.

Ayes, 3	Noes, 1
Peter Bottomley Mr Clive Soley Dr Alan Whitehead	Mr Hilton Dawson

Ordered, That the Chairman do make the Report to the House.

Ordered, That the provisions of Standing Order No 134 (Select Committees (Reports)) be applied to the Report.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

[Adjourned till Tuesday 1 March at 9.15am

Witnesses

(See Volume II)

Tuesday 9 November 2004

Tuesday 7 December 2004

Tuesday 14 December 2004

Tuesday 11 January 2005

Tuesday 18 January 2005

List of written evidence

(See Volume II)

Memoranda

Due to the number and volume of submissions received during this inquiry the following memoranda have been Reported to the House and made available in the Library of the House of Commons and the Public Records Office. They are also available on the Reports and Publications page of the Committee's website: www.parliament.uk/conaffcom

Joan Hunt, Oxford Centre for Family Law and Policy
Elizabeth Walsh, editor of journals Family Law and International Family Law
Ruth Smallacombe, Family Law In Partnership
Trevor Jones
Dispute Resolution Consultancy
Oliver Cryiax, New Approaches to Contact (NATC)
National Youth Advocacy Service (NYAS)
A Parent
Bridget Lindley, solicitor, researcher and family mediator
Rose Dagoo, children's guardian
Unity Injustice
Dr Tim Hughes, medical practitioner
Office of the Chief Rabbi
Robert Whiston
The Newspaper Society
Dr L F Lowenstein, Educational, Clinical and Forensic Psychological Consultant
Tony Hobbs, School and Department of Law, Keele University, Staffordshire
Dr A J Munro
FLINT
Antony Green, guardian ad litem
Alan Kelsall
Relate
JUMP (Jewish Unity for Multiple Parenting)
David Edwards
Peter Cuckson and Chris Thomas
Tony Coe, President, Equal Parenting Council
Refuge
Barry Worral, The Cheltenham Group
Families Need Fathers

Reports from the Constitutional Affairs Committee

Session 2003–04

First Special Report	Protection of a witness – privilege	HC 210
First Report	Judicial appointments and a Supreme Court (court of final appeal)	HC 48
	Government response	*Cm 6150*
Second Special Report	Government Response to the Fourth Report on Immigration and Asylum: the Government's proposed changes to publicly funded immigration and asylum work	HC 299
Second Report	Asylum and Immigration Appeals	HC 211
	Government response	*Cm 6236*
Third Report	Work of the Committee 2003	HC 410
Fourth Report	Civil Legal Aid: adequacy of provision	HC 391
	Government response	*Cm 6367*
Third Special Report	Further Government Response to the Second Report on Asylum and Immigration Appeals	HC 868
Fifth Report	Draft Criminal Defence Service Bill	HC 746
	Government response	*Cm 6410*

Session 2004–05

First Report	Freedom of Information Act 2000 — progress towards implementation	HC 79
Second Report	Work of the Committee in 2004	HC 207
Third Report	Constitutional Reform Bill [*Lords*]: the Government's proposals	HC 275