House of Commons
Constitutional Affairs Committee

Family Justice: the operation of the family courts

Fourth Report of Session 2004–05

Volume II

Oral and written evidence

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Witnesses

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Rt Hon Dame Elizabeth Butler-Sloss DBE, President, High Court, Family Division,
Rt Hon Lord Justice Wall
Hon Mr Justice Munby
His Honour Judge Meston QC
District Judge Michael Walker
District Judge Nicholas Crichton

Tuesday 7 December 2004
Christina Blacklaws and Hilary Lloyd, The Law Society
Kim Beatson and Christopher Goulden, The Solicitors Family Law Association
Philip Moor QC, The Family Law Bar Association

Tuesday 14 December 2004
Hilary Saunders, Women’s Aid
Ruth Aitken, Refuge
Phillip Noyes and Barbara Esam, NSPCC
Mavis Maclean CBE and John Eekelaar, Oxford University
Anthony Douglas and Baroness Pitkeathley OBE, CAFCASS

Tuesday 11 January 2005
Caroline Abrahams and Susannah Weekes, NCH
Margaret Pendlebury, National Family Mediation
Tony Coe, Equal Parenting Council
John Baker, Families Need Fathers
Celia Conrad, former law practitioner and a legal consultant

Tuesday 18 January 2005
Baroness Ashton of Upholland, Parliamentary Under-Secretary of State,
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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
Oral evidence

Taken before the Constitutional Affairs Committee

on Tuesday 9 November 2004

Members present:

Mr A J Beith, in the Chair

Peter Bottomley Mr Clive Soley

Mr James Clappison Keith Vaz

Ross Cranston Dr Alan Whitehead

Mr Hilton Dawson

Witnesses: Rt Hon Dame Elizabeth Butler-Sloss DBE, President, High Court, Family Division, Rt Hon
Lord Justice Wall and Hon Mr Justice Munby, examined.

Chairman: Good morning, Dame Elizabeth, and welcome back, in your case, and we are particularly
glad to have you back. May I just first make sure that we declare any relevant interests around the
table.

Mr Clappison: I am a non-practising barrister.

Ross Cranston: I am a barrister and recorder.

Peter Bottomley: My wife implemented the

Children Act.

Keith Vaz: I am a non-practising barrister.

Q1 Chairman: You will know that the scope of both our current work and of the Committee itself
is focused primarily on the responsibilities of the Department of Constitutional Affairs for the
courts, but also the Department’s involvement as a shared policy department with the Department for
Education and Skills and the Children’s Minister in this area. When we were considering CAFCASS
and produced a very critical report about the limitations and failings of that organisation, which
we now hope is on a much better course, I think we became aware of some of the problems in the
courts and the problems faced by the courts and thought we would like to look at them further.
Needless to say, Members of Parliament generally become particularly aware of some of the points
of greatest difficulty through their own constituency work and the people who approach them. Perhaps
a helpful starting point would be to put to you that the levels of recorded dissatisfaction amongst court
users are much higher in relation to family courts in disputed contact cases than they are generally,
and although there are certain obvious explanations for this and it is also the case that in
almost any action somebody might have cause to be dissatisfied, why is there this higher level of
dissatisfaction?

Dame Elizabeth Butler-Sloss: Well, I think there are a number of reasons. We are dealing with very
fraught emotional situations with the breakdown of relationships and in the old days in divorce cases,
which were fought, everybody fought out their emotional anxieties in the breakdown in the
divorce. Nowadays, we notice in money cases after divorce and in children cases, a great many families
continue to fight the fact that they have not resolved the conflicts of that breakdown. Of course an
obvious one is that one party sees himself or herself as winning and the other is losing, which is
inevitable. We do not, I think, engage yet enough in catching people before they ever get to court
which I think is perhaps the most important thing. Secondly, we need to catch them at every stage in
the court procedure to make them settle and we have not yet got sufficient resources or sufficient
arrangements for that. I think we may be to some extent guilty of concentrating on the public law
cases to the detriment of giving perhaps sufficient attention to private law. This has all really come to
a head in the last perhaps four years. We have created, thanks particularly to James Munby and
two other of my High Court judges, a very efficient protocol for judicial case management in public law
cases. We have now begun to put forward a similar, rather simpler framework for private law cases and
I think a real, genuine criticism of the system, which was highlighted of course in the case that
James Munby gave which got a lot of publicity, was that there was not sufficient judicial continuity. We
have not been able to enforce orders because we do not have the powers to do it. We do not always
have sufficient judges for continuity and we have of course given a preference to continuity on the
public law work and when you are looking at the judiciary, who are the people available to do it, they
are the same people largely doing the same sort of work, but the majority of private law family work
is actually being done by the district judges, two of whom of course are going to give evidence to you
shortly, and it is, I think, very important that they provide the backbone of the judicial continuity. I am
wondering whether either Nicholas or James might like to add to that.

Lord Justice Wall: I think I would add to that that you must remember where we start from. The
overwhelming majority of parents are able to resolve their differences before they come to court
and we get the 20% or so who cannot and the disputes are often very difficult, very intractable
and very high emotions are involved. People come into contact in particular with all the baggage of
the relationship with them and very frequently, I am afraid, a contact application is a means of continuing the power struggle that existed within the family and the child becomes the ammunition. We are at the forefront of recognising that the court structure is not the best place to deal with that process and it is much better dealt with by mediation or by conciliation or by out-of-court settlement.

**Mr Justice Munby:** I would only add this: that public perceptions are very much driven by the highly vocal views of the comparatively limited number of people in a situation where public perceptions are hindered by the fact that we sit in private and that proceedings are not open to the public, there are stringent reporting restrictions and the media has no access to the family courts. In fact the only people who do have access to the family courts, apart from the professionals, are the litigants and one of the consequences of that is that those litigants who choose in public to express themselves in a particular way are able to do so without fear of being gainsaid because there is nobody who is, as it were, able to set the picture right.

**Q2 Chairman:** We would like to come back to that particular issue later, along with a couple of others that were raised, but I wonder if I could just clarify at this stage perhaps, partly arising out of something Dame Elizabeth said about catching people earlier, whether you think it would be better if mediation occurred before couples appointed solicitors?

**Dame Elizabeth Butler-Sloss:** Yes, if we could catch them. The difficulty is that you do not necessarily know out there where they are, but if we could, yes. The Family Law Act of 1996, which had a considerable number of deficiencies, had extremely good proposals for requirements for mediation and information in relation to any couple who divorced. That would deal with a section of the population, but of course a very large number of people do not marry, but have children, so we have to be sure that we are dealing with the separation of partners rather than the separation of divorced people.

**Q3 Chairman:** So you are saying there is a gap in the law in that there is some provision within the system for mediation to be compulsory?

**Dame Elizabeth Butler-Sloss:** Well, no, you see, because that part of the Family Law Act never came into force and for a number of very practical reasons it did not come into force, much to the sorrow of many people, but what was in it in relation to mediation was good stuff. We have got of course the early resolution pilots, which I know only a little about, and I had hoped that Mrs Justice Bracey would be here because she is on the committee, but unfortunately she has had to go to have some medical advice today which is urgent so she could not be here, but District Judge Crichton is on the steering group of that, and if that worked, then you would catch the people before they ever got to court at all, and that is an admirable scheme.

**Chairman:** We shall ask you about that later.

**Q4 Mr Soley:** I think this brings out an issue that I have struggled with for years actually, that it seems to me that the current adversarial system actually aggravates the problem and I wonder if, in giving your views on that, you could also tell me whether you think the fault-based divorce laws that we have mean that it is too late by the time we get to dealing with the children and the custody issue, in other words, rather touching on what you said before, the intervention needs to be at a much earlier stage and perhaps the adversarial system actually makes it more difficult to do that?

**Dame Elizabeth Butler-Sloss:** Well, we are to some extent inquisitorial judges. I think our problem is that the parties make it adversarial and whatever the system, unless we went into the French system where everybody is examined, but under any form of the English system, the parties and their lawyers come very often in entrenched positions determined to fight. The other part is of course that if the judge descends into the arena, one side or the other tends to think, and some judges do descend into the arena, that they are not getting a fair trial. I think there is a deeply held perception on this. I do not think the fault-based divorce actually matters very much. At any stage of the dispute between parents who are married and then divorced, what they are divorced for is almost irrelevant. Nowadays, there is one in about I cannot remember how many thousand cases which is actually fought. It all goes through on paper now.

**Q5 Mr Soley:** But when you say that, in the legal representatives are people coming with a preset view which they have already discussed with their clients, have they not?

**Dame Elizabeth Butler-Sloss:** Not in relation to divorce because in either children cases or particularly in ancillary relief, money cases, for parents or particularly the parties fighting money, conduct is irrelevant.

**Lord Justice Wall:** I think the emphasis on all our work nowadays is on pre-court intervention and information is given to parents so that they can realise what is happening, how do they tell their children, how are things explained to the children and so on. If all that fails and parents have to come to court, there are inevitably cases where issues have to be decided. For example, if there is an allegation of domestic violence, that has to be resolved by the court and there is no other method of doing that. You cannot put a child into a situation of risk by ordering contact when there is an unresolved issue of domestic violence, so there are some situations where the litigation has to be adversarial. I absolutely agree with Dame Elizabeth that judges, magistrates and district judges up and down the country conduct these cases in a quasi-inquisitorial way, trying all the time to steer people away from aggravation, but, as we said, CASC, in
our report, the adversarial system does tend to polarise attitudes, and that is why we are so strong on pre-court intervention and taking these cases out of the court system wherever we possibly can.

Q6 Chairman: But, worse than that, it tends to be destructive in a situation where emotions are running fairly high and one side is trying to undermine the other.

Lord Justice Wall: Yes, indeed. I agree with that entirely, but sometimes if it is an issue of fact which has to be resolved, our system decrees that that is not done by the judge reading the papers and making a decision, but by oral evidence and cross-examination.

Q7 Mr Soley: I am struggling to understand your answer a little, if I may say so, Dame Elizabeth.

Dame Elizabeth Butler-Sloss: I am sorry.

Q8 Mr Soley: Well, what I am struggling with is that you are almost saying, I think, that the adversarial system is not a problem because it is not practised.

Dame Elizabeth Butler-Sloss: No, no, I did not say that at all.

Q9 Mr Soley: Well, it is perhaps what I want to get clear because I do tend to see it as the adversarial system versus a conciliation system. That might be too simplistic.

Dame Elizabeth Butler-Sloss: Yes. I think we have to have both.

Q10 Mr Soley: What are you actually saying?

Dame Elizabeth Butler-Sloss: Well, the ideal in a far from ideal world of dealing with these sometimes damaged personalities, and everybody is damaged by separation in acrimonious circumstances, so we start with that, we are always dealing with people whose lives have been adversely affected by their domestic disputes and we never deal with people who do not have it because they would not be coming to court and thank goodness that 80 or 90% of people do not come to court, but if they do, if we can stop them at the earliest possible stage, the private law framework, which is now just about to be rolled out across the country and is already happening in a lot of places, is intended to stop any adversarial element at all. It is to get them to settle, to agree, to produce a consent order because an order is sometimes quite useful, everyone can see where they stand and they never come back. However, if they are fighting their corner, they will be alleging things which may be true or may be untrue. Now, domestic violence is a very hot topic and it is said by wives that husbands beat them or intimidate them, and it is said by husbands that they do not. Well, we have to, we do not have any choice but to, resolve it, which is what Nicholas is saying. If you are going to resolve it, you have got to hear both sides and decide who wins. If that is not adversarial, I do not know what is. There is no way round it. Again if sexual abuse allegations are made, we have to resolve them. Did the father attack his daughter?

Q11 Mr Soley: So if I can just clarify, you are saying actually that the conciliation system is a preferred one, but inevitably you are pulled into the adversarial system because of the nature of cases and some of the people you are dealing with?

Dame Elizabeth Butler-Sloss: Yes.

Q12 Mr Soley: That is the sum of your answer and can I ask if your two colleagues agree with that?

Mr Justice Munby: I agree with that, yes.

Lord Justice Wall: Yes, I would just make one point before James comes in, that the new research for the Family Law Act showed that 80% of people’s first port of call in a separation situation was to a solicitor. I think you are going to be hearing evidence from the solicitors in due course. My experience is that specialist solicitors nowadays do not immediately go into litigation. They are as keen as everyone else to refer their clients to conciliation or mediation or to have a mechanism which they can take their clients to which will not take them to court.

Dame Elizabeth Butler-Sloss: Some of them are mediators.

Lord Justice Wall: Yes, some of them are mediators.

Dame Elizabeth Butler-Sloss: Quite a lot of solicitors have now become mediators. It is an admirable development of the specialist solicitors.

Mr Justice Munby: In an ideal world, one would hope that parents could reach agreement on these matters without outside assistance. We do not live in an ideal world. If outside assistance is required, then mediation is infinitely preferable to the court process. There will be an irreducible number of cases which have to come to court. Inevitably, given the emotional background to these disputes, whether the system is theoretically investigatory, inquisitorial or adversarial, the process will actually become adversarial, and that is simply a reflection of human nature. It is at that point, I think, that the court process at present tends to exacerbate matters and tends to make matters, which are already difficult and potentially adversarial, even more adversarial and it does so in two ways. First of all, the mere fact of delay means that people become more and more entrenched and the longer proceedings go on, the more entrenched attitudes become and the higher the stakes get. The other aspect, which is fundamental, is that the court process involves people putting out their case on paper. Now, the moment at which the father starts setting out his case on paper, complaining about the mother in relation to contact, then, human nature being what it is, the allegations are going to be put in their highest form. They are then met and the other party puts in a statement which meets all of those allegations and, human nature being what it is, it tends to put the best possible spin on that and then meets those allegations and there is another raft of cross-allegations. The moment that process
starts, the moment you get in the court context to the case being reduced to paper, of its very nature, matters tend to become more adversarial and if you then exacerbate that by delay, the matter gets worse and worse and because one of the inevitable products of delay is that you have to update the evidence, and updating the evidence simply means taking a rather weary, if not cynical, view of it. You are giving the parties another opportunity to return to the fray and make matters worse. In a funny sort of way, and this is counterintuitive, I find it is often easier dealing with cases if the parties are appearing as litigants in person because what you are actually getting is the facts of the case as they see it without the assistance, and some people might put that word in inverted commas, of lawyers. My view, I have to say, and on the first part of this I do not think I say anything different from Dame Elizabeth or Sir Nicholas, is that we want, if at all possible, to get these cases out of the court system altogether. Mediation is obviously infinitely preferable to the court process, but in relation to that irreducible number of cases which have got to go through the court process, I think we need to take a much more rigorous view both in relation to delay which generates difficulty, but also in relation to the actual process itself.

Q13 Chairman: We will come on to delay in a moment, but do you want to clarify just a little further what you could do to the court process to reduce its adversarial impact in those cases?

Mr Justice Munby: Well, I think we need to take a much more sceptical view as to what we need evidence about. We have all grown up in the legal system, and it does not matter whether it is criminal, civil or family, where one side puts its case on paper, the other side puts its case on paper, the first side responds, you then get expert reports, and, typically in these cases, before the court actually adjudicates on the case, either the rules or the process, or the court’s own directions, have generated a vast amount of paper without very much control by the court as to what topics are dealt with. If you simply, as we tend to do, say, “Father to file evidence in 28 days. Mother to respond 28 days thereafter. Father to respond, if so advised, 14 days thereafter” without any control as to what goes in, human nature being what it is, the emotional background being what it is, you will find wide-ranging evidence raising all sorts of allegations, many of which are, whether true or false, either irrelevant or exceedingly peripheral and marginal to the real issues in dispute. If there was a much more controlled use of evidence, if we had a much tougher system, saying in effect that you cannot put it in evidence unless the court says you can, and a much more rigorous control of the subject of the evidence and the topics which can be dealt with, in other words, the court is saying, “You can put in evidence, but in relation to the following matters only”, if we took a tougher line, and some judges do this in some contexts, saying that the evidence is not to exceed five pages or 10 pages of A4, things of that sort might help. They will not solve them, but they might help to reduce the temperature and to keep the thing manageable.

Q14 Mr Dawson: How easy is it to hear the voices of children in some of these very intractable and hotly disputed cases and is there a case for extending separate representation in private law and providing better advocacy services for children?

Dame Elizabeth Butler-Sloss: Yes, is the answer to that. There is a resource implication here which is very considerable. In again our so-called ideal world, which cannot be ideal because here are children whose parents are in dispute, if the parents are locked into an intractable dispute, I think the children should get a better voice than they are getting at the moment. The trouble is, and I have just produced a practice direction, Rule 9.5 which gives separate representation of children in these difficult cases. Now, to appoint a guardian, which is what we are talking about, takes up CAFCASS’s time and there is a considerable pressure on the judiciary, I have to say, not to appoint guardians unless it is absolutely necessary. I think we are probably having to err on the side of not putting guardians in place when perhaps we would like to do it partly because my practice direction is deliberately restrictive. I do not think it is seen as restrictive, but it is intended to be because of the resource implications of CAFCASS, and I would like to see some more children represented in these really very difficult cases. At the end of the day, I have to say, there are cases which are irresolvable. We have a small number which we know, for personality problems of one or both parents, we just cannot, as courts, manage, they are unmanageable and some of those, I have to tell you, are the vocal people that you are hearing.
Elizabeth has indicated, but as a mechanism it is very useful and I think it should be increasingly used early in these cases. If one can see that a case is going to be difficult and intractable, that is the time, at an earlier stage than when it is in court, to get in the guardian and separate representation.

**Q15 Ross Cranston:** Could I ask some questions about case management and first of all about the guidance which you, Dame Elizabeth, are going to issue or have issued and which will take effect before the end of 2004 and whether that is on track. Could I ask you to step back and explain whether the sort of case management that operates in other parts of the civil justice system as a result of the Woolf reforms already operate in the Family Division or were cases regarded as different and, therefore, not subject to those sort of techniques?

**Dame Elizabeth Butler-Sloss:** First of all, so far as the guidance, which is in the private law framework, is concerned, I have just drafted a letter yesterday which is going out to the judiciary generally to reinforce the advice I gave in July and, yes, I am hoping that we are on track already on various parts of this private law framework. I would like, if I may, Chairman, to have an opportunity just to explain it at some stage, convenient obviously to the Select Committee, because I think it may answer some of the problems which I totally agree with James Munby exist in the private law. We of course are not part of the civil procedure rules, save insofar as our family proceedings rules are deficient. The new Family Proceedings Rule Committee has its first meeting on Thursday and we will be creating rules, and, as I say, I am a member of that committee, which will particularly enhance in the family proceedings rules the overriding objectives of the CPR, and it is very important we do. However, in fact in the public law sector, thanks to James Munby, Paul Coleridge, Ernest Ryder and the Department for Constitutional Affairs’ committee, there is an extremely tightly based case management in relation to children who may be taken from their parents. We have not yet achieved that in the private law sector. I hope that my framework guidance will be a broad guide. I am not sure that it is appropriate to give quite such tight case management in private law cases. The whole point about a public law case is that it has got to go through, you basically cannot settle it because if the local authority wants to take the children from the parents, the parents naturally are not going to consent and you have to decide if the facts, which the local authority thought would make it necessary to remove the children, actually exist. Until we reach what we call the ‘threshold’ which permits us to make a decision as to where the child is at risk and must be removed, we have to decide if those risks exist. Was the child a subject of physical violence or was it an accident? It is not until we have decided that that we have any right to deal with what happens to the child. In private law cases it is a dispute between the parents and at every stage we want to make the parents settle, so we do not want to go through a pattern of 40 weeks as to how the case is going to be tried, but we want it finished on day one.

**Q16 Ross Cranston:** There is a great deal of argument of course around case management where the proponents say that case management goes hand in hand with settlement, you grab hold of the case and you encourage settlement. In your submission, you said that one of the causes of delay was the lack of judges. Now, what sort of estimate would you make of the need for additional judge power and where would that be? Is that in the Family Division or at other levels?

**Dame Elizabeth Butler-Sloss:** I have discussed this with the Lord Chancellor not very long ago and we do need both additional judges at, I think, all levels if we are to create a situation in which there are not delays for children. We need it at the High Court and the county court, both circuit judges and district judges. At the county court level with circuit judges there is a tension between the criminal and the family work. Until relatively recently I think it would be fair to say that the criminal work has always taken priority for very obvious reasons. A great many people are in detention on remand, awaiting trial, so there must be a real need to get their trials heard as quickly as possible, but I think that in the past the administration of family justice has suffered because many of the same judges are trying both sorts of cases. The district judges have only fairly recently had the private law jurisdiction, only in the last two or three years. Very much I requested this and it took some time to achieve it, but we now have district judges and if we can get continuity of district judges in private law cases, which are not the most difficult, I think they ought around the country to crack that. District Judge Walker, who is the Secretary of the Association of District Judges, is one of the people who is going to give evidence to you, and they are, I think, the backbone of this private law work. If they can get the cases back really quickly, and what I am looking for is that if you cannot settle, you just find out what the issue is, whether it is staying in contact, and the CAFCASS officer should only write a report on that issue instead of the whole general picture, if that is genuinely the only one, it should get before probably a district judge within a very short time, and I am talking about not more than three months and preferably much less. Then the district judge makes an order, but the CAFCASS officer should monitor the order, ring up on the Monday after the contact and say, “Did it work?” and if it did not, it should be back before that same district judge within a fortnight. In the more difficult cases that do require to go before the circuit judges, and it is a few that come to us, and all of us have experience of intractable disputes which we have tried to manage, we need proper enforcement. Again Nicholas wrote, as Chairman of a sub-committee of CASC, a marvellous report three years ago on
how enforcement was needed. 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.

**Q18 Ross Cranston:** If I could just interrupt, will the tighter case management not reduce the need for additional judge power?

**Dame Elizabeth Butler-Sloss:** Well, we hope so.

**Q19 Ross Cranston:** Well, that is the conventional wisdom of all the literature.

**Mr Justice Munby:** It will reduce the number of additional judges which are required, but it does not remove the need for additional judges. The simple fact is at present that we are struggling to maintain the 40-week period in public law cases and we are not meeting it. Because that is the imperative, the private law cases are being pushed back. Now, the kind of proactive judicial case management involving judicial continuity, which Sir Nicholas has just referred to, the idea that you get the case back on Monday if there are problems, there simply are not enough hours in the day and we are only managing to do this, for example, in the private law cases by sitting outside normal court hours. I can only actively case-manage private law cases by fitting them around my normal timetable and I sit repeatedly at nine-thirty in the morning so that I can fit the cases in around the normal list and that is simply a reflection of the fact that there are not enough judges.

**Q20 Ross Cranston:** In the DCA White Paper, the statement is made that cases currently take 36 weeks to complete, on average. What is a reasonable target if 36 weeks is not acceptable?

**Dame Elizabeth Butler-Sloss:** You cannot treat a private law case like a public law case. A public law case has to go through to its conclusion if the evidence shows that the child is seriously at risk. In the private law cases, I do not think there should be a target because I think we should be trying to stop them coming back at every single moment, so it is really impossible. I do not know where the DCA got those figures from, they certainly did not get them from the judges. I do not think that we ought to be looking at targets because if the case is easy, it is resolvable quickly and if it is difficult, it would take possibly years. What is happening is that because, as James Munby says, we are having to concentrate at each level, and this is the important thing, that the circuit judges and the High Court judges with different degrees of difficulty are doing the same work, we are having to concentrate in getting the public law cases out which means that we cannot always or cannot generally get the private law cases back in quickly enough.

**Q21 Ross Cranston:** There is a lot of talk about the effect of legal aid and one line of criticism is that legally aided parties spin the cases out. Now, I am not sure that is supported by the empirical evidence. Lord Justice Wall referred to Professor Eekelaar’s study which did not actually support that, but what is your view of this?

**Dame Elizabeth Butler-Sloss:** 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. The three of us are deeply into proactive case management. What we have got to be sure of is that at every level people realise that they must avoid unnecessary information. If someone wants to tell me about the fact that the wife committed adultery five years before they got married, I will not listen to it. It was said to me not so long ago, “Well, I’ll appeal you”, and I said, “Great, but see what the Court of Appeal says about that sort of allegation”. We are not going to listen to it.

Q22 Mr Dawson: We have already heard a lot of information about CAFCASS and about the way that their role could be developed in relation to separate representation and to supporting contact, and the Government wanted them to do more in terms of mediation and in terms of developing the role of family assistance orders. Presuming that the judges would want CAFCASS to develop their role, but plainly you are aware of their very limited resources, is there more that you could do to ensure that CAFCASS produced tighter, more focused, fewer reports, and is there something that CAFCASS could do to amend their practices as well?

Dame Elizabeth Butler-Sloss: The answer is yes and yes. Yes to the first one, that we must be requiring particularly the district judge at the first appointment. If the case is not settled at the first appointment with the help of CAFCASS, then I am hoping right across the country in every area where there are applications for contact and residence, the CAFCASS officer will be present at the court and the district judge will send the case to the CAFCASS officer. If the CAFCASS officer cannot settle it, the district judge will do a very carefully drafted order which includes setting out what the issues are. This is happening in a large number of places in the country and it has got to happen everywhere. The district judge will then say that the CAFCASS officer must deal with staying in contact, and that is the only real issue between them. The CAFCASS officer will then be expected to produce within a much shorter period, than anything from 12 to 20 or 30 weeks, which is one of the problems that it is sometimes six months before they can provide a report, and not their fault, but a lack of people, they must produce a report quickly of five pages, not 20 or 50, on the issue that matters. It is up to the judges to require CAFCASS to write focused reports and short ones and why not e-mail? Why does everything have to be done on a sort of template and handed in on hard copy? E-mail everybody and save time. Secondly, the CAFCASS officers must accept that this is the right sort of report because there are a lot of CAFCASS officers who think it is their duty to set the whole case out in detail. All of us are guilty of writing things that are too long, but we do want to encourage CAFCASS to save time, and it may not be necessary to have guardians in every case. If CAFCASS can have a support service in relation to families, it may meet a large number of cases without using guardians at all.

Lord Justice Wall: May I add to that that I regard CAFCASS as absolutely critical to the successful operation of the family justice system, and in the report we received enthusiastic support from CAFCASS for that. Historically, CAFCASS, the old court welfare service, was largely used for report-writing and clearly what is required is that CAFCASS is going to be part of the information-providing stage at the very outset, it is going to have to be part of the conciliation stage, it is going of course to go on writing reports, but we want CAFCASS officers to have more time to work with the children, to work with the family in the way the President has just indicated and if they can take that proactive role in assisting us, that, we think, would be absolutely essential to a successful outcome, but it does mean that CAFCASS has to expand and to meet the various roles we would like.

Q23 Keith Vaz: Dame Elizabeth, there is a perception that the family court system is biased against fathers. What is your view on that?

Dame Elizabeth Butler-Sloss: Well, it is untrue for a number of reasons. First of all, the Children Act requires us to treat spouses equally and parents equally, and my experience is that we do. I must have found, like both my brethren, for fathers on many, many occasions, but the situation is basically that when parents separate, the vast majority of children stay with mother and for the minority who stay with father, at the end of the day probably what we call the status quo is the situation which occurs because the child is settled there, and in cases where father is caring for the children, that is where the children are likely to stay. I have not come across in recent years, certainly in the Court of Appeal when I was there or now as President sitting both in the Court of Appeal and the High Court, cases where I have come across any bias in favour of mother or prejudice against father. I think one of the problems is that the public do not know what we are saying and I feel quite strongly, and what I had to say was endorsed and repeated by James Munby in the judgment that hit the headlines, that we ought to be giving our judgments to a far greater extent in public, and I think if we did that, whether we would dispel the perceptions, I do not know, but at least those who wanted to read them would know what was actually going on, but it is not true.

Q24 Keith Vaz: Nevertheless, when I practised family law 20 years ago, I cannot remember a circumstance and a time when so much direct
action was being taken by a particular group. We have had items being thrown at the Prime Minister, Batman going into Buckingham Palace, Spiderman three cases I tried at first instance, in two of them action was being taken by a particular group. We perception exists largely because most of our work is done in private. It so happens that of the last three cases I tried at first instance, in two of them I took children away from their mother and gave them to their father because their mother was obstructing contact, and in a third a father withdrew his application and the reason he withdrew it, I found, was because his conduct had made it impossible to have contact with his child. All these cases are different. I went out of my way in that case in public to say that there is no presumption, and it is in the paper which I submitted to this Committee, 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.

Q29 Keith Vaz: I have had people come to my surgery and I think they have also written to this committee, as we see in the evidence which is produced to this committee, fathers complaining bitterly about the fact that they cannot get access. Do you think that if we had an interim order being made right at the start of the proceedings so that the contact issue was taken out of the game and everyone was very clear that contact would not be used by one party or the other as opposed to the residency issue, that would help resolve the situation, that both parents would get contact on an interim basis and then you would proceed with the rest of the case?

Dame Elizabeth Butler-Sloss: The trouble is that if the mother says that the father has been guilty of domestic violence or is not suitable to care for the child, you have got to deal with it, and, therefore, you cannot make an interim order until you have something slightly less, such as that the court should have regard to the importance of a relationship between the children and a non-residential parent.

Q30 Keith Vaz: Do you think what we have got, at the moment, is a situation where the courts are being unfairly blamed for the failure of politicians Government to be very clear as to what they think parental responsibility should be and that if the Government came out and Parliament came out with a clear statement it would be much easier for you to interpret that statement? At the moment it is all being thrown back on the poor old judges.

Dame Elizabeth Butler-Sloss: Yes, judges are being unfairly blamed, there is no doubt about that. We are bearing quite an interesting burden of blame, which I have never come across before. I have been on the bench now since 1970, in one capacity or another, and I have never known a period when the judges have been, in our part, so much blamed. I
do not, for a moment, think it is the fault of politicians, I think the relationship breakdown paper is excellent. However, politicians cannot make the parties be sensible.

Q31 Keith Vaz: True.

Dame Elizabeth Butler-Sloss: The law seems to me, on the whole, since the Children Act, to be reasonably good. I think we need to improve the management by judges; we need to have enough judges—and enough courts. When I was out of London recently I found district judges did not have courts to try cases. District judges cannot be expected to sit in rooms because we have violence from time to time by parents where their fraught emotions just completely overwhelm them. There was a grandmother who was not going to see her grandchild again; she absolutely went berserk in a district judge’s court in London and she wrecked the court. Fortunately, that district judge was sitting in a proper court; if it had been in a room—it is just not safe. So we have a lack of courtrooms, too.

Q32 Keith Vaz: Lord Justice Ormrod has said that there are some cases that are insoluble—as you have said today—and even the greatest judge in the world is never going to be able to solve those cases. What do we do about those cases?

Dame Elizabeth Butler-Sloss: The personality problems are sometimes of both parents. Fathers complain that they have come to court a hundred times but they do not explain why they have come to court a hundred times. I think we have to try. We have put in evidence a number of decisions of the Court of Appeal and of the High Court judges. Unfortunately, at the level below the High Court very seldom are judgments recorded. I did try to get some so you have a broader flavour, but I could not find them, just to give you a feel of the intractability of some of the cases and how we try to approach them. Yes, I think we have to try as far as we can go and then we occasionally give up. I remember a case in the Court of Appeal, when I was a junior Court of Appeal judge, where the then Master of the Rolls, Lord Donaldson, was very shocked to find that the circuit judge had given up in Bristol—a very experienced circuit judge—but the mother went to court on every occasion with her suitcase packed. Why? Because she expected to go to prison; she was quite prepared to go to prison; she was not going to let the child see the father. The child had never seen the father, so, in fact, the child could not go to the father as the alternative parent. We have no hesitation in moving children from unreasonable mothers to reasonable fathers (or the other way round) but if the child has never met the father, what do you do? How long do you put them inside for? Two years is the maximum for contempt.

Q33 Keith Vaz: I realise that this not Kramer v Kramer and there is not the kind of emotional background that would enable us to solve this on a sentimental basis, but have you or your colleagues met with the Fathers4Justice campaign or any of these other, campaigning organisations that are seeking to put forward in a sensible way, as opposed to the rather dramatic and unacceptable way—

Dame Elizabeth Butler-Sloss: May I say, I think we all have. Fathers Direct and Families Need Fathers I have had quite a lot of contact with. I was chairing a conference which was disrupted by Fathers4Justice at the very moment that the Chairman of Families Need Fathers was giving a paper in which he was putting forward extremely well the father’s point of view.

Q34 Keith Vaz: So there is a schism within the fathers’ movement?

Dame Elizabeth Butler-Sloss: Fathers4Justice chose to disrupt this and put a flare into the conference room so the smoke detectors went off, we could not see, and we had the father actually giving a very good paper. Eventually we got back and he continued his paper.

Q35 Chairman: That is why we had to make arrangements today different from the ones the Committee normally has because we did want to hear from you and from other witnesses in conditions in which you could express yourselves freely.

Dame Elizabeth Butler-Sloss: We are enormously grateful to you, Chairman, for the care you have taken for us, because we have no problem in meeting fathers or mothers. We have to bear in mind that the mothers’ groups have a point as well as fathers’ groups, and it is the fathers’ groups which are being heard at the moment. Yes, of course we meet them and you meet them.

Lord Justice Wall: A few years ago I went to address the annual general meeting of Families Need Fathers and I was actually very impressed by the strength of their feelings and their emotions. The message I gave them—and I was not the only one doing it—was that the way to succeed, the way to get into the system, is not to sloganise but actually to get on the committees, get in with government where there is lots going on and people want to consult you, and respond to Contact Work. We had an excellent response from Families Need Fathers, part of which we incorporated, and I think Families Need Fathers has become a key player in the debate about ongoing contact and joint residence. We make progress with rational argument; we do not make progress by sloganising.

Dame Elizabeth Butler-Sloss: I cannot meet Fathers4Justice because they are not being sensible. As long as they throw condoms with purple powder and send a double-decker bus with a loudspeaker outside my private house in the West Country there is no point in talking to them; they are not going to talk, they are going to tell me.

Q36 Dr Whitehead: One of the arguments that has certainly been put to me sometimes in my constituency surgery about the issue relates to what
is seen by some people as the impotence of enforcement and the issue, for example, as has been mentioned this morning, of imprisonment. Indeed, Sir Nicholas, I think, in your recent paper you described imprisonment as an extraordinarily crude weapon. I think you also cast some concerns about fining mothers who already were on benefit. You have identified, Sir Nicholas, a number of alternative routes of enforcement. Do you think those would actually, as it were, make for open water, as far as enforcement is concerned?

**Lord Justice Wall:** Yes, I do, and I am very pleased to see that in the Green Paper the Government has adopted most of the proposals we put forward in *Making Contact Work*. May I just say that I do not see this as simply an enforcement or punishment issue. If a contact order is not working what I want to have is a mechanism which will help it work. Contempt of Court is designed to be partly punishment for disobeying the Court order and partly deterrence not to do it again. In the very sensitive family field I have not found, in contact and residence disputes, putting people in prison operates. Indeed, in the case of *Re D*, in which James gave judgment, I think imprisonment had taken place and it still did not work. So what I want and what the Government seems to have accepted, and what we put forward in *Making Contact Work*, is a raft of proposals which would, in the first instance, be facilitative; so if an order is not working you want to send someone off—whichever parent it is—to a resource which can address that particular issue (whether it is a parenting class or a programme or what-have-you). It is only if that does not work that you then move into the punitive, and the punitive could include community sentences and so on. However, the idea behind our thinking is that if we are trying to make an order work we need a range of facilities and, ultimately, maybe, in a particular case, imprisonment is a method which will work. I am very sceptical about it but it can do. So we call it enforcement, but I would prefer to see it as a wider form of facilitation.

**Q37 Dr Whitehead:** I notice you have suggested, and the Government has placed it in its Green Paper, awarding financial compensation where, say, a holiday has been frustrated. Have you looked at or thought about the idea of compensatory contact where, perhaps, a non-resident parent might be given additional contact where contact had previously been frustrated?

**Lord Justice Wall:** That, as a matter of practice, happens. That is a regular order that would be made. Yes, absolutely. If contact is frustrated on a particular occasion the court will almost invariably seek to make it up in some way or another.

**Dame Elizabeth Butler-Sloss:** I will tell you where the problem arises. Mother brings a child late; father then requires an extra half-hour the next week. This is getting silly. If, in fact, the father does not see the child at all, of course he should see the child on another occasion, but there are fathers who actually add up the minutes and produce it and say “Now I should have so much more contact because I lost five minutes last week and 10 minutes the week before”. It is difficult to deal with that sort of thing. I will tell you one area about which I am very concerned: if we should be sending to mediation, or anger management, or counselling—or whatever it may be—at every stage, including the so-called enforcement stage—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 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 to getting people to save money in the courts may not be the best use of money.

**Q38 Chairman:** I get a bit worried at this point, where compensatory time is discussed, about the position of the child. Surely that becomes extremely relevant at this point because the child may have quite strong views about which group of friends in which place it wants to play with that weekend, or which organisations—whether it is the ballet class or the football team—it wants to be with on Saturday. If it becomes a time negotiation the child is omitted from this process.

**Dame Elizabeth Butler-Sloss:** Last week I was sitting in Nottingham and I had three contact cases, as it happened. In each of them I found out what the child did at the weekend and I said to the father—because the child was having football classes—“You must take him to football. Don’t expect contact instead of football; you go there, you watch him play, you take him away and give him a meal and send him home.”

**Lord Justice Wall:** I think the Chairman has identified a genuine tension because the order of the court has to be an order and it has to be devised. So you tend to say “10 to 4” in the court order, whereas the best form of contact is that which is entirely flexible. If the child is thoroughly enjoying him/herself the child can come back at half-past five, six o’clock or seven o’clock—what-have-you—but that is not the way it works in the context of a court order, unless the parents are flexible—and if they are prepared to be flexible they do not need an order. So you go round in a circle.

**Q39 Mr Soley:** I understand in some other countries they do make a financial contribution to the other party if they do not keep the arrangement. I wonder if you have any thoughts about that, and, also, whether, if you were to go down that road, you could not make the financial contribution to the child in terms of a held fund of some sort. It actually does indicate then that it is the child that is losing out.

**Dame Elizabeth Butler-Sloss:** I would be delighted, but we live in a world where almost everybody does not have any money and the woman who is looking after the child may be having a problem in managing, and to fine her, in effect—
Q40 Mr Soley: Other countries do it and they are poorer than us.

*Dame Elizabeth Butler-Sloss:* I do not know. One of the problems is the payment is through the child support service, and a lot of mothers equate—and you cannot be entirely surprised—how far they are prepared to be friendly about contact with the extent to which the father is paying. It is not always the fault of father, because sometimes there is a hold-up on the child support payments—

Q41 Chairman: And incorrect assessments.

*Dame Elizabeth Butler-Sloss:* —and incorrect assessments and so on, and money and child contact do go together. They should not, but of course they do. If the woman is not being paid she is not going to let the father see the child, in quite a lot of cases.

Q42 Mr Dawson: Children are murdered during contact visits in this country and children are abused during contact as well. I think the last year for which we have figures is 2002 and at a time when CAFCASS were saying that 23% of contact cases involved domestic violence in only 0.8% of cases was contact actually refused. Is this not evidence that rather than actually not acceding to the wishes of fathers judges are going the other way and not taking domestic violence seriously enough?

*Lord Justice Wall:* This was the theme of our first report, which is on contact where there is domestic violence. We had a choice of how we addressed it: we could either go down the New Zealand road, which would be legislation with a presumption there is no contact where there has been domestic violence, or we could try and address it, in the way that we did, by guidelines. The direct answer to your question is that no judge will make an order for contact where there is a risk to the child, unless that risk can be properly catered for and the contact remains in the interest of the child. It is a question of awareness, I think.

*Dame Elizabeth Butler-Sloss:* I wonder if you could that risk can be totally covered and the contact remains in the interest of the child. The Court of Appeal did give guidance in a case called *L v V and others*, (Lord Justice Thorpe and I gave the main judgments on it) in which we gave guidance. Whether it is read or not, I do not know. We did give guidance on how courts should deal with this problem.

*Mr Justice Munby:* One of the problems is that we do not have enough fact-finding hearings resolving these issues. Intractable contact disputes and contact disputes which are on the way to becoming intractable are always fraught with large numbers of allegations and cross-allegations. What happens too frequently—sometimes it is lack of judge time, sometimes there is not enough time in court for the hearing—is that one tends to put it off; the father, if the allegation is of violence, will give some undertaking and the issue, in a sense, is swept under the carpet. Then you discover, three years down the line, that these allegations have festered away and have never been judicially investigated. It seems to me that where we do have cases in the court system where there are factual allegations being raised, we need right at the outset to take a firm view: are these allegations which, of their nature, require to be resolved or are they simply irrelevant or peripheral? If it is domestic violence plainly they need to be resolved. The crucial thing is to have fact-finding hearings at a very early stage; get to the bottom of it, make findings of fact and, thereafter, plan the child’s future and plan the future of the case on the basis of findings of fact. One of the great defects of the system in practice at present, in my experience, is that too often allegations which ought to be investigated are either never investigated at all or are investigated far too late.

*Dame Elizabeth Butler-Sloss:* I wonder if you could let me add just two things. One is that the form is going to be changed, I think, as from January and there will be a box to be ticked by a mother—or sometimes a father—that there is an allegation. Yes, fathers suffer from domestic violence as well as mothers. I have come across a number of cases before me where fathers have been very badly injured by mothers, but the majority, of course, are mothers. There is going to be a form which will be ticked on any application in relation to children as to whether or not domestic violence is an issue. You see, it is the parties that, very often, sweep it under the carpet. In our *L v V and others* cases on domestic violence we said very firmly that this is an issue that must be sorted at a very early stage, and we told the judges to do it. However, of course, if they are not asked to they do not do it. Of course, the parties do not necessarily want it tried.

*Lord Justice Wall:* One of the most interesting things about *Re L* was that there was a report from two very distinguished child psychiatrists spelling out very clearly the effects of domestic violence on victims and on children. I think that brought home to the judiciary—certainly it brought home to me—
very clearly the learning on this particular subject and that, perhaps, in the past we had not addressed it sufficiently.

Q43 Mr Dawson: The Green Paper talks about the application of the CASC guidelines being patchy, and clearly we have also got the implementation next year of Section 120 of the Adoption of Children Act and significant harm in relation to domestic violence. We receive allegations from bodies such as the NSPCC and Women’s Aid that judges continue to allow unsupervised contact—and indeed residence—to Schedule One offenders, which seems absolutely extraordinary.

Dame Elizabeth Butler-Sloss: We do not always know they are Schedule One offenders at that time. If the local authority comes in and tells us they are a Schedule One offender then, of course, we will take steps. It is always a question of what has been told to the court at the moment the contact order has been made.

Lord Justice Wall: May I just add to that that I have, obviously, been to Women’s Aid conferences and discussed this issue with them, and one of the things that will be very helpful, at some point, is if this evidence could be investigated by a senior judge. One frequently has allegations, for example, that a woman in a refuge is required to make her children see the person whom she is fleeing. I would be interested to look at the file on that case, to look at the evidence put before the judge and to look at the judgment. What was the judge doing? Did he make an order like that? If so, why? If that sort of order is being made it is totally unacceptable, it is dangerous to children and it should not happen. I think this needs to be slightly more than just anecdotal. I think it needs to be investigated properly.

Dame Elizabeth Butler-Sloss: If I found it and I found a judge, in those circumstances, was actually propounding unsupervised contact where the father was dangerous, I would consider whether I would take his Family Law ticket away. I do not get told about these. We have a lot of anecdotal evidence, even from the NSPCC, for whom I have an enormous regard, which I think is not necessarily based on fact, or on facts which did not come to the court, which I think is really the problem here.

Chairman: That brings us to the point which you made earlier, which I will ask Mr Cranston to deal with, which is about the openness of court proceedings. You have just referred to how useful it would be to know about various things which, in the nature of things, we do not.

Q44 Ross Cranston: I do not want to embarrass him but Joshua Rozenberg said in a submission to us that the courts ought to be more open.

Dame Elizabeth Butler-Sloss: Yes. He is here.

Q45 Ross Cranston: Absolutely, and he is very distinguished as well.

Dame Elizabeth Butler-Sloss: I agree, Mr Cranston.

Q46 Ross Cranston: Comparable jurisdictions, like Australia and Canada, as we understand it are more open. Is it possible to be more open while, of course, keeping secret the names of the parties involved?

Dame Elizabeth Butler-Sloss: I think there is a distinction between the giving of the judgment, which I believe ought to be open (at least, the press should be able to come in, which makes it open), possibly the submissions of counsel, but in very fraught family cases I have my doubts as to whether the public should pour in and listen to people exposing their real concerns. I have had fathers in the witness box huddled up in tears; I have had mothers who are distraught; I am not sure that having the public in would not make it even worse for them. So my gut feeling is that a distinction be drawn between the evidence of the parties. I think in some cases that have medical evidence I would not object to that part being given. I try a lot of vulnerable adult cases and almost all of them, if we are dealing with medical cases, are open, particularly on permanent vegetative state, where the people are likely to die. The whole of that evidence is given in public because the person about whom we are dealing is not giving evidence. I think parents need protection.

Mr Justice Munby: I think this is a topic on which views differ and I personally would take a rather more open view. 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. That is not to say we simply open the doors to everything but I think we could do more to open up the system. One thing—it is only an idea—is I think I am right in saying that in the Juvenile Court (the Youth Court) the press is able to attend but is subject to a reporting restriction. I think there might well be attractions in considering whether the press, the media, other interested bodies, should have a right to be in court, subject to judicial discretion to say not in a particular case, but subject to reporting restrictions. At present the rule is nobody can be there, nobody can report anything unless a judge says so. I think, perhaps, a more flexible system is required. I also believe that there are more judgments which could be given in open court. Traditionally, we have tended to give judgments in open court only if we think there is some legal point of interest to the law reporters, but the consequence of that is that the public judgments tend to be skewed away from the ordinary run-of-the-mill case to the legally complicated case, and the consequence is that the public has very little insight into or access to the routine work we are doing. I think many more judgments should be given in public.
Dame Elizabeth Butler-Sloss: 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 and right the way through the county court and the high court of allowing the press in under certain restrictions. We have always done it, of course, with divorces and annulment where the public are permitted and we go into open court. The trouble is I would not want us to get robed on those occasions, because I think there has to be a degree of informality. How you play that, I am not sure. What James Munby says is well worth considering.

Q47 Peter Bottomley: It may be possible for you to consider whether you could do us a note on what inhibits the changes being made. Is it law or is it custom and practice? If it is possible for you to make changes it would be worthwhile.

Dame Elizabeth Butler-Sloss: I am sorry. Do you mean the change in going public?

Q48 Peter Bottomley: As a minimum, to have judgments issued so they can be reported, in the Q48 Peter Bottomley: mean the change in going public? but are there any circumstances in which a person changes it would be worthwhile.

Q51 Mr Dawson: Given the difficulties that we have heard of victims coming forward to allege domestic violence, and given the problems of hearing the voices of children involved in difficult private law proceedings, is there any reason to suppose that opening up that court process to further publicity and the presence of journalists would actually aid those people in coming forward, or would it make it less likely that the court would hear information that it needs to hear?

Dame Elizabeth Butler-Sloss: I have no idea.

Chairman: That is one of the most honest answers the Committee has had for some time!

Q52 Peter Bottomley: Again, it might be something you want to consider and give us some notes about, but are there any circumstances in which a person involved in a private law case cannot consult their Member of Parliament about their concerns and worries?

Dame Elizabeth Butler-Sloss: As you appreciate, I am sure, the DCA is now looking at this and I understand that in the Children Bill there is a clause that is going to deal with the problem of rule 4.23 of the family procedure rules. This has been the subject of a considerable amount of discussion. It was exposed, actually, by Lord Justice Thorpe and myself in a case in the Court of Appeal and we had not appreciated it, but of course it must be cleared. However, if I might respectfully say so, not just for MPs.

Q53 Peter Bottomley: So the answer is no; there are no circumstances in which that restriction should be maintained?

Dame Elizabeth Butler-Sloss: I do not think it should be maintained, no, of course not. We did not even know it existed until it was brought to our attention. You obviously did not know it existed.

Q54 Chairman: Thank you very much, Dame Elizabeth, Sir Nicholas and Sir James. You have been very helpful this morning. Clearly, we might want to contact you at a later stage, but we are looking forward now to hearing from your colleagues who are at the sharp end, so to speak.

Chairman: He asked you to consider whether you would like to submit one and it is entirely up to you.

Dame Elizabeth Butler-Sloss: Certainly I shall.

Chairman: Thank you.
Witnesses: His Honour Judge Meston QC, District Judge Michael Walker and District Judge Nicholas Crichton, examined.

Q56 Chairman: Judge Meston, Judge Crichton and Judge Walker, welcome, we are very glad to have you with us. As I said earlier, I think you are at the sharp end of dealing with the quantity of cases, many of which do not reach the higher courts. What practical steps do you think the courts can take to reduce the average length of cases, an issue which we raised in the earlier session?

Judge Meston: I think we would all agree pro-active case management is critical. We already work very hard at it. Cases which will require some form of court hearing are timetabled at an early stage through to a final hearing, with such interim orders as are necessary being made at the same time. You cannot monitor a case all the way through to ensure that the timetable is met but we try hard to ensure that a timetable is set and is adhered to to ensure that the parties provide the evidence which the court requires and to ensure that CAFCASS provide the vital report, focused, if possible, on the essential issues within the time constraints which they have. In the area where I work we are working to 16 weeks for CAFCASS reports, which I think is not as good as some but better than many.

Q57 Chairman: Can you achieve the judicial continuity which was seen in our earlier discussion as being very helpful without getting very complex listing arrangements and, perhaps, disruption of the listing arrangements that you are using to try to get the cases dealt with quickly?

Judge Meston: I can only speak as a circuit judge. Once the case reaches the right level of judiciary—in other words, once a decision is made that it is either going to stay with a district judge or move up to the circuit judge—then it is plainly desirable, and we all recognise that it is desirable, that it should have the same judge throughout. It is much easier for the judge, let alone for the parties. It is not always achievable but we simply try, and certainly the typical circuit judge has other demands on his time. As the President was saying, the really superior demands for the family judiciary are the public law cases where judicial continuity is at a premium, but we also have criminal work to do and, some of us, civil work to do, which is booked up ahead so it is not always easy to fit a case into the timetable and you have, therefore, to make a decision as to what gives. I do not know about the district judges.

Judge Walker: The President mentioned earlier that sometimes there is an estate problem of the judge just not having the right room. However, on the whole, that is not a problem; district judges are sitting 100% of the time in the county court and we know what our lists are. If I want to adjourn a case from today to four weeks’ time I know what I am doing and when I am doing it and it is easy to slot the case in, on the whole. It really should not be a problem and if it is a problem it needs to be sorted out. It is even better for Judge Crichton because he has a one-off situation.

Judge Crichton: I sit in a family proceedings court, which is a magistrates’ court, and we have three courts daily run by lay magistrates and three by district judges. The other two district judges come in on a rota basis from the criminal courts, they have got their Family Law tickets and they give me about eight weeks a year—one or two weeks at a time—but I am there the whole time. That gives me the possibility of keeping certain cases to myself and reviewing them on a regular basis. Like James Munby, who talked about this, I frequently take two or three cases before court business starts at 10.30 just to keep tabs on them and see how they are going. I also take cases at 4.30 in the afternoon, at the end of the normal day, fitting it round whatever suits the parents best. It works. If you can pick up where you left off last time, particularly if you have got a mother who is very anxious about staying contact. I had a mother recently who had agreed with a degree of reluctance to visiting contact and that had gone quite well, and the child was six or seven, and father was now saying “I would like to have him for the weekend; I would like to have him overnight on Saturday”. Mother was saying, “Absolutely not”. I was saying “Why not?” She said, “He’s too young.” I said, “When do you think he will be old enough to spend a night with his father?” “Not till he is 13 or 14.” I said, “It is going to happen this weekend” and she became quite frantic. I said, “And at 9.30 on Monday morning you are going to come back and tell me if it did not work.” She came back on Monday morning quite sheepish; it had gone very well and the child had had a good time. To be able to do that is a tremendous advantage.

Q58 Chairman: Do you experience delay being used as a tactic in the hope of putting off the day when a relationship can be either fostered or even begun? Is it something that you experience and, if it is something you see, you are able to prevent?

Judge Crichton: I do not think so. The quality of legal representation at my court in the Inner London Family Proceedings Court is extremely high. The solicitors and the barristers are very much committed to what we all perceive to be in the best interests of the children, and work very hard to persuade their clients. I do not think I see that sort of tactical delay.

Judge Meston: I have to say I agree with that. I heard the earlier questioning and I just do not think that happens. If it is thought to be happening in a particular case it is picked up very quickly. Our court structure is such that you simply do not allow to happen. 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.

Q59 Chairman: Do you see grandparents very often in proceedings? They are often very aggrieved.

Judge Meston: Yes. Sometimes they are the saviours. They facilitate contact, they provide finance which is not otherwise available. At the other extreme,
sometimes they make a bad situation worse. You cannot generalise, but, yes, I have just done a case where the saviours of the case were the grandparents emerging, as it were, from the woodwork at the last moment, to resolve what was otherwise going to be a very difficult case to resolve.

Judge Walker: If I may say so, before there was talk of domestic violence and very often providing for contact at the grandparents’ address is the answer to what sometimes can be a very difficult situation, and you know you have responsible grandparents keeping an eye on the situation.

Q60 Ross Cranston: We were told that there was an early intervention project which had started off in 2003 and which had strong judicial support. We were told that because of CAFCASS’ involvement somehow that has been supplanted by another project, and the initials, I think, are FRS [Family Resolutions Project], which does not have that judicial support. Can you clarify it for us?

Judge Crichton: I certainly can. There has been a lot of mis-information about this. I chaired the ad hoc working group which was developing an idea that was brought to us by Dr Hamish Cameron, who is a very well-known child and adolescent psychiatrist. It was based on some work that is being done in Florida and indeed in Scandinavia where under the title of “Early Intervention” parents are directed out of the court system and into a more educative programme, if that is the right word. We reported to Government in October of last year, Government set up a steering group, which has Mrs Justice Bracewell on it, and a design group which I am on, and we have spent the last year working on it. The Department for Education and Skills changed the name of the project to—

Q61 Ross Cranston: Family Resolutions.

Judge Crichton: Family Resolutions from Early Interventions, because they felt it might be an early intervention within the context of court proceedings but in the context of the family’s history it was quite late. Now, they changed it without consultation, and gave the wrong impression, but the project that we have developed is exactly the project we intended to produce when I submitted the paper from the ad hoc working group last October.

Q62 Ross Cranston: So it still has judicial support?

Judge Crichton: It still has judicial support. It has started and, in my court, we are identifying the cases to go into the project, but the facilitation groups, which are an integral part of the project, will not start for two or three weeks to enable us to build up enough cases to put into the project. So we are just beginning to walk.

Q63 Ross Cranston: Is there anything inconsistent with that early intervention project and what the President was telling us about—the new framework? Are they consistent?

Judge Crichton: Yes.

Q64 Keith Vaz: Do you think there is a bias in the family court system against fathers, or a perception of bias?

Judge Crichton: I am as insistent as the President that there is not.

Q65 Keith Vaz: You have heard these comments being made; you know the concerns of fathers’ groups. Where do you think this comes from? Have they made it all up?

Judge Walker: You have to remember that there are 160,000 divorces a year, there are goodness knows how many thousands of parents who are not married who separate, there are 100,000 divorces a year involving children under 16 and, inevitably, in that situation there are a few people who are going to feel aggrieved. I would agree with everything that everyone has said today; there is no bias in the system. There is a perception of bias but it does not exist in reality.

Judge Meston: There are women’s groups who say the courts do not take sufficient steps to protect them. This is the problem. We are obliged to be even-handed, with the focus on the welfare of the child and the protection of the child.

Q66 Keith Vaz: Sure, but do you think there is that presumption that the best place for young children, in particular, is with the mother?

Judge Meston: It is not a presumption in the legal sense; it is what happens in practice in the vast majority of families. We all know that, and the courts have to work around that. The court’s task is to produce workable solutions and arrangements, sometimes, only for the immediate future but we try and produce arrangements which will last a little longer term, so the parties do not have to come back to court. However, it does not always work and those are the cases we have to tackle.

Judge Crichton: One point is this whole issue of enforcement of court orders. I think once the court has made an order that contact should take place then if a mother flouts that order father has some justification in saying “Why don’t you enforce your order? What are you going to do to enforce your order?” I think eight or nine out of 10 of the orders we made are not flouted and do proceed, and we can work with them. It is difficult to criticise the father who has got his order and cannot persuade a judge to enforce it, but if the judge continues to act in the best interests of the child are you really going to send mother to prison because, when she comes out of prison, she will forever-and-a-day thereafter be saying “That father of yours got me sent to prison”, which cannot be healthy for the child.

Q67 Keith Vaz: If we dealt with the issue of contact right at the start by way of an interim order in which the contact issue was put to one side, do you think it might be easier for the case then to develop in a much more fair way because nobody would be disputing contact?
**Judge Meston:** It depends what else is in issue. Very often contact is the issue. Obviously, in your scenario, residence of the child may also be, ultimately and probably, the main issue, but of course in any case where you are timetabling it through to a final hearing you want to know what the interim arrangements will be. CAFCASS will want some interim arrangement for contact because they will want to assess the ability of the parents to co-operate and to work to arrangements which are set out for contact, and they will want to assess the attachment of the child to each parent. So there has to be a regime, even if it is a temporary or interim regime, for contact and we are keen to ensure there is one. In extreme cases it has to be through a contact centre.

Q68 Keith Vaz: Judge Meston has just mentioned grandparents. I had a case only two weeks ago where a police officer had come to see me who was not being given contact with his child and it was the grandmother who came and was also saying she could not have that contact. What is the situation that can bring in the whole of the family?

**Judge Meston:** There is a mechanism. If grandparents, as in the case I was referring to earlier, emerge and say either they want contact or they are prepared to do something in terms of actually taking over the care of the child, they have to apply to intervene and they have to apply for leave to make an application, but that is readily done and they become parties to the existing proceedings.

Q69 Keith Vaz: You are quite clear, in answer to the Chairman’s question, that none of the legal representatives who appear before you, at any rate, use the system to delay?

**Judge Meston:** I have to say I have not come across one chap who came to see me on Friday was very honest, where you say that some judges are not convinced me, that the problem he was facing was his one of you gave evidence during our CAFCASS inquiry and which one of you said it was okay. Was it Judge Crichton?

**Chairman:** I do not think anybody said it was okay, just that it was better in some areas than others.

Q71 Keith Vaz: Has it got better?

**Judge Crichton:** It is too early to say. I think all the signs are very hopeful. There is a much keener awareness when one is speaking to people from CAFCASS about their responsibilities and an enormous determination to put things right, but past experience, I think, makes us want to wait and see the product rather than listen to the hopes and wishes. I am quite optimistic.

**Judge Walker:** The President has mentioned the private law framework before. I think that will make a big difference to the resources that CAFCASS will be able to devote to cases. The fact that reports will be shorter and quicker will make a real difference.

Q72 Keith Vaz: One quick final question: more judges at your level?

**Judge Crichton:** Absolutely.

**Judge Meston:** Yes.

Q73 Mr Dawson: Some of us think that a lot of problems brought by fathers’ groups and brought by fathers to our advice surgeries will begin to be resolved when men learn to relate much better to their children than they actually do. But certainly one chap who came to see me on Friday was very strong in his opinion, and certainly managed to convince me, that the problem he was facing was his wife’s solicitor who was behaving in what seemed to be an extraordinarily aggressive manner towards him. I am also reading the evidence that Judge Crichton has prepared for us, which is tremendously honest, where you say that some judges are not suited to the work and plainly do not want to be doing the work. This is clearly a very specialised area of work, it requires the greatest sensitivity and attention to the most delicate of issues. How can the legal profession put itself in order? How can it assure itself that solicitors and barristers are working in the best interests of children? How can it ensure that it only gets the most conscientious and able and committed judges?

**Judge Crichton:** I am not sure that I can speak for the profession as it is 18 years since I was a practising solicitor and, again, I can only repeat what I said: the standard of advocacy and the commitment of solicitors and barristers who appear in my court in central London, almost without exception, have no fault and they are tremendously committed to trying to help parents achieve what is best for their children. One has a hearing when they come in at 10 o’clock and they say, “Look, could you give us an hour because we are talking and it is constructive?” so you go back to your room and get on with some paperwork and an hour later you are told: “Another half an hour should do it.” What is happening is that the real work in the court building is being done in the court corridor and being done by very
committed, professional lawyers, and at the end of the day to have a solution which they have been able to resolve outside the courtroom (often with the help of CAFCASS officers) is a solution that is much more likely to succeed than one imposed upon them by the court.

Judge Meston: I do not know what your story was saying about the judge but the fact is that most judges who do family cases will have been drawn from the specialist branches of the profession and, indeed, almost all of us will have done family law if not exclusively then as a large part of our practice and belong to the appropriate professional bodies. Moreover, we, as the President mentioned, are ticketed; we have to be approved to do that type of work and we have to be trained by the Judicial Studies Board and attend refresher courses to ensure that we are up to speed.

Q74 Mr Dawson: But Judge Crichton—and sorry to put you on the spot—is telling us about judges who have been pressured by court managers into obtaining a family ticket. That clearly is not acceptable.

Judge Crichton: I meet that when I go out of London. It is definitely a problem.

Judge Walker: If I may say so, on the county court side, with the judges I represent, I do not think there are any district judges with a civil and family jurisdiction who are doing family work who do not want to do it. There is enough work around that if someone really has a propensity for doing civil work or housing work or whatever, they can focus on that. Those who are doing family work are those who want to do family work.

Judge Crichton: The cases that I allude to are in smaller courts out of London where there is a pressure to get through all sorts of work, and I believe it needs to be addressed.

Q75 Chairman: Can I just clarify a point I asked about earlier on family proceedings courts where you have got lay magistrates dealing with these matters. There has been a great fall off in the amount of work in this area which they are doing. Is that a necessary consequence of the difficulty of judicial continuity that we mentioned earlier or could that be provided for because obviously you are only using certain lay magistrates who have had special training for the purpose? Could you deal with the problem of continuity and ease some of your other problems by raising the amount of work which the lay magistrates do in this field in the family proceedings courts?

Judge Meston: I can only speak for the semi-rural area where I operate. Continuity is a problem and, you are right, there is a fall-off of private law work before the magistrates’ court and family proceedings court. Indeed, I think they do very little of it in reality. They have to deal with the public law cases because they are the first point of reference for every public law application. The other problem they have is that none of them have any form of in-court conciliation machinery that I am aware of. Certainly in my area, and I suspect that reflects what happens throughout the country. They just do not have the facilities for it, the CAFCASS officials available to man it, so I suspect they have their limitations.

Judge Walker: If I may say so as well, there is a legal aid problem. Solicitors with a legal aid certificate will get paid more if they pursue their case through a county court than if they take it through the magistrates’ court.

Q76 Chairman: That is a false incentive in the system?

Judge Walker: Yes, it is a problem with the system which is well-known. The President is in consultation with the Legal Services Commission to try and address it.

Q77 Chairman: Is it worth doing something about that or are there other reasons, which Judge Meston gave, sufficient to feel that we cannot get this area of work back into court?

Judge Walker: It needs to be tackled. Apart from anything else, the private law framework will not work unless the problem is tackled. Everyone is aware of it, but there are instances where, because of the way it has all worked, if a solicitor has a case in the Family Proceedings Court and then instructs counsel to do the advocacy, the solicitor ends up receiving nothing and all the fees actually go to counsel. It needs sorting out and I am sure it will be sorted out.

Q78 Mr Clappison: Where magistrates do deal with these private law cases, forgive me for asking, are they specialist benches of magistrates or are they drawn from the general bench of magistrates? What is the position? What training do they receive?

Judge Crichton: They have been trained as lay magistrates and then they apply to come on to the specialist panels and some go on to the youth panel and some come on to the family panel. One of their problems is that under the present regulations they are still required to sit so many days a year in crime and there are many of them who would like to do all their sittings in family and they are not permitted to do so. I have sat on two working groups that have made recommendations that lay magistrates ought to be allowed to specialise after having sat for a significant period of time, maybe three years, in the criminal courts in order to develop their court skills, witness evaluation, and the like, and we are losing magistrates from the family panel in London because they no longer want to sit in crime, they want to sit in family and they are not being allowed to sit in family full time. If I can come back to the earlier question in London we have no shortage of work for lay magistrates. There is plenty of work, sadly, but judicial continuity will always be a problem.

Q79 Mr Soley: Could mediation be used in a greater proportion of court cases; in fact instead of the court system?
Judge Crichton: That is what the Family Resolutions pilot projection is all about. I do not know if it is helpful for me to outline very swiftly what the project is doing. In our court we have a team of 13 qualified lawyers. We used to call them justices' clerks, they are now called legal advisers, and magistrates courts have to have them, and we are very lucky to have them because they are very experienced and they do a lot of the time-tableting and directions hearings. When a contact application comes in they will screen it for any allegation of potential harm and if there is no such an allegation they will put it straight into the project. The parents will then receive an information pack very quickly explaining what we believe to be the emotional needs of their children in terms of knowing both parents and knowing that they are loved by both parents. Then they will be invited to go to two facilitation groups but they will not go together, but they will go to separate facilitation groups. At the first group they will be shown the video that we have heard about and they will be spoken to by an experienced facilitator from Relate or from the Parenting Education and Support Forum about the issue of the needs of their children, and trying to focus on the needs of their children, and being seen by their children to be co-operating in trying to meet the children’s needs, and trying to keep their children out of the conflict which is going on between them. They will go away for a couple of weeks and then they will attend another facilitation group run by the same people but again not going together where they will be working with, hopefully, a dozen other parents in a similar situation and they will start talking about developing the skills of communicating with the partner with whom they are in such conflict, for the benefit of their children, and they will work round those sorts of issues. Having done that, two to three weeks later they will meet together with a CAFCASS officer and start talking about how they might come to an arrangement that will work within that family. The ad hoc working group that produced this scheme hoped very much that we might be able to change the culture in which these issues are dealt with. It is difficult to talk about a normal family because every family is different, but, all other things being equal, it would be good for these children to see father perhaps for 50% of their quality free time, which might equate to alternate weekends (and it would be nice if it could be Friday night to Monday morning and dad as well as giving the kids a treat would have to do the laundry and get the children ready for school on Monday morning) and possibly one evening a week for an hour or two to help with homework, to have that sort of input into the children’s lives, half of the school holidays, half of half-terms. Many families would not be able to make that work because of the geographical situation, working arrangements, whatever, but if we started thinking like that and then adjust it to meet the needs of a particular family it would be healthy, we felt.

Q80 Chairman: This is not a presumption, these are frameworks offered in the mediation process?

Judge Crichton: Exactly so.

Q81 Mr Soley: I know it is difficult to prejudge it as it is a pilot project but is your gut feeling that that system is better than the court system?

Judge Crichton: Yes. If it can be made to work it has to be better.

Q82 Mr Soley: The problem is whether or not it can be made to work or encouraged to work, to use that phrase.

Judge Crichton: Yes, there are issues about whether families will go into the process willingly and how far courts can direct people into the process. They do it in America but the Americans, I think, are more biddable. It remains to be seen. I hope that people will do it wholeheartedly.

Q83 Mr Soley: From what you know of it so far and also from your general experience, do you think it could be done better prior to people seeing solicitors or is it a situation which is more likely to work if the court, rather on the basis you described with this pilot, makes an assessment and then refers them back to the mediation process?

Judge Crichton: I do not know how we find the families unless they come to us through solicitors. Somebody has to make an application to court. We do get unrepresented parties coming to court and when they fill in the forms they are helped by the court staff to do that, but the vast majority of cases that come to us still come through solicitors' offices. What we need to be doing—and the Legal Services Commission have taken this on board—is making sure that from the solicitor's point of view it should not be a prerequisite that they engage in correspondence to try to see if they can resolve the issue because that correspondence frequently makes things worse.

Judge Meston: I was going to say I think you are looking really for the trigger for mediation and there is, I think, a case for re-visiting the Family Law Act 1996 which never got off the ground which, if I remember rightly, made an attempt at mediation between married couples—because it only applied in divorce cases—a pre-condition to public funding, and I think it is unfortunate that perhaps that has been lost sight of.

Q84 Mr Soley: But it focused more on marriage, did it not, rather than children?

Judge Meston: It was mainly to do with revising our divorce laws, but it tried to do a lot else and that probably was the source of its failure.

Judge Walker: May I also remind you that 90% of these cases never actually come to court at all. The courts deal with 10% of contact cases, 90% are resolved by the parties or, to be honest, very often (and one should not forget it) by negotiation that is being spearheaded by solicitors. I was a matrimonial solicitor myself for 15 years before I took my appointment and so were a lot of my colleagues and an enormous amount of work is done in private practice between solicitors finding out what the
problems are and very often very quickly and very amicably resolving them. We ought not to forget that. We deal with the minority of cases, not the majority.

Q85 Mr Soley: I recognise you are dealing with the most intractable cases by definition.
Judge Crichton: It is a part of the Family Resolutions pilot that if at any time down the road the parents say, “We have understood the message, we want to come out of the system,” we let them out because that is what we want to achieve for all parents anyway, that is what we would like to see happen. If, on the other hand, they want to reach the end of the pilot and say, “We understand, we have got an agreement but we would very much like to have the judge’s stamp on it,” we will happily give the judge’s stamp if that makes them feel more confident with the arrangement that they have arrived at.

Q86 Mr Soley: Is it to early to say how you think this pilot is going?
Judge Crichton: I am ever the optimist. You do not do this work unless you are an optimist.

Q87 Mr Soley: That is a slightly different answer to the question.
Judge Crichton: I am optimistic.

Q88 Dr Whitehead: I am interested to get a feeling for the proportion of cases that come before you where somebody, either before the case or during the case, makes an accusation of domestic violence against the other person? What proportion would you say that happens in?
Judge Walker: I do not know. I have never, to be honest, kept a tally in the 10 years I have been doing it, but it is the minority. If I said 25% I would certainly be over-pitching it. The problem, though, is not so much the cases where normally the mother will say, “There has been violence and I am concerned about the risk the children will be put to”; the real problem cases are those where it is not said to you at all and one is left realising during the course of whatever discussion or hearing one is having that actually there is a domestic violence problem which is going unsaid. Very often it is unspoken.

Q89 Dr Whitehead: Would you actively seek to bring that out? Would you refer cases to the police?
Judge Walker: No, I would not refer it to the police but obviously if it is there one brings it out into the open because one has got to. It is where I find CAFCASS are very helpful indeed. They can pick it up and if necessary they will go off and have a one-to-one with the mother or the father and come back and tell you that there is a serious problem that is going unsaid.

Q90 Chairman: How did you say this came to light?
Judge Meston: Through the guardian being introduced into an already difficult private law family dispute involving a child.
Judge Walker: May I pick up something that was said before. There was criticism of the fact that it was believed the average case takes 36 weeks to resolve. What sometimes happens and what gives rise to those sorts of figures is that you might have a situation where there is domestic violence and the father is quite prepared to concede that it has happened. He might have a different explanation for it but it is there and it is conceded. One might at a very early stage, and we are dealing with these cases sometimes four to six weeks after they have been issued, be somewhat reluctant to have the normal unrestricted contact taking place. One therefore for instance might be seeing whether there is a grandparent or if there could be contact at a contact centre, something of that sort, for a period of time. And a typical order may be for contact at the contact centre once a fortnight for six/eight/ten weeks; one might say, “Fine, I want the case back in 10 weeks” or whatever, we will then look at it and we will see if we can alter the order to a more common sort of contact arrangement. That is adding to the period of time it is taking ultimately to resolve the case but in reality the contact is taking place and it is resolved a lot quicker than 36 weeks.

Q91 Chairman: In truth, this is not a case to be resolved within a period of time, the court is engaged in a continuous monitoring role of something which is happening and perhaps improving.
Judge Walker: There is a limit obviously to the number of times one wants to have a case coming back but it is not uncommon to see a case come back three or four times.
Q92 Dr Whitehead: Some fathers, though, have in the past claimed that this is effectively the nuclear bomb of the proceedings, that a mother may claim domestic violence knowing that that then, as it were, stops the contact or could stop the contact. What facilities do you have during cases to check the veracity of claims so that that may or may not happen?

Judge Meston: If there are no admissions or there have not been separate injunction proceedings in which domestic violence allegations have already been tested and adjudicated upon, all the court can do, if issues are raised in a children case, is to set a timetable, to set sometimes a separate hearing to have the allegations set out in a manageable form and adjudicate upon them, to hear the parties, and to have the fact-finding hearing as soon as possible. The problem is when the allegations emerge late in the day because either the mother has been reluctant to articulate them or because they have emerged through some other source, CAFCASS, or they have emerged much later on in the sort of circumstances I described earlier. You are having to deal with allegations which may by then be quite stale but come to have an importance, and all the court can do is to say we will have a hearing to adjudicate upon these allegations as soon as possible so that the whole basis upon which the case proceeds and arrangements for contact proceed is clear to everybody. CAFCASS are very reluctant to make firm recommendations if there are untested allegations hanging around. They want the court to get on and adjudicate, which the court tries to do.

Judge Crichton: I think there is a problem here with the new forms that are coming out on 1 January and there is a fear that some mothers, a small minority of course, may wish to play the domestic violence card. I read a psychiatric report last week which did not refer to it as domestic violence, it referred to it as “intimate partner aggression”. I hope it does not catch on!

Judge Meston: Inter-actional dysfunction!

Judge Crichton: But there is an issue here because the guidelines that were handed down following the Court of Appeal decision in L v V and others which we have heard about this morning, make it clear that the court has to make an early decision about the relevance of the allegations of domestic violence to the issue of contact. In the Court of Appeal and the High Court, of course, they are getting the worst cases but there is a much wider spectrum than that and we get the other end of the spectrum in the family proceedings courts. I would not want anything I am about to say to be thought to mean that I do not take any allegation of domestic violence seriously because it is always serious, but there is the other end of the scale and it may have been two months of unpleasantness which may have involved pushing and shoving, may have involved slapping, but happened at the time the relationship was breaking down and we are now six/eight/12 months on from there and we are dealing with the interests of the children and the relevance of that difficult time may not be that great in considering the issue of contact, particularly if the children did not witness it. We do sometimes get a CAFCASS report for which we have waited weeks which says, “I have spoken to the parents. There is an allegation of violence. I am going no further until the court has held a fact-finding hearing.” By the time that gets back to us and we find a couple of days in our list to hear those allegations and make a decision we are losing time all the way along the line. I cannot resist saying that two months is 1% of a child’s childhood and we are losing it all the time.

Q93 Dr Whitehead: How would you respond to the contrary claim that courts effectively allow contact in a way that puts children’s safety at risk because of domestic violence?

Judge Crichton: I would hope that we would never do that but that is part of assessing the relevance of the allegation to the issue of contact. If it is a threat to the child physically or emotionally then I hope that we would identify that threat and not permit contact.

Judge Meston: The statutory framework requires us to have regard to the risk. The whole business of what we are about is very often assessing risk, measuring risk, and deciding how to manage risk, and inevitably, but I hope rarely, things go wrong.

Judge Walker: If I may say so, we are all human—judges too. 19 children have been killed during contact since 1999 and no judge wants one of those 19 cases to be a case where he made a contact order. One is instinctively trying to do one’s best to protect the children.

Q94 Mr Dawson: Just to make the point that domestic violence still goes widely unreported. I think that is generally accepted, and again it is generally accepted that the moment of separation or the time shortly after separation is also a very, very dangerous time for victims of domestic violence. Domestic violence does not end at the moment of separation. You clearly have a very difficult job to do in these circumstances.

Judge Crichton: Could I say a word about the issue of secrecy of courts. We have been approached by many responsible television companies who want to do programmes—this is an issue that is now in the public domain—to demonstrate the difficulties that courts face in making decisions both in public and in private law, but of course as soon as we tell them that they cannot film in our courts and they cannot do anything that would identify the family or particularly the children that we are dealing with, I am not going to say they lose interest but they begin to find how difficult it is if they lose the human angle on it. To come to the issue of the press, it is a little known fact but section 69, I think it is, of the Magistrates’ Courts Act 1980 includes a list of people who may be in the family proceedings court, and it includes the press. I had a reporter in my court last week. He asked if he could come and I said did he want to sit in the back of the court. He said, “I did not know I could.” And I said, “You can but subject to my control of my own court and I will only allow...
you in my court if the parties are all comfortable with it.” I had two private law cases, which is what interested him most, but the parents were in extreme distress and they said, “Please, no.” I said, “He is not going to be reporting on the case. He is just trying to feel the flavour, trying to feel the atmosphere of the family proceedings court,” and they said, “Still not, please, no,” and he very kindly withdraw, but it is a fact that they are permitted to be there, subject to the judge’s discretion, as they are in the youth court.

Q95 Peter Bottomley: Changing the subject, we know the importance of continuity. We also know that most of the cases are at the lower courts. We also know that most district judges sitting in magistrates’ court spend a lot of their time on criminal work. Who has the power to say they want to have more people to work better, or to have more district judges in magistrates’ courts who will specialise in these family proceedings?

Judge Crichton: I would think the Lord Chancellor. It is something that I have been discussing with my immediate boss but he has control of district judge magistrates’ courts all over the country and I am just one and I am the only one who deals with family proceedings. I am begging him to give me a deputy and he is saying he cannot do it because nobody amongst my colleagues wants to do the work full time. I think we need to be going to the specialist practitioners and advertising these jobs for these people to come in and bring their expertise in at FPC level, but we have got the Unified Courts Administration coming up next year and I think really we have got to wait for that to happen before we start discussing these issues in more detail, but I intend to.

Q96 Peter Bottomley: What you do is up to you. I suspect we could then expect to question the Lord Chancellor or his representatives and say are there any real inhibitions on getting the kinds of minor changes which would allow reasonably specialist qualified people to give nearly all their time to these sorts of issues where continuity matters.

Judge Crichton: Yes please.

Ross Cranston: Some judges might want variety. They might want to spend 50% of their time in family and 50% in crime.

Peter Bottomley: But the cost is continuity.

Ross Cranston: Not necessarily.

Chairman: We are having a debate between members of the Committee at the moment. If you want to add anything, please do!

Q97 Mr Dawson: Can I just ask would that help with public law cases as well?

Judge Crichton: Absolutely.

Chairman: Thank you very much indeed for your help this morning and for the evidence you have given to us beforehand. We appreciate it very much.
Tuesday 7 December 2004

Members present:
Mr A J Beith, in the Chair
Peter Bottomley
Ross Cranston
Mr Hilton Dawson
Mr Clive Soley
Keith Vaz
Dr Alan Whitehead

Witnesses: Christina Blacklaws, Chairman, Family Law Committee, and Hilary Lloyd, Head of Strategic Policy (Research), The Law Society; Kim Beatson, Chairman, and Christopher Goulden, The Solicitors Family Law Association; and Philip Moor QC, Chairman, The Family Law Bar Association, examined.

Chairman: Good morning and welcome everyone. We have got a splendid team of witnesses and we are very glad to have you with us. We have Philip Moor, from the Family Law Bar Association; Kim Beatson and Christopher Goulden from The Solicitors Family Law Association; and Christina Blacklaws and Hilary Lloyd from The Law Society. You are all very welcome. I think we had just better declare any interests.

Mr Cranston: I am a barrister.
Keith Vaz: My wife holds a part-time judicial post and I am a non-practising barrister.

Chairman: Please do not feel obliged to answer every question. Between you I think we can have a very good source of ideas and comments. On the other hand, if something is said which you feel does not reflect your own standpoint by all means feel free to indicate that you want to contribute on that point as well. Mr Soley?

Q98 Mr Soley: I would like to know about the feeling of dissatisfaction by parents with family courts generally. We are told that there is quite a high level of dissatisfaction. First of all, do you think that is correct? Secondly, what do you think the cause of it is? Bearing in mind the Chairman’s comments that you do not all have to answer, but in a way it crosses all your expertise, so who wants to start?

Christopher Goulden: If I could comment first. I feel sure that most people would agree that what parents particularly object to about the family justice system is the length of time it takes to get anything done, and there are a number of reasons for that, but delay is a great source of dissatisfaction.

Q99 Mr Soley: Okay, that is delay. What about process?
Christopher Goulden: The process itself to an extent they would have objections to because they find it an uncomfortable process but, ultimately, they have an idea of what they want and they have an idea of when they want it and so long as those two are met I do not suppose they would actually object to the actual process itself.

Q100 Mr Soley: What do they find uncomfortable about it, apart from the fact they are talking about deeply personal issues?

Christopher Goulden: Well, the court process of giving evidence is an extremely uncomfortable one and they feel disempowered by the idea of decisions which reflect very closely their most deeply-held personal feelings being dealt with in a relatively public way and dealt with by strangers.

Q101 Mr Soley: So it is the discomfort of talking about relationship issues?

Christopher Goulden: Yes, in a formal setting.

Q102 Mr Soley: What about the issue of bias, have you come across a feeling of bias about mothers or fathers as parents?

Christina Blacklaws: No, I do not think that there is any bias that can be evidenced in the court process or in the family justice system itself. A lot is talked about it, I know, and I am aware of that, however, in my experience and I think probably the anecdotal experience of everybody on this bench, I have always found the courts to be gender blind in the way that they deal with the cases that are before them. However obviously 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.

Q103 Mr Soley: Could that bias go back to the position of separation where for other reasons in a sense a man might often be the one who leaves the home and then the mother is with the children and that possession puts them in a stronger position at the beginning. Is that right or not?

Christina Blacklaws: It may well be the case but I think what we are doing with family law always is that we are dealing with the situations that face us. If the father has left the home and 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.

Q104 Mr Soley: It there not a difference though in the sense, if you take the gender issue out of it, it is about the non-resident parent, is it not, so the parent who leaves the home in the sense of leaving the other parent with the children, does that parent who has got the children not start off a court
Christina Blacklaws: Do you think that happens or not? Would it be your assumption that the Government process with an advantage in the sense there is a Q107 Mr Soley: the court, whether it is for residence or for contact that only about 10% of cases actually come to court Q105 Mr Soley: Are you saying that it is the time factor then that might distort the situation in that the non-resident parent slowly loses out? Is that what you are saying? Christina Blacklaws: Yes, I think in terms of residence that is the case. If a status quo has been established with one set-up of the family then it is unlikely that the court will change that, unless there is very good reason. With regard to parents seeing their children, then obviously the longer that they go without seeing their children the more difficult it is to re-establish their contact.

Q106 Mr Soley: Is not the assumption in society that the male role is actually to withdraw in that situation and leave the mother with the children? Is that not a general assumption? Leave aside whether it is right or wrong, does the court not reflect that to some extent and that is where the feeling of bias comes from? Christina Blacklaws: I think it is a bit of a chicken and egg. That is what often happens in our experience. Often as the family that is left behind, for whatever reason, and sometimes on the part of the father very good reasons—to ensure that the children have stability, that they can continue to attend their school, that their housing needs are put first—yes, that is often the situation. Then we as lawyers and the courts themselves have to deal with the reality that we are given. So of course that is often reflected in the courts’ decision-making.

Q108 Mr Dawson: I think we have started to veer slightly into public law there but in terms of private law entirely, are you happy that the courts actually do recognise evidence of domestic violence and respond to it appropriately? Christopher Goulden: That is certainly much improved. Going back some years it could be said that courts did not recognise them sufficiently but there is a much more heightened understanding of the implications of domestic abuse and so I think generally the answer to your question would be yes.

Q109 Mr Dawson: Despite the wide prevalence of domestic violence, courts still are very, very reluctant to refuse contact orders, are they not? Does that imply that they are very good at making arrangements for safe contact for children? Christina Blacklaws: Is the Committee aware of the new forms that have been developed? Yes. I think that there are real problems in domestic violence issues being brought to the fore at a very early stage. It is very important that this is recognised right at the outset. It is an allegation and it may not be true, it may be that (archetypally) the mother is trying to prevent contact for no other reason than her own, but the allegation itself needs to be taken very seriously, needs to be investigated early on and a judicial decision made as to whether those facts are made out and then the court can go on to determine what is in the best interests of the child.
on that basis. It is very important that that is identified and dealt with at the earliest stage in the case as possible.

Q110 Mr Dawson: These are new procedures which come in early next year and they respond to Section 120 of the Adoption and Children Act, I believe? Christina Blacklaws: That is right so at the very outset of the case the court will be aware if there are any allegations of any sort of abuse of the children and any possibility of the children being adopted, so these two issues are very clear at the beginning.

Q111 Mr Dawson: You are confident about that? Domestic violence, I hardly need to stress, the point is something that is hidden and that has taken decades, or centuries even to achieve the prominence that it has. Surely there are many occasions on which women are reluctant even now to give evidence of the abuse that they have suffered?
Christina Blacklaws: Yes, absolutely. I think that there has been great progress, certainly in the courts’ approach to this issue of domestic violence, and a greater awareness and understanding of its prevalence, and the court and the lawyers need to be vigilant to ensure that the issue of domestic violence is not something that is just addressed at the beginning of the case because actually, as you have said, a lot of victims of domestic violence take some time to be able to tell their story and that is something that needs to be checked all the way through.

Q112 Mr Dawson: So when you said, as you said earlier when you talked about women wilfully refusing contact (and certainly the Family Law Bar Association talk about a small group of women who are obdurately refusing contact) is it not likely that domestic violence underpins a great deal of those women’s position to contact?
Christina Blacklaws: It may well be the case. Having had these cases myself sometimes it is very difficult to get to the bottom of why contact is being so very forcibly rejected but, yes, it certainly has to be in every lawyer’s mind, “Is this because of a threat of harm either to (archetypally) the mother or the children themselves?” and that needs to be carefully and with a lot of sensitivity explored with the client.

Q113 Chairman: Can I just clarify whether it is your view that a past experience of violence between the parents is in all circumstances a bar to contact with the children?
Christina Blacklaws: No, not at all, sir. It is something that needs to be carefully looked at and then what I would say is that contact needs to be safe. As long as safe contact can take place and as long as it is always in the children’s best interests then, of course, it is no bar.

Q114 Mr Dawson: Experience of domestic violence is now acknowledged as a factor of significant harm, is it not, under the same procedures we are talking about?
Christina Blacklaws: Yes.

Q115 Mr Dawson: Can I just ask how well you feel the voices of children are heard in private law proceedings?
Philip Moor: I think they are heard pretty well. In fact, in the Principal Registry in London, when an application is made and a child is over the age of nine, the child comes along to the first conciliation appointment and the CAFCASS officer will see the child, usually privately without the parents, then if it is still impossible on that occasion to reach a sensible compromise in the interests of the child then the CAFCASS report will be directed, and my experience certainly is that the voice of the child is heard during that process. Of course it can be very difficult for the child because the one thing the child wants is for the parents to stay together in general. They want the situation to carry on as though there was nothing wrong. It is very difficult for children to choose between parents and we have to recognise that.
Kim Beatson: Philip has described the arrangement in the Principal Registry which involves children over nine attending conciliation appointments. It is the view of the Solicitors Family Law Association that children should not be obliged to attend conciliation appointments on court premises and that there is a better way of hearing children without the shadow of the law children who are effectively being taken out of school with one parent, knowing that they may have to speak against the other parent, and we find that not the best way of hearing children.

Q116 Mr Dawson: Indeed. The President of the Family Division certainly spoke strongly about the system of tandem representation à la the situation in public law. Is that something that you would like to see operated more in the private law field?
Christina Blacklaws: It is certainly not necessary in every case but in those cases which are the ones that hit the headlines that concern the judiciary and the lawyers the most, the intractable cases that go on and on and on, and children’s voices are not heard and their best interests are not seen to, in those circumstances, I think it would be most welcome if they had that sort of protection to ensure that their rights were protected as well.

Christopher Goulden: If I could say the experience of Lord Justice Wall when he gave evidence to you, the fact that you can so quickly crack an intractable case, is certainly my experience of 9.5 appointments. As Christina has said, the last thing you want is children being represented in every case or indeed in a lot of cases, but for those few it can be a magic wand.

Q117 Chairman: In your written evidence you suggested that there should be a statutory presumption that the children should have contact with both parents following separation. How would that relate to the existing presumption that the court must act in the best interests of the children?

Christopher Goulden: I have to deviate slightly from the SFLA line on that. 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.

Q118 Chairman: When Dame Elizabeth was before us she said that she could see a case for something slightly less than the legal presumption such as “that the courts should have regard to the importance of a relationship between the children and a non-residential parent.”

Christopher Goulden: I think that is well put and that is more or less what we were saying.

Q119 Chairman: That is generally supported across the table, is it?

Christina Blacklaws: Yes, it could go into the welfare check-list which is what guides the court in its decision-making process on all of the issues that it needs to take into consideration when making any decision about children.

Q120 Chairman: Do you think that should be embodied in Section 1 of the Children Act?

Christina Blacklaws: I do not think that any of us could see that that would do any harm at all and if it supports families and children then yes.

Q121 Mr Cranston: Mr Soley raised the issue about reducing the role of the courts. Could I ask you about reducing the role of lawyers and in particular the impact of legal aid. Casual observation—and there is some academic writing about this—makes the contrast between our system and the system, say, in some parts of North America or Australasia where lawyers seem to have a lesser role, where there is more do-it-yourself activity and that has happened for quite a long time; could you give a general view of that before we move on to legal aid?

Kim Beatson: From the point of view of the solicitors organisation we do not feel possessive at all about these cases. We are talking now about contact cases, are we not? In our own proposals we suggest there is an intervention appointment as soon as an application is made to court. The intervention appointment would not involve us, it would involve a CAFCASS officer acting in an assertive capacity. I do not think that most of us have any enjoyment out of difficult contact cases and I think that is something you really have to understand. We are as frustrated about the difficulties in enforcing orders as the applicants tend to be.

Q122 Mr Cranston: What about on the public law side?

Christopher Goulden: I can speak as a practitioner 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. do not think that most of us have any enjoyment out of difficult contact cases and I think that is something you really have to understand. We are as frustrated about the difficulties in enforcing orders as the applicants tend to be.

Q123 Mr Cranston: —I have got no presumptions, I am just asking questions.

Christopher Goulden: —Because there seems to be a myth going round that these cases are unnecessarily prolonged by practitioners using public funding. I do not think in my experience over some 20 years that that is something which I recognise. They are not well remunerated. 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.

Christina Blacklaws: I can add to that to say that given that so many family lawyers are stopping undertaking publicly-funded work, those of us who continue to do so are flooded with cases, more cases than we can possibly handle, and in those circumstances again it does not make any sense that we would be “milking” those cases of publicly-financed work. It is quite important for the lawyers—we run our own private businesses—that we get those cases dealt with as expeditiously as possible because, as Chris has said, it can take nine months from the end of the case until we are actually paid.

Christina Blacklaws: I do not think that any of us could see that that would do any harm at all and if it supports families and children then yes.
this more general issue that we have more lawyers involved in family law work than other comparable jurisdictions and, query, should we?

_Christina Blacklaws:_ I think we cannot ignore the fact that 81% of people who have a family law problem go to see a solicitor so we are often the first point of call for people who have just experienced family breakdown.

**Q125 Mr Cranston:** But that is the culture. Should we have a different culture?

_Christina Blacklaws:_ I would say that one of the benefits about that (and this is something that is very much part of the FAInS programme which might have been mentioned to you) is that the solicitor is the point of call for the client, the service user, to be able to access all the other services that they may need, so effectively the middle of the wheel with you as a solicitor being able to signpost your clients to—and obviously there are often a number of problems associated with family breakdown—debt counselling, welfare benefits, housing issues, all of these social welfare issues, to ensure that all of that person’s problems are dealt with by the right people in the right way so as a sort of manager of the process. That is a model that actually works very well. It is not “lawyering up” the process in any way but it is ensuring that somebody holds that so that that person is assisted to access all the things that they need to solve their problems.

**Q126 Mr Cranston:** I am not sure that Richard Moorhead’s evidence actually demonstrates that lawyers do that the best. I think his evidence shows that CABs might do that the best. I do not know. Mr Moor seems anxious to say something about this general issue.

_Philip Moor:_ There are a large number of areas that you have problems with when your relationship breaks down and it is not just contact. You have to sort out your housing arrangements and that may give rise to applications for ouster injunctions. There may be molestation issues or domestic violence issue that we have already heard about. There may well be maintenance problems. This is often the only time that these people will come into contact with our courts in this country and, in my view, it is a harrowing process to go through a relationship breakdown and you need expert help to get you through that process and make sure that you come to sensible solutions which are in the interests of your children and the family as a whole.

**Q127 Mr Cranston:** Could I ask about delay. What, in your experience, is the major cause? I think you have refuted the notion that it is legal aid or the fact that these are publicly funded. In some of the evidence CAFCASS was mentioned as a possibility. There is also the operation of the courts. What is the major problem?

_Christopher Goulden:_ I do not know which of us said that but I do not think either of us meant to give the impression that delay was not caused by legal aid. I do not know if I heard you wrongly there. We did not refute it. We said there was considerable delay caused by the process of getting legal aid.

**Q128 Mr Cranston:** In getting legal aid, yes, sorry. The more general allegation is that the fact there is public funding through legal aid prolongs these cases, which in a way was the sort of proposition I was putting to you. Incidentally, with no preconceptions at all: I was just trying to get to the bottom of this since I do not practise in the area. What is the major cause?

_Christina Blacklaws:_ 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 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. As Kim has said, 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.

**Q129 Mr Cranston:** Assuming it cannot be mediated, where is the major problem or is it a series of problems in terms of the delay?

_Christina Blacklaws:_ I think there are maybe two or three reasons. One of the major issues is about court management and that is something that the judiciary has started to very successfully address. One real problem there again is resources. This is my major point about delay—that we do not have enough judiciary. I phoned the Principal Registry yesterday to find out when the first one-day hearing was—and this is for any type of family matter, childcare, financial or private law children matter and the first day available is 20 July 2005. We can manage ourselves in our court process, we can have protocols, we can do all of that but if we cannot get before a judge for seven or eight months, well, then, that is going to do untold harm to the family, and the same applies with regard to the availability of CAFCASS or other experts that we use in difficult family cases, for example child and adolescent psychiatrists. It can take six months for us to be able to identify a good one and get them to prepare a report, so those sorts of delays—and I know I stray on to the public law arena but it is just as bad in private law as well as the public law—are the real things that we cannot actually do anything about. It would be up to Government to put more resources in there.

**Q130 Chairman:** Your tone suggests that lawyers are always trying to avoid delay but if a mother does not want contact to take place, given what you said earlier that it is generally to the disadvantage...
of the non-resident parent trying to get contact if delay takes place, are you confident that lawyers advise their clients not to pursue avenues which produce the very delay that might actually reduce the likelihood that the contact will be granted in the end?

**Philip Moor:** The court does not or should not allow us to do that. The problem is if you cannot get a hearing date for another six months, it happens by default. In the last 30 years the number of Family Division High Court judges has gone up by two from 17 to 19 whereas in the same period the number of Queen's Bench judges has gone up by 28 from 45 to 73. It is absolutely awful to have to tell your client that the first hearing date is next October but it happens all the time.

Q131 Chairman: You have not answered my question which is are you confident that lawyers acting for the resident parent, usually the mother, in circumstances where the mother is resisting contact will advise their clients against prolonging or delaying proceedings?

**Philip Moor:** Yes, I am quite confident that the membership of the Family Law Bar Association spends the vast majority of their time trying to be sensible and trying to get people to come to agreements and to avoid conflict unless it is absolutely necessary.

**Christopher Goulden:** To add to what Philip said, the sort of thing you are suggesting I suppose is an unnecessary request for an expert report or something like that. There are two advocates, as it were, in the field and you have to prove your case before a judge if you want an expert. If the judge says ultimately, “I need an expert in this case,” then, yes, there will be delay. It is difficult to see how that could be improper.

Q132 Mr Cranston: What about joint expert reports? Do we have too many experts' reports?

**Christopher Goulden:** There is very strong encouragement that there should be a jointly appointed expert.

Q133 Mr Cranston: One of the theories in other areas of the civil law where you have got problems of this nature where there is a shortage of justice is that you push the cases down into lower courts. What possibility is there of that? We heard from one magistrate and I think he is the only full-time magistrate who does family work. Is that a possibility?

**Philip Moor:** It is an extremely good idea but when I started practising, district judges just did the ancillary relief work, the financial work. They now do all the injunctions, they do the contact cases, they do the residence cases, and they are just as busy in fact as the High Court judges are.

Q134 Mr Cranston: But if we want more judicial power, as it were, is that the way to go, rather than increasing the number of High Court family judges beyond 19?

**Philip Moor:** We support a position in which the district judge acts as the gatekeeper and decides which is the appropriate tier of court to determine each particular case. Clearly delay will be one of the factors in that, trying to get the case on quickly, but there are certain cases that have to be heard by a High Court judge and certain which are quite able to be dealt with in the Family Proceedings Court.

**Christina Blacklaws:** One thing that would really assist, and it is part of our evidence from the Law Society, is a unified family court system. If you had a dedicated family court system you would have the expertise at all levels of the court, which would hopefully assist in terms of efficiency but also in terms of quality of decision-making and I think that is one of the worries Philip has talked about High Court to county court and county court to family proceedings court level, and there are some concerns that if lay magistrates were dealing with a case of great complexity and difficulty it might take them longer to deal with that case. They might come up with a very good decision but in terms of Court Service time then that might not be an effective way to deal with it.

Q135 Mr Cranston: That is Law Society policy, is it, that there be a unified family court? Maybe Ms Lloyd can say something so she at least gets on the record.

**Christina Blacklaws:** All family lawyers have been saying for a very, very long time that is what is needed.

Q136 Mr Cranston: Of course this is the Australian system.

**Christina Blacklaws:** Yes.

Mr Cranston: Thank you, Chairman.

Q137 Keith Vaz: What is your experience of the family proceedings court? Is judicial continuity a problem in the handling of cases?

**Christopher Goulden:** Inevitably. Typically a case will be heard by three magistrates and you have got to get three people together instead of just the one you would with the district judge or a district judge magistrates' court, like Mr Crichton you heard from.

**Christina Blacklaws:** The other problem is that district judges in the magistrates' courts tend to be criminal district judges. My point about the unified family system is there is no direct route for an experienced family lawyer to become a district judge in the family proceedings court. You have to become a district judge in the magistrates' court and then get a family ticket. Those people only tend to sit for approximately eight weeks a year in the family proceedings court.

Q138 Keith Vaz: Sure. One of the things that has changed, of course, is that this is one of the areas where legal aid has been in a sense—and I know you would not agree with this—protected because family cases are so important. Do you think the
type of practitioner going into family law work is
different than it was 10 or 15 years ago? Are there
more people coming in?

Christina Blacklaws: Can I say first of all I think
there is a dispute as to whether family legal aid is
protected. There is one legal aid budget and
obviously last year we had a £100 million
overspend in terms of the criminal budget. That
means that at the softer end—the family and the
civil budget—gets squeezed. I do not think there is
any protection per se for family legal aid.

Q139 Keith Vaz: Right. What about the type of
people going in. All of you have been practising in
family law for many, many years. Do you see a
difference? Do you see people going out in droves
and all becoming commercial litigation solicitors at
Linklaters?

Philip Moor: When the family graduated fees came
in lots of people were not being attracted to our
work and other people were trying not to do the
work and, yes, we did feel that there was a serious
problem.

Q140 Keith Vaz: Would a system of accreditation
help?

Hilary Lloyd: It has and it has not. The issue with
family law, unlike criminal law for example where
the vast majority is legal aid and therefore if you
are a criminal lawyer you tend to need to stay in
the system, is that in family law because there is
so much opportunity for private work a lot of very
experienced solicitors move out of the legal aid type
of work and into the more lucrative financial
dispute resolution area. The Family Law Protocol
that the Law Society developed with the support of
the SFLA the DCA, the LSC and generally
everyone working in the family field has, I think,
changed the nature of the person going into family
law in that they are now working very much
towards a less adversarial approach and developing
the right skills needed to deal with difficult family
cases. So the person is different but we are not
finding as many of them coming in and certainly
not as many staying in the legal aid arena when
there are other opportunities elsewhere.

Q141 Keith Vaz: Is this one of the areas where there
are more women practising than men? For
example, if you looked at the percentage of women
at the family law Bar, would that be a bigger
percentage than other areas of law?

Philip Moor: Yes I think it would, overall.

Q142 Keith Vaz: Is it a noticeable percentage?

Philip Moor: I think it is noticeable in the sense that
it is at all levels of the family Bar whereas I think
that the Bar as a whole is becoming more
representative of society as a whole and therefore
at the lower levels it is perhaps not so marked in
family law but overall, yes, if we have a conference
we would expect to get over 50% of women.

Q143 Keith Vaz: What about the solicitors?

Kim Beatson: It is certainly true for the SFLA. The
membership is something like two-thirds women
and I think probably that is representative
throughout practice.

Q144 Keith Vaz: Miss Blacklaws was quite
emphatic that she did not believe there is a bias
against fathers in the family court system. You
were quite emphatic about that, were you not—

Christina Blacklaws: Yes.

Keith Vaz: And you were offering us anecdotal
evidence to suggest the opposite that actually
everything is fine.

Christina Blacklaws: Not exactly the opposite, just
that the courts often reflect what is the status quo.
I have also mentioned that sometimes that status
quo develops not for good reasons but because
there is difficulty in getting before the courts to be
able to resolve these matters.

Keith Vaz: The Solicitors Family Law Association
sitting at your side have come up with this proposal
that there should be a presumption in favour of
contact—

Chairman: We have covered that, could you move
on to another question.

Q145 Keith Vaz: As part of that, enforcement
becomes a pretty important issue, does it not?

Christina Blacklaws: Absolutely.

Q146 Keith Vaz: As part of that presumption that
everything is fair in the system that we have, how
do you think the current system is working as far
as the defaulting parent is concerned?

Christina Blacklaws: I think that there is a high
degree of frustration amongst everyone who works
in the family justice system that there is not the
range of remedies on enforcement that is needed.
At the moment we have very blunt instruments. A
defaulting parent can be imprisoned, fined, or
residence can be transferred, or the courts can do
nothing about it at all, and that is a real concern.
If there were a greater range of remedies, as is
proposed in the Green Paper, then that certainly
would be very helpful and would enable the
judiciary to be much more creative in terms of
taking the family forward than, as I say, the very
blunt instruments that we have to punish
recalcitrant parents.

Q147 Keith Vaz: But do you think that it is more
likely to be a deterrent against defaulting fathers as
opposed to defaulting mothers? The courts are very
reluctant to send mothers to jail, for example, if
they default whereas as far as fathers are concerned
it is probably easier.

Christina Blacklaws: As I said, I think it is probably
rarely in the children’s best interests for any parent
to be sent to jail.

Q148 Keith Vaz: Sure, I understand that.

Christina Blacklaws: So if we could have a range
of other measures including softer measures they
might be just as effective. I know one of the
proposals is if there has been loss financially that the other parent compensates the parent who has had the financial loss on default of contact.

Q149 Keith Vaz: Mr Goulden, does it have any effect on the intransigent parent? Does the power to send somebody to jail for not turning up on time have any effect?

Christopher Goulden: I do not think anyone would seriously be making an application to court to send a parent to jail for not turning up on time. The enforcement measures are not effective. I do not think anyone would argue with that. Yes, ultimately, being sent to prison may be effective, I do not know, it only happens in very extraordinary cases.

Q150 Keith Vaz: Do you know how many parents were sent to prison last year?

Christopher Goulden: I would think no more than a handful, no more than that. Where I practise in Bristol I can think of one occasion since I have been there and that was the talk of the town, it is that unusual, but what would be much more effective would be to be able to say if it does not happen on a Saturday then the following week you are going to be back explaining. That is going to be effective.

Kim Beatson: It also envisages quite a different role for CAFCASS whereby instead of lengthy report writing CAFCASS is there as a facilitator. CAFCASS, not the father who has missed his contact visit, will be phoning up the mother on Monday and saying, “Why didn’t this happen? I will collect the child on Friday and I will make sure that he is taken to the father,” and just playing a more active role in making sure that contact works and that it is not the father who is having to complain and take the case back to court and suffer more delays in enforcement.

Q151 Keith Vaz: Both the FLPA and the Law Society raise the issue of funding for the new range of enforcement powers. Do you think sufficient consideration has been given towards these ideas by the Government?

Christina Blacklaws: The Law Society is very clear that any new proposals, particularly any legislation, need to be properly costed out in terms of their impact upon each and every budget. It is a real worry that although everyone here and everyone we represent fully support the proposals, for CAFCASS as well and that will be one way of...
ensuring that this communication, which is absolutely essential, continues outside of the court process as well. We are constantly sharing committees and negotiating and discussing and developing ideas with many of the other groups and individuals involved in the family justice system. It is a very important part of the work that the Law Society and SFLA undertake.

Q158 Mr Dawson: Would it not help to deal with delay and enforcement and actually improve the whole mediation between parents and produce more satisfactory outcomes if there was a compulsory referral to mediation in the first place? Is not Mr Moor’s idea that because the legal profession can deal with a number of different issues which might arise at the time of divorce or separation quite wrongheaded because issues of family contact, residence and all the rest of it are quite distinct and quite different from some of the other issues that you might be faced with?

Philip Moor: We have absolutely no problem with a mediation system. To make it compulsory I think you would have to change the law but effectively at the moment the one that operates in the Principal Registry happens in every case, and 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.

Q159 Chairman: The present project does not in your view test all of the innovations which the original proposal had in it?

Philip Moor: That is right. 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.

Q160 Mr Dawson: But have we not talked previously about the tremendous difficulties that judges must face in deciding where there are real issues of safety in particular cases and does not a presumption of parenting plans and a template work against the idea that we should try and tailor solutions very carefully to particular individual circumstances?

Philip Moor: If there are serious issues such as domestic violence, which you mentioned, then it would not go into the scheme in the first place and it would have to go for determination as to whether the violence is proved or not. So we are talking here about the cases where there are not those serious issues. I would certainly take the view that the vast majority of cases do not raise those sorts of serious issues.

Q161 Mr Dawson: But children are murdered on contact visits in this country and clearly those are appalling circumstances.

Philip Moor: Of course.

Q162 Mr Dawson: Clearly we are not 100% good at identifying circumstances in which there are very, very serious risks of abuse and injury and death. So does not a presumption work against the best interests of the children? Would it not be better to look in close detail at the circumstances of particular cases rather than simply trying to apply a template to those very difficult and very individual circumstances?

Christopher Goudlen: I think the Family Law Protocol asks practitioners at an early stage to carry out a domestic abuse audit. We are encouraged right at the very outset, even if the client does not say “I am being threatened”, to ask a client whether there are any of these issues, and yes that must be looked at.

Q163 Chairman: Incidentally, that sometimes causes offence to some clients, does it not?

Christina Blacklaws: We are trained to ask them in a fairly oblique manner so that we are not either putting words into people’s mouths or indeed offending them by the very suggestion that there may be those issues, so it is quite a subtle interview but equally a very, very important one. Can I just add on mediation, Kim and I are both experienced mediators and it is an excellent way for many people to resolve their matters but it is not for everybody and it would be very difficult to see how it would be right to force people into what is a voluntary process. It would not be mediation, it would be something else then. One of the reasons why it is not right thing for a lot of couples is because of the power imbalance and that can be for a number of reasons. It can be economic but it can also be about abusive behaviour and relationships, so those sorts of cases would never be appropriate for mediation and it is a worry that parents who are in the lower courts are sometimes left to their own devises to come up with a solution that the court then rubber stamps as an agreement and that solution is (a) not in the children’s best interest and (b) and, equally worrying, not safe for that child or for that child’s carer, so yes it is something that needs to be properly managed.

Q164 Mr Dawson: Can I just ask about your experience because you are obviously both skilled and experienced mediators; how does that accord with your legal expertise? Does your legal background and experience contribute to that mediation or is it completely unnecessary? What is your experience?

Kim Beatson: The Solicitors Family Law Association trains lawyer mediators and we find it particularly helpful when dealing with financial
mediation to have the expertise to be able to give legal information to the couple, and indeed they expect it, so it is particularly helpful in that forum. What I think we have to do, though, is be quite careful about the use of the word “mediation”. It is a voluntary process. We prefer to use the expression “family intervention appointment” because I think that is essentially what the SFLA is looking for in its proposals, not compulsory mediation.

**Mr Dawson:** You talk about financial mediation. Clearly people will be mediating about close and intimate aspects of the couple’s relationship, the way that they deal with the children the way that they make arrangements for the children. That is a social work task, is it not?

**Q165 Mr Cranston:** Many commercial lawyers are now mediators, Hilton. It is widely used in the law.

**Christina Blacklaws:** Yes, there are social work aspects to it, but as experienced family lawyers hopefully we have also developed some of those skills that we could bring to it. I would say that it is rare that you have a mediation case that is solely about whether the children should be picked up at five o’clock or six o’clock and that sort of thing. In family breakdown, as I said before, there is often a range of issues that this family faces and even if it is just about maintenance for the child it is very helpful to have the legal knowledge and experience in the room to be able to assist the couple.

**Q166 Mr Dawson:** The CSA.

**Kim Beatson:** We are not suggesting that only lawyers can mediate. You asked about the skills that lawyer mediators can bring to the process.

**Christina Blacklaws:** It is about financial matters as well. I just wanted to make the point that it does take a very long time for financial matters to get before the court. If I make an application today I will not get an appointment for four months and that can be just as disruptive and corrosive to a family breakdown situation and really impacts, even though it should not, on contact and relationships between the adults, so that is a real problem as well.

**Q167 Mr Dawson:** Is it necessary to have lawyers mediating?

**Kim Beatson:** No, it is not. At the moment there are mediators from all backgrounds. It is a different skill but obviously members of the public may choose a lawyer mediator knowing that that is their background because there may be reasonably complex pension issues, for example, that are better dealt with by a lawyer mediator.

**Q168 Mr Soley:** I was going to ask you, Ms Beatson, if you can tell us in your view what are the advantages and disadvantages of the collaborative law system and whether we ought to be promoting that a bit more than we are at present?

**Kim Beatson:** Do you all understand what the system involves? It essentially involves the couple choosing two lawyers both of whom have training in collaborative law. Then the four sign a contract in which they agree to rule out any legal proceedings and most of the case is dealt with by four-way meetings. It is quite hard to explain how it works but probably the best thing I can mention is the fact that neither of the lawyers must polarise the client, so if you are giving advice about the range of outcomes the lawyers would actually discuss what the range of outcomes would be and then that would be presented to the client. There is no “without prejudice”. There is no, “Ask for A, but expect to arrive at B”. It is a very open process. It is equally applicable to barristers, and we are training barristers as well. It is not the cheapest process because four-way meetings are quite expensive in terms of time. There is less correspondence, and most of it is done face-to-face. If it all crumbles and you cannot reach a solution then those lawyers have to drop out of the process and the couple then instruct other lawyers in a traditional capacity. There is some interest in it at the moment from the LSC. They are trying to choose two areas in England to pilot. It is very difficult at the moment to find enough collaborative lawyers willing to do publicly funded work; but we are training more people in March. I think it is probably going to be a fairly slow roll-out. You have to have an optimum number of trained collaborative lawyers for you to be able to refer work when it comes in.

**Q169 Mr Soley:** I asked you for the advantages and disadvantages and you have given me two of the disadvantages—the expense and the fact if it goes pear-shaped you have to start all over again—but what are the advantages?

**Kim Beatson:** The advantage is probably the expense compared to litigation.

**Q170 Mr Soley:** This is cheaper?

**Kim Beatson:** Yes, it is infinitely cheaper than litigating.

**Q171 Chairman:** With the likelihood of an accepted outcome?

**Kim Beatson:** I think that is the main advantage of all, that the couple own the outcome. It is a wholly different process to mediation. Everyone is committed to working for a family-orientated solution.

**Q172 Mr Soley:** Without putting words in your mouth, I am trying get out what you think is the main advantage. Are you saying that it actually is a better opportunity of reaching an agreement which satisfies all the parties, including the children?

**Kim Beatson:** Yes, that is absolutely right. Comparing it to mediation, it is much more appropriate for a couple who can mediate but are adamantly opposed to litigating. Unlike mediation, where you have perhaps one lawyer/mediator acting as a facilitator,
in collaborative law both parties have the support of their own lawyer but acting in quite a different capacity looking for a family solution.

Q173 Mr Soley: How long does it take to train a lawyer?
Kim Beatson: Two days.

Q174 Dr Whitehead: Could we move back to the notion of media coverage. Mr Moor, you mentioned a little earlier you felt that greater openness and general reporting of the proceedings in Family Courts was something you think you would important?
Philip Moor: Yes.

Q175 Dr Whitehead: Do you think that that openness should simply be full reports of the proceedings or edited reports of the proceedings or, where possible, judgments publicly handed down? Where would you see the line being drawn?
Philip Moor: I would see the line being drawn at edited versions, because I do not think in the vast majority of cases it is at all helpful to identify the children. I can see absolutely no problem whatsoever in publishing the reasons why judges come to a particular view: for example, the reasons why someone was given permission to take the children out of the country to go and live in Australia. Because there is a great deal of ignorance as to the way in which the family courts work I think it would be of assistance.

Q176 Dr Whitehead: You think that would be the main advantage, an educative advantage as it were, and the myths and misapprehensions might be dispelled?
Philip Moor: That would certainly be one important role of it, yes.

Q177 Dr Whitehead: Who would then do the editing?
Philip Moor: The judge would normally do that in coordination with the lawyers.

Q178 Dr Whitehead: How would that then, as it were, add to the idea that the way the process works would thereby be scrutinised, if the purpose would be explicitly simply to say to people, “Well, actually some of the things you are saying about us, the anecdotes you are putting forward, are not right”?
Do you think there is a further issue here in terms of ensuring that the process is seen to be done? Indeed, as one of our previous witnesses, Mr Justice Munby, has described the court should no longer be perceived as being a secret justice system?
Philip Moor: As I understand it, there are also proposals to enable people to have greater access, for example, to their Members of Parliament if they have a problem in relation to the family justice system. As I understand it at the moment the restrictions make it very difficult for them. I would certainly support those sorts of changes as well. I think this specific one is just so people can see the reasons why decisions are taken in the way that they are.

Q179 Chairman: Is there not a wider point within individual cases that many of the fathers’ organisations regard the system as a whole as very secretive, and the only knowledge they have of it is based on the experience of others who share their personal experience of a case going against them? So we have no general picture available to people of the range of reasons why particular decisions are taken—reasons which do not have to be attached to a named individual but which in any other area of court activity are readily available. If you run through a string of cases, press reports can compare how various judgments have been made; they do not always do it accurately or well, but there are a number of ways in which you get a general picture of why decisions are taken. Instead, in this area, for a number of witnesses and potential witnesses the whole thing is secret and their perception is entirely based on similar experiences to their own.
Philip Moor: Yes, I would agree with that.

Q180 Chairman: What do you envisage being the outcome of the edited version you refer to? In all cases, a section of cases, or what?
Philip Moor: There were two cases earlier this year, were there not? In one, Mrs Justice Bracewell giving judgment in open court explained the reasons why she had moved some children from the mother, who was implacably opposed to contact, to the father. There is one good example. There was also the decision of Mr Justice Munion, who explained how the system had let down one particular father in his quest for contact. It is that sort of situation.

Q181 Ross Cranston: How did we get to the position where the family courts are confidential and secret? Is that because it was in chambers historically? Coming from the outside, at first blush I find the notion that you can do all this behind closed doors rather objectionable?
Philip Moor: Of course originally all the defended divorces used to be in public.

Q182 Ross Cranston: Of course. Why have we got to this situation?
Philip Moor: I think it is just a perception, is it not, with disputes about money and children it is in the interests of the people concerned to keep that private in the interests of them giving a full and frank account to the court. I do not know about the experience of the others, but the vast majority of my clients are extremely keen that it should be in private. They do not want the newspapers—

Q183 Ross Cranston: That is the case with most litigants, is it not?
Christopher Goulden: From the child’s point of view it must be right that evidence regarding that child should not become public in such a way that the child can be identified. I do not think anybody would have any problem with that.

Mr Dawson: That is an excellent point, but there is another point which is, even where the child is not identified, the child knows who they are; and sometimes cases which become public law cases are reported as criminal cases. That child knows who they are. Given the irresponsibility of the media in this country, they are sometimes reported in the most grotesque and appalling terms, and that simply compounds the abuse that child has experienced.

Christina Blacklaws: Yes. I can probably speak for us all. We are all very much in favour of it. We have concerns about how it is going to be funded.

Q185 Mr Soley: The Green Paper or the general policy of the Government which has been brought out?


Q186 Chairman: That is obviously a general view?

Philip Moor: That is the view of us.

Christopher Goulden: It is essential that as much attention is given actually to funding initiatives as coming up with them. They must have that potential as well.

Christina Blacklaws: They need to be analysed. We need to make sure these initiatives actually work before we roll them out. What we have is a situation where we do not have much hard evidence about what works and what does not work, and we need to build up that body of evidence through these pilot projects.

Kim Beatson: It is also essential in the lead-up to a general election that this does not become a political football.

Chairman: That is a very wise note on which to end.

Thank you very much.
Tuesday 14 December 2004

Members present:

Mr A J Beith, in the Chair

Peter Bottomley  
Mr James Clappison  
Ross Cranston  
Mrs Ann Cryer  
Mr James Clappison  
Mr Clive Soley  
Mr Hilton Dawson  
Keith Vaz  
Dr Alan Whitehead

Witnesses: Hilary Saunders, Policy Officer, Women’s Aid; Ruth Aitken, Policy Adviser, Refuge; and Phillip Noyes, Director, and Barbara Esam, Lawyer, Public Policy Division, NSPCC; examined.

Chairman: This morning I am very glad to welcome Hilary Saunders from Women’s Aid, Ruth Aitken from Refuge, who has come in at short notice, for violence is not considered to be a very serious problem in thousands of cases.

Ross Cranston: I am a barrister and recorder.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial post.

Mr Dawson: I am a parent and I think that is fairly common round here.

Q187 Mr Soley: In your view, do you think the family courts take sufficient account of violence, and I am using the word “violence” in the widest sense, as it covers various types of abuse, as you know, when they are hearing contact and residence applications?

Hilary Saunders: I think the answer has to be no because we are frequently seeing cases where contact orders are granted where really it is unsafe to do so. We have seen cases where contact orders have been granted even when there is evidence of domestic violence, even when there are convictions for violence and sometimes even to Schedule 1 offenders. What is absolutely extraordinary is that increasingly we are being told of cases where unsupervised contact is being granted to Schedule 1 offenders. That was one of the findings of our “Failure to Protect” report last year. 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, well, almost 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.

Q188 Mr Soley: Really your evidence is to say that they do not take sufficient account of violence, your evidence is that there are enough people coming forward where either there are convictions or other evidence of domestic violence who are still getting access. Does not that imply that any evidence at all would mean no access?

Hilary Saunders: That is not what Women’s Aid is asking for. We are frequently misrepresented on this. We are not saying there should be no contact in cases of domestic violence because we know that a lot of children actually want to remain in contact with violent parents. What we are asking for is that contact should be safe and I think that is not an unreasonable request.

Q189 Mr Soley: We know of the evidence of the violence of men against women but what about the cases of women against men?

Hilary Saunders: As far as we are concerned, the same principle should apply to each. We do not condone violence by women, not for one minute.

Q190 Mr Soley: Do you think it is a significant problem, or not?

Hilary Saunders: I think all the statistics show that domestic violence is a very gendered issue and in the vast majority of cases it is men committing violence against women, but that does not excuse women on occasion committing violence against men. The problem does exist.

Q191 Mr Soley: You do not see the other side of the problem, do you, of women against men?

Hilary Saunders: Only insofar as women sometimes are violent in self-defence.

Q192 Mr Soley: That is different. Can I ask the other two what they think about the gender issue?

Phillip Noyes: From our own research and that of others, we believe that domestic violence, by and large, is perpetrated by men against women. We share the concern of Women’s Aid that the safety of children must be paramount and the research that we have conducted, which also is being widely misrepresented on various websites now, makes very
clear the very strong association between domestic violence and the maltreatment of children, to an extent that the authors of the research, who are not playing to the public gallery, identify that in cases where there is domestic violence it should be regarded as a predictor of abuse, even though there may not be evidence of risk to the child. That feels to us to be a very high coinage recommendation in a very thorough and sober report.

Q193 Chairman: Does not that make it necessary to ask of you what Mr. Soley asked Ms. Saunders, whether the presence of domestic violence in cases is an absolute barrier against contact with the children?

Barbara Esam: Definitely not. It would not be an absolute barrier at all. What we think is important and in fact absolutely essential is that investigations are carried out to make sure that the child is safe. If the court can be assured that the child is safe and everyone else can be assured that the child is safe then contact can go ahead. Our big concern is that children do not have any opportunity in private proceedings to have their views represented. I think it is widely recognised that domestic violence does not always come to light. Even within court proceedings families do not always talk about it. Mothers might feel frightened and do not tell everybody about it. Children do not get an opportunity in general to say what their views are and that is in sharp contrast to what happens in public proceedings where children are represented. We think that is a real problem. In terms of representation, it is not just about domestic violence or violence against children or parents, children’s views should be represented in any case, they have a right to be heard and that right is being denied them in our present set-up.

Chairman: We will come back to that point a little later. Just for the moment we will stay in this area.

Q194 Ross Cranston: Can I ask you some practical questions about mechanisms, the existing mechanisms for uncovering domestic violence, and what you think of the Government’s proposals. First of all, there are going to be these new forms, and the Law Society, when they gave evidence, thought that was a good idea. Also there is going to be the piloting of an integrated domestic violence court. Could I get your reaction to the deficiencies in these proposals, as to whether they will address what in your view are the deficiencies?

Ruth Aitken: I think there are large problems with the way in which domestic violence is investigated across the board really, not just in private proceedings but in all aspects of the law. What we have been calling for at Refuge and Women’s Aid and other groups is an accurate definition of “domestic violence” to underpin any formal investigation, so whether that is in terms of establishing the veracity of claims or whether that is in terms of an assessment which is necessary to look at the impact that the violence may have had, once it is established that it has happened, also looking at the risk for future victims. I have not seen the gateway forms but I do understand that they are an opportunity—and if anybody has seen them they can correct me if I am wrong—for somebody just to flag up the fact that domestic violence has occurred within a relationship at the beginning of any kind of investigations or proceedings. In our view, firstly, it is not enough and, secondly, it could be dangerous. One of the reasons why I say that is because domestic violence victims sometimes do not even recognise themselves as domestic violence victims. You might think that is a strange thing to say, but in my experience of working with women within a refuge over a number of years I met people who had fled from their home, with their children, had come to stay in a refuge and they would say, “Well, actually, I’m not one of those abused women, I’m just here for a bit of a break. He needs to calm down. We’re just having a few problems.” They would not have been able to see the systematic pattern and nature of abuse of power and control that was occurring within that relationship, because one of the by-products of abuse is that it is minimised and denied by the perpetrator.

Q195 Ross Cranston: As a practical matter, we are concerned about the machinery of Government and how the courts ought to operate, how are you going to address this issue? I think Barbara Esam was hinting that there should be separate representation, but is that going to be in all cases? How do we actually address the issue; that is what I am asking you to consider?

Ruth Aitken: We need to have more detailed assessment. We need to have interviews with parents and children and we need to gather information from other sources: what does the school know, what do hospitals know, are there any police reports, are there any other proceedings in other courts going on? We need to be looking at it in a broader sense.

Q196 Ross Cranston: Who is going to do that, as a practical matter?

Hilary Saunders: Initially, obviously, it would be the CAFCASS officer, if the court had requested a welfare report in response to a tick in the domestic violence box. Essentially, what we really want to see is a differential approach, instead of this one size fits all assumption that contact is almost always in the interests of the child. With our written evidence we submitted a table drawn up by Peter Jaffe, who is renowned for his research on domestic violence. What he points out is that the judgments that you make and the information that you have to collect and assess should be focused on safety, in cases where there are allegations of abuse, whereas in other cases what you are looking to do is reduce hostilities and do everything you can to promote contact. Essentially, that is the first thing we want to see, a recognition that when you have got allegations of abuse you have to address the issue of safety, and we are not satisfied that is being done properly at present. After that, obviously, having a proper definition of domestic violence is fundamental, so that people recognise that what we are normally dealing with is a wide range of abusive behaviour,
and instead of looking for just one incident and saying, “Oh, well, we can prove one incident of domestic violence,” then a lot of the courts will say, “Well, it was only one incident and he was terribly upset because they were separating.” They will not look, and because there has not been that holistic assessment they will miss it.

Q197 Ross Cranston: You are saying CAFCASS, to inquire, now what about an early hearing by the court, are you also saying that is the implication, so that they can make a fact finding about this? Is that a corollary?

Barbara Esam: I think that we would really welcome the approach of the court having an early investigation when domestic violence is flagged up, that the court has a look at that issue as early as possible and makes findings of fact. I think that has to be a good thing. That is a practical approach and that is a very positive way forward. We have not seen these forms either, but we think that it is certainly a move in the right direction.

Q199 Ross Cranston: Not necessarily emergency injunctions. If there is an injunction against a person on the basis of behaviour but without any admissions of past violence, the court would just issue the injunction. You want an inquiry in each case, do you?

Phillip Noyes: It will be better to look into each case and decide on its own merits. We are very much also in support of an approach that is not one size fits all. The limitation of a form is that you can put too much reliance on ticking boxes, and certainly we want to see a process in which children are talked to as early as possible, with two evidence-based things in mind. The first is that when you talk to them about what might have happened in the past you must recognise that they might not have told anybody that they had been abused in the past, because a lot of children do not. Secondly, evidence from our maltreatment study, the NSPCC maltreatment study that I have quoted already is that children tend to minimise what has happened to them and make the best of it. We think it is very important that every case is looked into and judged on its merits, and not in terms of dogma or general principles but one child at a time, even within families.

Q200 Chairman: There are a couple of dangers in the answers you have given. We have had two answers, one in relation to mothers and one in relation to children, in which the implication is almost of a criticism of mothers and children for not recording or admitting to more violence having taken place. That suggests leading witnesses, does it not?

Ruth Aitken: Can I just say, it is not a criticism, it is just an understanding of the way in which abuse affects victims.

Q201 Chairman: Once you make that assumption you are in danger of leading a witness, are you not?

Ruth Aitken: We are not making that assumption, we are just raising it as a possibility. Some people do not say that they have been abused, because of fear, because of shame, others do not identify themselves as being abused, and because denial, minimisation and distortion of reality are part of the abusive process that is the effect that it can have on victims. I think that the courts need to be aware of that.

Chairman: Have you ever come across instances where abuse is alleged by all the parties without foundation as a weapon in the on-going argument?

Q202 Ross Cranston: Have you come across malicious allegations of abuse?

Hilary Saunders: I am sure it will happen on occasions, but that is not what we see in refuges. With regard to false allegations, I think probably the best comment on all that is in Peter Jaile’s book, “Child Custody and Domestic Violence”. This is a man who has had 25 years working in the family court clinic in London, Ontario, and who is well respected for his work on domestic violence. He says here: “Women who raise concerns about a violent partner in family court proceedings are unlikely to be believed because lawyers and judges tend to overemphasise the possibility that false allegations are being used to further custody claims.”

Q203 Chairman: My question was whether any of you had come across examples, and Mr Cranston following, of malicious allegations?

Phillip Noyes: Yes, but also we have got examples of situations where the referrer has been malicious about the adult and in fact the allegations have been true. So a golden rule for the NSPCC staff taking the calls, including calls about domestic violence, is to separate out what sounds like malice between adults from what needs to be investigated in relation to the safety of the child.

Q204 Mrs Cryer: Ross Cranston was asking about injunctions, that a woman could make allegations and gain an injunction against her husband to exclude him entirely from the family. Am I right in assuming that husband normally would appear before that judge, perhaps a week later, and put his side of the case, therefore appealing against that injunction? I just want to clarify it in my own mind. That is still the case, is it not, that the excluded husband would have a right of appeal?

Hilary Saunders: Yes.

Q205 Mrs Cryer: An application for the injunction would be heard without his presence but then he would be invited to come into the court, say, a week or so later, to put his side of the argument?
Hilary Saunders: Certainly that is my understanding.

Mrs Cryer: I just wanted to make sure that was right.

Q206 Mr Clappison: Just going back to the point about finding out when women have been victims of violence, is it within your experience, when you say that sometimes you have had women who, perhaps through sheer embarrassment, have not said anything about violence, that later on you have uncovered cases where there has been actual, serious, physical violence?

Ruth Aitken: Yes, absolutely. Another common theme is that women may say, “He abused me but he was okay with the kids. I don’t think the kids have seen anything, we always tried to keep it quiet.” Before I was Policy Officer, my job was working as a psychologist directly with women and children in a refuge, in fact for a number of years, and I would be working in parallel with the woman and with the child so I would hear both sides, confidentially, of course. I have had a five year old say to me “My dad used to strangle my mummy. She used to say it was a joke but I know it wasn’t a joke, but I don’t tell her because she gets upset.” So there is silence and secrecy between the parties.

Q207 Mr Clappison: I understand that you are dealing with complex situations in which people sometimes do not want to admit things. On the question of the definition, which you did strive to highlight, would you accept that there is some danger if you pitch the definition too wide on this, in perhaps the vast majority of cases, given that there is always going to be disagreement, rancour, between the parties, reasons why people want to separate from each other? Do you accept that there could be a difficulty in having a definition which was too wide and it would include nearly every case?

Ruth Aitken: I do not think so, because our understanding of domestic violence, and the understanding that comes out of the New Zealand legislation definition, is that it is ongoing, systematic, purposeful, the purposeful abuse of power and control within a relationship. We need to find ways, I agree, of differentiating that from problems around relationship breakdown, problems around arguments, problems around conflict, but if we have a clear definition and people are trained I cannot really see that there is a problem with that.

Q208 Mr Clappison: The definition should spell out a clear difference between the two?

Ruth Aitken: Then couple it with training, rolling it out, implementing it, I think that would help.

Q209 Mrs Cryer: Can I put a question to the NSPCC. This Committee has received submissions which suggest that in cases which involve the neglect and physical or sexual abuse of children the children were more likely to be living with their natural mother alone. Have you any evidence to support this?

Q210 Mrs Cryer: This is to Women’s Aid. You have suggested that non-resident parents should be banned from applying for contact for several years in high risk cases. What do you consider to be high risk cases? In order for such an order to be made, should the non-resident parent have been convicted of an offence in a criminal court?

Hilary Saunders: No, because the level of criminal convictions is very, very low. The central problem with all of this is that we are talking about abuse that is committed usually within the home, behind closed doors, and so what the court is presented with is a he said, she said, situation. If you do not have that broad understanding of what constitutes domestic violence, you can get narrowed down to talking about just one event. It is extremely difficult to prove. One of the things that we would really like to see, and we argued for this in our recent report which was launched yesterday about 29 child homicides, these were children who were killed as a result of contact or residence arrangements in England and Wales over the last 10 years, 10 in the last two years, we talk about the need for front-line staff in statutory agencies to recognise significant risk indicators and for research to establish what significant risk indicators are with regard to children affected by domestic violence and involved in family proceedings. We are close to it in South Wales because the Cardiff Women’s Safety Unit has worked with the South Wales Police and also with the NSPCC to draw up significant risk indicators with regard to women, and if you applied them to the 29 child deaths that we looked at in that report you could see that there was a high correlation. What we want is for front-line staff to have good risk assessment tools and an awareness of where the risks are, because if you do not understand the dynamics of domestic violence you can make very dangerous assumptions.

Q211 Mrs Cryer: You would say that no-one would be banned from applying for contact for several years unless there was some strong body of evidence?
**Hilary Saunders:** Absolutely; yes.

**Q212 Mrs Cryer:** It is just that there are some very high profile pressure groups operating on this and this is not always made clear?

**Hilary Saunders:** I think when contact is refused in less than 1% of cases there has to be a good reason for those refusals.

**Q213 Mrs Cryer:** Again to Women’s Aid. You have complained that the standard of proof has been raised higher than the balance of probabilities in serious cases involving sexual abuse. In fact, the civil standard of proof which is applied by the courts always means more likely than not. If non-resident parents were to be denied contact for several years in high risk circumstances, how could their rights be safeguarded against malicious accusations? Also, if the consequences of an accusation of domestic violence are to escalate so that a non-resident parent were to be denied contact with the children until findings of fact were made, should the standard of proof also be raised?

**Hilary Saunders:** I appreciate the concern about a loving parent being denied contact with their children. I think that is very unlikely to happen. What I would be much more concerned about is what happens to children when the courts demand what they call a higher standard of proof, a higher balance of probabilities, because the worst cases that we see are cases involving child sexual abuse. When a woman says that a child has just disclosed child sexual abuse, we know that woman is going to have a terrible time in the family courts, because very often we are talking about children who are under the age of five and that child is too young to give evidence. So even if you have got a social worker and a police officer agreeing that, yes, they think this is sexual abuse, you have to prove that he did it, it is not enough just to prove that the child has been sexually abused, you have to be able to show that it was that particular person. It is incredibly difficult.

**Q214 Chairman:** You have to show that he was party, in some way, to the abuse?

**Hilary Saunders:** Yes.

**Q215 Chairman:** Not that he carried it out but that in some way he was party to it?

**Hilary Saunders:** Yes, and because that is so difficult we come across really bizarre situations. That was highlighted in the AMICA survey in 1999. This was a study of 130 abused parents talking about what had happened to their children in family court proceedings. They found that direct contact was slightly more likely to be granted in cases where there were allegations of physical or sexual abuse of a child than in cases where there were simply allegations of abuse to the mother. If you think about that, it is quite extraordinary, in fact it is utterly perverse, and we think that is a direct result of the Re H & R judgment. I know that Lord Hoffman has made a statement, quite an amusing statement, which aims to clarify the position, but we are still seeing cases where, frankly, very dangerous decisions are being made, particularly in cases involving child sexual abuse.

**Q216 Keith Vaz:** Do you think there is a bias against fathers in the family justice system?

**Hilary Saunders:** I do not think there is a bias against fathers. I do not think there is a bias against mothers. I think the one real problem that we have got is that there is such an overwhelming presumption of contact, that has made the family courts a profoundly hostile environment for abused women and children.

**Q217 Keith Vaz:** What about the NSPCC, do you think there is a bias?

**Phillip Noyes:** I agree. We have got no evidence that there is a bias. I guess it is underpinning what we are saying that we are concerned about bias against children and that the discourse around men versus women will somehow blind us even more to the fact that children, one at a time, need to be properly safeguarded when they get contact with their parents.

**Q218 Keith Vaz:** Let us look at the bias against children then and the issue of contact arrangements. Do you think that the views of the children are being taken into consideration adequately when these arrangements are being made?

**Barbara Esam:** I started to refer to that earlier, as you know, and certainly we do not think that these children’s circumstances are being adequately looked into and that is a failing of the system in private proceedings at present. There seems to be a sometimes dangerous presumption that if you consult both parents the welfare of the child is automatically then going to be safeguarded, and we think that is a real concern and is not giving children the right that they deserve to have their views properly taken into account. They need to receive information as well about what is happening, and of course all of that needs to be with the proviso that there has to be the recognition that children have to be of a certain age and understanding so that they are not overburdened with this.

**Q219 Keith Vaz:** Let us look at the age situation. Obviously, the younger children, their views will carry less weight than if the child is, say, 10 or 11. Do you think that there is a difference, in terms of priorities, in the views of the children, depending on the age of the child?

**Barbara Esam:** I do not think their views should carry less weight, necessarily, depending on their age. It is more difficult to get information from children the younger they are, but there should be sensitive procedures to provide age-appropriate means of getting information from children, giving them an opportunity to have their views listened to.

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1 AMICA stands for Aid for Mothers Involved in Contact Action. With the help of Dr Lorraine Radford this organisation carried out a survey with 130 abused parents and Women’s Aid Federation of England published the findings of this survey in a report titled Unreasonable Fears? in 1999.
Q220 Keith Vaz: Who should be doing this? Should it be CAFCASS, should it be the judge? Who should be involved in this process of listening to the views of the children and moving this whole issue forward?

Barbara Esam: I think CAFCASS is the most likely source, although of course I recognise that resources are a huge issue and already in the Government’s Green Paper CAFCASS is being asked to do an enormous amount more than it is doing now. I do not think that we would say therefore the Green Paper is not worth looking at, or therefore we do not agree with the proposals there. There are resource issues and we are very concerned about them, but I do not think that we can just close our eyes to the fact that these children at the moment are not getting their voices heard regarding something that is absolutely crucial to their lives.

Q221 Keith Vaz: The results would be different, do you think, in many of these cases, or some of these cases, if the children’s views were heard?

Barbara Esam: I suppose we do not know. They might well be different, or they might not, but it would have a positive benefit for children in any case to have been listened to.

Keith Vaz: What about the target times for key hearing stages?

Q222 Chairman: Just before you do that, when you say hear children’s views, is there a problem about putting children into the actual court process? Is this something you would rather see achieved by the intermediary, CAFCASS, or something else, or is there a real problem once you put children into the hostile environment that the family court can be sometimes?

Barbara Esam: I think it depends on the child and I think it depends on the way that it is dealt with. I think it is conceivable that it could be dealt with sensitively. Certainly we know from our experiences of young witnesses in criminal proceedings that, despite all the special measures that are there to help children give evidence in those proceedings, it is a complete nightmare. I think there is perhaps greater potential in civil proceedings to help children give their views directly to the court, but it would have to be dealt with very sensitively.

Q223 Peter Bottomley: Roughly how many times would a child have had to tell their story before they could tell it in court, to a caring parent, possibly to a police officer, to a social worker probably, to the solicitor for the family? How many times, roughly, would a child have to tell a story?

Barbara Esam: I think we would want to minimise that, obviously. It would be best, would it not, to have that dealt with by only—

Q224 Peter Bottomley: Is it likely to be fewer than 10 times?
Mavis Maclean: especially with its parents. That seems to me to be beneficial relationships, settlement imposed upon them? controversy, and that is simply the interest that a durable than for those people who have a court could be agreed as a fact, I think, without much has happened, and perhaps that settlement is more I think there could be a fact and something which agree a settlement they are more content with what contact, what is the fact going to be? parents engage with the courts that subsequently so on, they are all facts. What sort of fact do you your view, what evidence is there that where background of the child, the needs of a child, and number of clear facts from research, and so on. In terms of facts, the the parents but not solely. I think sometimes there is a tendency to forget that there are other courts that make people angry, whereas I think it is pretty clear that you do not go anywhere near a courts operate on the basis that they view contact as a good thing. There is no doubt that you cannot look at that area without appreciating that is the view. The question is whether any statutory amendment would make any difference and perhaps it would make things slightly worse. As I see it, I think the debate has been between writing in special presumptions or some other form of statutory change. I think presumptions are problematical, people are concerned about them, because they could be a distraction. It is always difficult to frame a presumption in a way that would be satisfactory, say, a presumption that there should be contact. You might want to say there is a presumption there should be contact unless it would be dangerous, or something. Then you would have possibilities perhaps of counter presumptions, and this could be a distraction and cause an argument. That is why I feel that one has got to be very cautious about that. There are other possibilities. I am not sure it would make any difference, but if it was felt that there should be some sort of public endorsement, or parliamentary endorsement, of this, something which included an addition to Section (3), which lays out the matters to be taken into account, could be considered. I will say just a word about that. When you look at those factors in Section (3), they are all matters of fact—the age of the child, the sex of the child, the background of the child, the needs of a child, and so on, they are all facts. What sort of fact do you put in about contact, what is the fact going to be? I think there could be a fact and something which could be agreed as a fact, I think, without much controversy, and that is simply the interest that a child has in maintaining beneficial relationships, especially with its parents. That seems to me to be a kind of fact and an interest which a child has. I quite like that wording because it talks about maintaining beneficial relationships especially with the parents but not solely. I think sometimes there is a tendency to forget that there are other relationships, with siblings, grandparents, and so on, which are beneficial and tend to be a bit marginalised here. If that is simply put there as something that courts should consider, I do not think that would lead to the kinds of problems which presumptions might do. There is another possibility. You could amend some other part of the Act, Section 10, which gives a court power to make Section 8 orders. You could put in something there that the court should make the order, “recognising the interests of a child”, as I have just said, it could be put in somewhere else in that sort of way, just recognising that the child has interests, the court may make an order. These are ways, which are not for me to decide, which could be considered if you wanted to put in some statutory form.

Q230 Dr Whitehead: Do you think that if Section 1 of the Children Act were expanded to emphasise the importance, precisely, “the court should have regard to the importance of a relationship between the children and a non-residential parent,” that would be of benefit to separating parents and their children? John Eekelaar: I am going to start off with the present position. As has already been said, the courts operate on the basis that they view contact as a good thing. There is no doubt that you cannot look at that area without appreciating that is the view. The question is whether any statutory amendment would make any difference and perhaps it would make things slightly worse. As I see it, I think the debate has been between writing in special presumptions or some other form of statutory change. I think presumptions are problematical, people are concerned about them, because they could be a distraction. It is always difficult to frame a presumption in a way that would be satisfactory, say, a presumption that there should be contact. You might want to say there is a presumption there should be contact unless it would be dangerous, or something. Then you would have possibilities perhaps of counter presumptions, and this could be a distraction and cause an argument. That is why I feel that one has got to be very cautious about that. There are other possibilities. I am not sure it would make any difference, but if it was felt that there should be some sort of public endorsement, or parliamentary endorsement, of this, something which included an addition to Section (3), which lays out the matters to be taken into account, could be considered. I will say just a word about that. When you look at those factors in Section (3), they are all matters of fact—the age of the child, the sex of the child, the background of the child, the needs of a child, and so on, they are all facts. What sort of fact do you put in about contact, what is the fact going to be? I think there could be a fact and something which could be agreed as a fact, I think, without much controversy, and that is simply the interest that a child has in maintaining beneficial relationships, especially with its parents. That seems to me to be a kind of fact and an interest which a child has. I quite like that wording because it talks about maintaining beneficial relationships especially with the parents but not solely. I think sometimes there is a tendency to forget that there are other relationships, with siblings, grandparents, and so on, which are beneficial and tend to be a bit marginalised here. If that is simply put there as something that courts should consider, I do not think that would lead to the kinds of problems which presumptions might do. There is another possibility. You could amend some other part of the Act, Section 10, which gives a court power to make Section 8 orders. You could put in something there that the court should make the order, “recognising the interests of a child”, as I have just said, it could be put in somewhere else in that sort of way, just recognising that the child has interests, the court may make an order. These are ways, which are not for me to decide, which could be considered if you wanted to put in some statutory form.

Q231 Dr Whitehead: Are you suggesting that the nature of facts, as opposed to presumptions, and how one might, as it were, address a presumption as a fact, to some extent, may need clarifying, in terms of the approach that the person who is coming to the court thinks the court might then adopt? That is perhaps the tendency, to regard the presumption as a right or a fact, whereas, in fact, that must be heavily qualified by subsequent examination. Is that something you would regard as an operational problem for presumption, or a disqualification of the presumption as a starting-point in the process? John Eekelaar: If I have understood, yes, I think a worry would be that somebody would come believing they had got, as you say, a right, so there is a preferred outcome which is not necessarily based upon a true assessment of the child’s interest. Just because it is contact, as it were, that is what should happen, irrespective of whether this would be in the interest of the child, and as we know it is not always in the interest of the child, and quite often against the interest of the child, therefore you would immediately have to qualify it. That is where they could get into trouble, if it was something which was pointing to an outcome. Whereas, if you simply stated as a fact that a child has an interest in maintaining beneficial relations, which I do not think anybody would deny, you could prevent it.

Q232 Dr Whitehead: In terms of facts, the submission that you have made to us, Mavis Maclean, concentrates very much initially on a number of clear facts from research, and so on. In your view, what evidence is there that where parents engage with the courts that subsequently agree a settlement they are more content with what has happened, and perhaps that settlement is more durable than for those people who have a court settlement imposed upon them? Mavis Maclean: That is an interesting and important question. I think there is a lot of confusion about the impact on parents of going to court. Often it seems to be being said that it is courts that make people angry, whereas I think it is a tendency that you do not go anywhere near a court unless you have tried everything else and you are very angry when you get there. Research in progress at the University of East Anglia, commissioned by DCA, is making it very clear that even when people first arrive at court they are very
conflicted, very unable to communicate with each other, they have exhausted all their other resources and very often they have a number of other problems too. Very often they have problems with debt, unemployment, health and housing. These families are in a lot of difficulty when they arrive at court. I think the Green Paper is very wise. There is a sentence in it about these families’ disputes being ongoing, continuing disputes. They are not something which is going to be resolved on one day by one piece of paper issued by a court, or signed up to a mediation or a conciliation meeting, these are ongoing problems which, in my view, need ongoing support and advice. To get back to your question, I think that people who have a court adjudication are a tiny, tiny population. Some of them go back to court for a variation, but very often this is because circumstances have changed. It is something like a sixth of the people who have an order who feel that they have to go back, that the matter is not resolved. Of those who have an in-court conciliation appointment, again, from research in progress, which I think the DCA will publish shortly so I cannot give you precise numbers, it is not in the public domain, but from having read those reports, my understanding is that a majority of people manage to agree after one of these in-court conciliation appointments, and more contact does happen. Again, a large number of these agreements are not kept to in full, they may be kept to in part but they do not get set in stone and follow automatically. I think what worries me most about them is there is no indication that there is any change in the level of conflict between the parents. Although these parents seem to sort of break the court habit, when they have a problem they do not immediately rush back to court, and I think that may well be a positive step, there is still anxiety about children experiencing contact in a situation where the parents go on being so highly conflicted. I do not think anyone would dispute the fact that to lose contact with a parent who is loved, or with any carer with whom a child has bonded, is bad for a child. To be involved in a parental conflict, to be a sort of pawn in the game, similarly is bad for children. The difficulty for policy-makers arises where you have these two conflicting aims. You want to maintain a relationship with a parent but you do not want to expose the child to ongoing difficulty while experiencing that contact. I think this is a bit of a gap in the research knowledge. We do not know yet how to balance the short-term stresses of changeovers and being used as a pawn in the game, or being asked not to refer to a new partner, any of those problems which children in research have told us about, how we would balance that against the long-term benefits of an ongoing relationship with a non-resident parent. There are still lots of unanswered questions.

Q233 Dr Whitehead: Essentially, you are encouraging the idea that engagement through either mediation or other forms of settlement subsequent to a brush with the courts and that outcome not being simply the end of an imposed settlement is desirable. At the very end, we have got the idea that where it is necessary to protect a child from clear harm a court order may then be necessary, but only then necessary. This is a question to John Eekelaar. Does not that give a licence to whichever parent is in a more powerful position to abuse that position, when the end of the road has been reached simply to say, “Well, I’m sorry, I’m not going to co-operate any further and there’s nothing you can do to me because the criterion of harm to the child is something I can hide behind”? John Eekelaar: If I could explain the reasoning behind the suggestion which I made. The first point is in terms of enforcement, and in a way enforcement is the really crucial thing and this is where people get really very frustrated. They have got an order and it is not complied with, and you try and it is not complied with and nothing seems to happen. Perhaps it is more important than the first things we were talking about. So how can we improve it? The first thing, I think, looking at the cases, is that the courts are all over the place on this. They do not really know what to do. On the one hand, they will say, “Look, we just must enforce this, because otherwise they are flouting the power of the court.” On the other hand, they say sometimes, “Well, it’s bad for the child, we can’t do it.” It is very difficult. I think we need clarity here, which we lack, and how can we make it clearer but also just and also protect the child? It seemed to me that if you had a criterion that a court should take enforcement, and we are talking about enforcement, we are not talking about the initial orders, we are not talking about persuasion or other things, or even a parenting order maybe, or education order, we are talking about real coercion, say, that the courts before they will do it must be satisfied that this is necessary to protect the child from clear harm, if that is the basis for the order and a finding has been made, it does seem to me that it is more likely that the courts will carry it through, because, here you are, you have got clear harm found to the child. I will give you a parallel from another part of family law. In the case of occupation orders, and these are orders which courts can make, indeed must make, to kick somebody out of the house, it can cause significant harm for the applicant or a child. There is a test there which says that the courts actually must make such an order, unless they consider that equal or greater harm will be caused to the applicant or the child by making the order. Here we have got a statutory provision which actually accepts that in some cases making an order, in this case expelling a person from the home, might make things worse, even if significant harm is being caused.

Q234 Chairman: Can I ask a question the other way around. A person who says, “Well I know perfectly well the court won’t do any enforcement of any kind unless there’s the threat of harm to the child, and there’s no way that he’s going to be able to convince the court that it’s harmful to the child for me to deny contact, in other words, enforcement
measures will not come in unless I, the resident parent, am able to allege harm against the non-resident parent, it won’t work the other way round, so frankly I cannot make the child available for the agreed and ordered contact”?

John Eekelaar: Where a parent is denying contact where that contact is a beneficial and valuable thing for the child, I think that child could be held to be suffering harm.

Q235 Chairman: Have the courts so held in many cases?

John Eekelaar: Certainly the presumption of contact suggests that they see it that way. In fact, I think they see it rather more broadly, in a sense. I would suggest that any form of denial of contact could be seen to be harming, it does seem to me, if that is the case. Obviously it depends on the facts and what is happening.

Q236 Chairman: There is a fundamental difference here. If the possibility of harm is the non-resident parent taking the child away, out of control and causing it harm, the court is quite likely to take that very seriously indeed. If it was the other way round and the resident parent were to say, “No way. The court can say what they like. I don’t agree with this contact. I’m not going to allow it,” the likelihood that the court will say the child is suffering serious harm from this denial of contact is much less the other way round?

John Eekelaar: I just do not know. If a parent alleges that the non-resident parent might take the child away, the court is going to have to decide on the reasonableness or the plausibility of that claim, and it seems to me that if a court thinks that this is just a ruse, that there is no reasonableness in this and the result—

Q237 Chairman: I am comparing two situations. The likelihood that harm from non-contact will lead to the court taking enforcement action of a real and effective kind is argued by many people to be very low indeed. The likelihood that the court will inflict some measurable punishment or deterrent upon the resident parent in those circumstances would seem to be very low indeed. Can you give me an example of what the court might do, given that prison is thought generally to be a pretty useless thing to do to a non-resident parent?

John Eekelaar: Yes, that is my point, that the court would have to make a decision. Does the denial of contact cause greater harm than taking enforcement action? There may be cases where it would be. It is possible, it seems to me, that a court could say that a child who has had an excellent, splendid relationship with the absent parent and that has been denied, for no good reason whatsoever, is being caused harm, which will be greater than the harm which might be caused by taking enforcement action. I do think that is a question that has got to be faced. It may be a difficult one but it has got to be faced. I accept also the possibility that the court might go the other way and say that it would cause greater harm to take enforcement action by allowing the contact, which is a problem. Is there a problem of imbalance there? The answer is that of course there is, of course there is, and we have got to be honest about that. The world is not equal here, the position between men and women, and so on. A mother may well have had the greater control, or does have a greater control, of the child. The issue is then, and we have got to face it, that the father of course has interests and rights, they are protected by human rights law, but what does human rights law say? Human rights law says that the state must do everything in its power, its utmost, to try to protect those rights, it has to do that, short of causing damage and harm to the child, and that is a crucial thing. 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 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 to protect the child’s, protection against harm to the child—or the father’s interest. You have got a straight choice. I cannot solve that dilemma, it is just part of the dilemma.

Q238 Dr Whitehead: If we return to the notion I put a while ago, about Section 1 of the Children Act and what you might call an enhanced presumption, would that not therefore change the basis upon which that decision subsequently might be taken by a court? That is, if there is an enhanced presumption of the importance of the relationship between the child and the non-residential parent, the notion of harm therefore is influenced by that presumption. One of the problems at the moment I think that some people perceive is that, as our Chairman said, if the powerful parent simply holds to their position and there are no other circumstances where one can say that the powerful parent is harming the child, or indeed the contact itself would harm the child, they would simply deny that the contact itself is perceived by the non-resident parent as simply saying, “Well, I appear to have got this far, in terms of the rights of contact, now I’m simply going to have to give up because there is no other remedy”?

John Eekelaar: First of all, I was not really arguing for an enhanced presumption. I think the Section 1 thing is just simply stating in a way a rather bland, obvious point, but in a specific case I do not think it would make much difference to a person. I do think a court has to make a judgment, that is what courts are for, and it has to make a judgment, “Is the denial in this case of contact causing this child more harm than would be caused to the child if we put the mother in gaol, or if we did that?”, and so on.

Q239 Chairman: Or to find another form of redress or deterrent or punishment?
John Eekelaar: Yes, any form of coercion. The evidence seems to be, and I think it is really clear, that coercive measures, once you get into coercion and you try to make a mother carry out instructions about contact, as it were, under coercion then this is likely to cause harm to the child, and a judgment has to be made whether that is worth it, whether that is desirable, given the harm that otherwise would be caused by not allowing contact. I just want to highlight that as being what the choice is.

Q240 Mr Clappison: We have been helpfully supplied with the headnotes of the case, which I am sure you are familiar with, V & V, in front of Mr Justice Bracewell. It is a very recent case, this year, a case which was dealing with a mother who showed implacable hostility towards the father having a right of contact, and in the end the judge made a residence order in favour of the father, after going through all the issues and finding that the mother had been unreasonable and shown hostility. It is a fairly robust case, but is there anything wrong with that case, in your view?

John Eekelaar: I cannot remember the details of that. Maybe I am mixing it up with another one where I think a care order was made.

Mr Clappison: This was a case in which the mother was found to have shown implacable hostility, and the headnote takes us through all the things which the mother had said, which turned out to be wrong, and at the end of the day the judge robustly gave a residence order in favour of the father. Have you seen this? It was Mr Justice Bracewell.

Q241 Chairman: This is speaking to an individual case, but Mr Clappison mentioned another step the court can take in carrying out this judgment?

John Eekelaar: Exactly, so transferring the residence is certainly an action. I would say again that the test for that should be is the present harm the child is suffering by what the mother was doing in not allowing the contact greater than whatever harm might be caused by forcibly taking the child away from the mother and giving it to the father? If the judge came to a clear conclusion and thought that the present harm to the child was greater than any disruption, etc, caused by the removal and came to her decision, that is what the judge is there to do and probably I would agree.

Mavis Maclean: To make it mandatory would have required primary legislation. This was a small pilot scheme and it simply was not appropriate to delay introducing the scheme in order to consider primary legislation. If the scheme is a resounding success and national roll-out is on the cards then of course that could be revisited. I think myself that it would make a very minor difference, in that this is a scheme to which parents are referred by the court, they come to court, somebody is asking for a contact order, they are then directed by the court, very firmly, towards this scheme and I think it would take a lot of resolution to resist this direction. Also, I am sure that advisers would intimate to parents that if they went on directly into court, by-passing the scheme, the court would not be too pleased with their choice. I think a lot has been made of this issue, but I think actually, in practice, it is a very minor point.

Q243 Mr Dawson: Are you seeing any resistance to the project at the moment?

Mavis Maclean: It is very early days, but certainly the courts are very enthusiastic, the judiciary are very enthusiastic, it has had a lot of support from local solicitors, so I do not envisage difficulties so far.

Q244 Chairman: Surely you cannot test how a compulsory scheme with parenting plans would work by piloting a voluntary scheme. You may learn something from a voluntary scheme, it might work out to be very good indeed, but you are not testing the same thing, are you?

Mavis Maclean: I do not understand the question.

Q245 Chairman: The essence of the scheme that was not proceeded with, because it would have required primary legislation, was compulsion. You are not piloting compulsion. You cannot draw conclusions about whether a system with those features would work better when it is not being piloted?

Mavis Maclean: If everybody goes into it, in effect, you are—

Q246 Chairman: Surely the whole character of the scheme is different, if it is voluntary from the start and every aspect of it is voluntary? Are there not two different things here, each of which may have merit but they are not the same?

Mavis Maclean: Indeed, but the Florida scheme, which has been much discussed, was compulsory, simply because judges in Florida have different powers. If a scheme is offered and everybody who is eligible takes it up then the mandatory nature is there.

Q247 Chairman: It is not just signing up to it, it is the obligations you undertake when you become part of it?

Mavis Maclean: The primary reason for not making the scheme mandatory was the legal position, but I think there is also a very positive aspect of not being mandatory, in that it is widely accepted that decisions which people take part in, make for themselves, sign up to, have a higher level of acceptance and sustainability than those which are imposed. I think there are two strands to this issue.

Chairman: Thank you very much indeed and thank you both for your help this morning.
Chairman: Baroness Pitkeathley, Mr Douglas, welcome. Welcome to your first session with this Committee. It may be the first of many perhaps on subjects for which you are responsible. We are rather sorry that we have lost oversight of CAFCASS, having taken a very close interest in it earlier, and that means that it has forced another committee to review in general the progress that has been made since you took over, and indeed appointed a new Chief Executive, Mr Douglas. From the point of view of this inquiry, we are very interested in the specific role of CAFCASS and how the work you have been doing to improve its performance will help. How long, on average, will it take a CAFCASS officer to produce a report in the sorts of cases that we have been talking about?

Baroness Pitkeathley: I think it is very difficult, Chairman, to give an average. Certainly we can do that but I think, as we have been hearing this morning, and as our officers are very well aware, many of these cases are exceedingly complex. We do have targets at the moment, which is 10 to 12 weeks for the completion of the cases. We would hope obviously to improve on that, but some of them are already done much more quickly than that, others are done more slowly, that is certainly an average. I will emphasise to the Committee again that, as you know, on the whole they are extremely complex cases where the parents are already in quite a conflicting situation before they come to the court.

Chairman: Do you accept that the delay in embarking on the production of reports and in completing them is a major contributor to the harmful delay that we have been talking about this morning?

Baroness Pitkeathley: I think it is, although I think we should also bear in mind that sometimes delays can be helpful, depending in what situation the family finds itself, because it may enable them to come to some kind of resolve. Certainly we are very conscious of delays, both in private and public law, and, particularly since Mr Douglas has been appointed, three months ago, it is something on which we have been making very major progress.

Chairman: Given the difficulties you face in reaching targets, can you really envisage enhancing your role either in order that the children’s guardians should do more work on establishing whether domestic violence is taking place, which seemed to emerge from some of our witnesses this morning, or indeed to enhance the child’s ability to inject his, or her, views into the situation? Can you envisage expanding the role without adding further to the delays?

Baroness Pitkeathley: We are very up for expanding the role as set out in the Green Paper. Of course there are issues of resources but we have a lot of ideas and indeed are making some progress about how to shift some of our resources, and I am sure Mr Douglas will want to expand on that.

Mr Douglas: Yes. I think the parallel with public law is a good one, because in the last 10 years, since the Children Act, the time taken on cases has quadrupled and so it is a common problem. I think really that does relate to going into cases into more depth. I think these cases split off. The court sample is very different from the community sample. We think roughly 20% of cases perhaps could be diverted to mediation, in whatever form it takes, earlier intervention with accredited solicitors who mediate positively, and our staff do that sometimes. There are some parents who would benefit from the Family Resolutions Pilot, from that approach. In the vast majority of our work, and I had been a social services director for 10 years before taking up this job and I was struck by the similarities, 70% of our work in private law was public law cases. 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. These cases take a considerable time to resolve because what our staff have to look at is really the consequences of the decision for the rest of the child’s, certainly, childhood but then later life. That is why, I think, delay, if you complete a case in 20 weeks or 30 weeks, if it is handled well, otherwise it would have resulted in becoming entrapped for several years, will never be resolved and that is 20 weeks of productive work. I would make a distinction between 20% to 25% of our cases where I do believe some form of mandatory mediation, some form of expectation on parents, with something of a shared presumption even, is absolutely right, but that is not the right framework for the bulk of our cases. I do think they are better placed probably within the “Every Child Matters” agenda, using local resources, perhaps extended schools to carry on family support work with parents for extended periods of time, so that cases can be kept under regular review. Children’s welfare, even if it is sorted in the short term, is vulnerable in the longer term and that is a better framework for our work, not to look at it as “mediation might solve everything”, or equally that all children need a particular focus, like tandem representation. I think we are in danger, as previous speakers have said, of adopting a one size fits all approach to very, very different cohorts.

Keith Vaz: Mr Douglas, those who come to my surgery about these matters still complain bitterly about CAFCASS and the delays that are inherent in
Anthony Douglas: Indeed. I am not defending delay. Delay is not acceptable, particularly for children.

Q253 Keith Vaz: It sounded like it?
Anthony Douglas: No. I was trying to explain the very different cases we have and that delay for one child and one family is different from another. What we are moving towards doing is better forms of triage so that we assess which cases need to be handled quickly and which will take a longer period of time.

Q254 Keith Vaz: Would you accept that there are still criticisms about your organisation which need to be addressed and they feed into the delay in the family justice system, because so much depends on your reports?
Anthony Douglas: You are absolutely right, but there has been a wider realisation over the last six months that there are problems in listings, there are problems throughout the family justice system.

Q255 Keith Vaz: I am talking about ourselves, we know about the others. I am talking about CAFCASS?
Anthony Douglas: Our own delays are non-existent in some parts of the country and serious in others. We have to target our hot spots, which are often because of staff shortages, sickness, retirements and difficulty in recruiting staff, we have to target those areas. We have got lots of measures in place to do so and you will see improvements over the next six to 12 months.

Q256 Keith Vaz: The other complaint that I have, and indeed last week a serving police officer came to me with a very sad and disturbing story about what he regarded, and others regard, as bias by CAFCASS officers against fathers. Do you think that exists?
Anthony Douglas: We are part of a system where non-resident parents, usually fathers, lose contact, so there is institutional bias in that sense. Mothers think we are biased against them. Fathers think we are biased against them. Our focus has to be on reducing that level of perception of what we do. What I see our staff do, and certainly across the 500 cases I have reviewed, is try to do the best for the child and try to complete cases, which often are intractable, as quickly as they can. I have not met people who are walking into situations with in-built bias.

Q257 Keith Vaz: You have heard the perception, and indeed you have recognised it?
Anthony Douglas: That is the perception.
Baroness Pitkeathley: I think that is the perception, but I think the focus of our very skilled and experienced staff is always about putting the child first and ensuring that the voice of the child is heard. That is something that our workers and our Board take extremely seriously.

Q258 Keith Vaz: Obviously there is best practice which has been identified. We have talked about the delays and the problems but also you are witnessing best practice in different parts of the country. How are you identifying that best practice and ensuring that is adopted in those parts which perhaps are not as good as the others?
Anthony Douglas: I will give two to three examples. In Cambridge, through particularly judges and CAFCASS practitioners working together, only 4.9% of cases go to the report stage. In other words, they conciliate and mediate the vast majority. That is true in Hertford and in many parts of the country. We are going to roll out those best practice methods, we have given a commitment to do so by April 2006, to roll out an agreed model. I was in Bradford yesterday, looking at the intake of cases over the last two weeks, and 18 out of the 20 are for very, very young children, often with two parents who are in very brief relationships, sometimes not in a relationship at all, some forced marriages, and to work out those cases, they are in the larger group I have talked about, 18 out of 20 in the current intake. We do face, I think, a position where we have to roll out the very fast model you are talking about across the country which deals with the 20%, 30% of cases where we can move things through very quickly.

Q259 Keith Vaz: Are you making recommendations, guidelines for your staff which can be adopted in all parts of the country?
Anthony Douglas: Yes. We have got an agreed practice model through the President of the Family Division involving the Court Service, so it is agreed with the justices, with judges and with our own Service, the principles of that, to accelerate cases, and there are some terrific examples. You were talking about domestic violence earlier where an early finding of fact hearing does produce something very hard and quick as against an extended report-writing process, and that is often done through very experienced judges, justices and CAFCASS practitioners working together as a team, and you would find in a typical public law system. I think the teamwork in the system is very strong in some parts of the country and not so strong in others, and that is what we have got to tighten up.

Baroness Pitkeathley: Our aim is to increase the benefits people get from that teamwork. Perhaps we should add here that we are in the middle of very much a refocusing process with CAFCASS to put more resources into the regions, into the front-line teams who are delivering the services.

Q260 Keith Vaz: You said you are up for everything in the Green Paper, but you did raise, very politely, the resources issue. You need a pretty determined increase in funding, do you not, in order to achieve what you want to achieve?
Baroness Pitkeathley: We have negotiated some increase in funding from the DfES, I am happy to say. Naturally, we would say it is not enough, and certainly it is not enough for some of the things that we will have to do. The refocusing of CAFCASS work is very much dependent on changes in demands by the court, changes in demands by the judges, and the President has been very helpful to us in sending out those messages too. Certainly, in the long term, if we are to develop this role then more resources will be needed.

Q261 Keith Vaz: What is morale like at the coal-face? After all, the last Chairman and Chief Executive to appear before our Committee were not there six months later, the Board has changed. Is morale improving?

Baroness Pitkeathley: I have to tell you, and I think it is more appropriate for me to say this than the Chief Executive, that morale in the organisation is very high. Lots of people are saying to me, “This is what we’ve been waiting for for a long time.” Within the organisation, morale is high and getting higher. There are some bits of anxiety, naturally, because we do face a period of major change. The other thing I would like to say here is that we are having huge support from outside CAFCASS too, from the judiciary, from all the people involved in the system from the voluntary children’s organisations, so the Board and the Chief Executive and the staff are feeling good about the prospects for CAFCASS at present.

Q262 Chairman: Just going back to findings of fact for a moment, you stressed findings of fact hearings at an early stage as being helpful. Are they not actually quite important to avoid the perception which sometimes arises that the CAFCASS officer writing a report has accepted as fact allegations which remain contested, and indeed are crucial to the argument? Certainly my experience, and probably also that of some of my colleagues, is that the argument against CAFCASS is sometimes not central to the achievement of this goal. The goal probably also that of some of my colleagues, is that partnership with the research community, will be important to point out how good many of our increasing that to three national posts and we are the CAFCASS o

Q263 Chairman: At the end of the day, people are more likely to be satisfied if the court has sought to establish the facts than if the CAFCASS report is being relied on for controversial factual evidence?

Anthony Douglas: I would say we have more social workers than any other organisation in the country. They are trained to come down on one side or another and I want them to make clear recommendations. What I was saying is that the combination of a strong judge, a strongly experienced judge, a strongly experienced CAFCASS practitioner and a good justices’ clerk can get somewhere with a very difficult case, so that it has been through a proper risk assessment, a proper screening process, to a quicker determination than perhaps if the whole system is muddled, a bit chaotic and indecisive, and that sometimes is when things can go on for a long time. What we have to do in terms of quality assurance is build in practice models which do emphasise completion of cases quickly, in a timely way, to a very high standard, without sacrificing risks to a child, a woman or a father. That is a particular style of work which really you have to do in teams, and teamwork in private law is not as strong as in some other disciplines. It is my firm belief that if we build that up at the local level and also make better use of other local resources, extended schools, Sure Start programmes, which some of our teams are doing to give some back-up, some follow-on support, particularly for parents under stress, then we will have higher success rates.

Q264 Mrs Cryer: Thank you, Mr Douglas, for mentioning problems emanating from forced marriages in Bradford. I was beginning to think I was the only person in the world who talked about such things, so thank you very much, it is very gratifying to me. To take further what Keith Vaz was talking about in discovering what is best practice for CAFCASS, when we examined the workings of CAFCASS last year we identified a significant gap in knowledge about what works in family proceedings-related work which CAFCASS needs to fill. Therefore, bring us up to date. What steps have been taken by CAFCASS to develop a research-friendly culture, as previously recommended by this Committee? Just to remind you, one of the things we said was: “The development of a research-friendly culture, which welcomes external analysis and can work in partnership with the research community, will be central to the achievement of this goal.” The goal being improvements in best practice in CAFCASS.

Mr Douglas: I think our interventions are difficult to evaluate, especially as the outcome is over a long period of time. We have had only one post of research officer. In our current restructuring we are increasing that to three national posts and we are looking to do particularly some action research locally and regionally. Our regional managers are developing an audit tool about the effectiveness of some of the interventions, some of which have been used over the years through probation teams before CAFCASS, or other predecessor organisations. We have got a wonderful array of models but they do need to be evaluated and tightened up within what was talked about as the roll-out, approved model. We are looking at accrediting particular models as being up-to-date, research-proofed and as effective as we can tell, and also exploring the systems like the judiciary have, ticketing systems, so that our practitioners can be accredited for expertise in either private law or public law or adoption work over a period of time. I think we are realising that the extent
of what people have to know these days, the Bradford example is one of many, is that the work is highly specialist, even within private law, you cannot have just a general training will help. We are putting in 200 days of mediation training for our private law converged staff next year, which will be a plus three-day training, because many have studied informally but have not had formal training. All this will help and really we do need to increase the quality assurance, research, training and development functions over the next three to five years to be at an excellent standard in everything we do.

Baroness Pitkeathley: I think that applies within CAFCASS but also with our links with the wider research community, with other agencies which provide training, and so on, and we have been very focused, Mr Douglas and I, and indeed my individual Board members, on increasing and extending our links with those other communities.

Q265 Mr Soley: As the Government indicated, if you adopt a more accurate problem-solving approach you might have to spend less time on writing court reports. Do you think that is right and do you think that is necessary?

Mr Douglas: In about 20% of cases, yes. I think, to deal with cases that are contested orally in court, through submissions, would be right. Some of our reports duplicate information that in a fine analysis is not relevant to what happens now and in the future.

Q266 Mr Soley: Are courts asking for reports inappropriately, or what?

Mr Douglas: It is custom and practice, but also some situations are so complex a court would be unwise not to have all the details set out so they can be properly appraised. I would emphasise, I have found only, I would say, 10% of cases I have studied that did not need to be set out in some shape or form, but, as I say, if we diverted 20% of our case-load to mediation much earlier on, 10% from reports, that is already beginning to release some resources for some of the aspirations that we all have. I do not think there is an instant quick-fix, to suddenly dispensing with setting out the complexity of lots of cases where children are very vulnerable.

Q267 Mr Soley: Do you think you have a way in which you could identify the sorts of cases where you were asked to do a court report, which you could do without, without putting at risk the child’s interests and having their view expressed to the court?

Mr Douglas: Certainly, in all of our cases, our practitioners talk to children; that is one of their statutory duties, to consider the wishes and feelings of children. Certainly some earlier paper screening triage of cases could reduce. I think, the amount of time taken on some cases, but again we have a statutory duty at least always to consider what is going on for a child in a situation, we would be outside the framework if we did not.

Q268 Mr Soley: Is it more appropriate for you or for the court to say, “Well, we probably don’t need a court report in this case. It might be better if the time was spent on more active involvement in some way”? Mr Douglas: Probably it is best to do that jointly. We are not an administrative body, in the sense of reaching our own solutions, and the important part of that is to have early directions jointly with judges and justices who do make those decisions quickly, and that does happen in many parts of the country already.

Q269 Mr Dawson: The use of Family Assistance Orders has been neglected since the 1989 Act. I suppose you could speculate that has been about resources, to some extent. Given your embrace of the possibilities of Family Assistance Orders, what additional facilities and funding will be required to make them work?

Baroness Pitkeathley: I think the Accounting Officer had better deal with that one.

Mr Douglas: We operate about 700 a year, so far. I think the only way of doing that is, we have guesstimated that the implementation of—we have had a rise in 9.5s, children represented separately, this year, as the Committee will know, and we think that represents a significant continuing cost, potentially. If we implement the support arrangements, that is a significant cost as well. We think that is done best within the framework of “Every Child Matters”. These are mostly children in need. The resources that have gone into children in need are questioned, but that is where most are, with some of the developmental schemes locally and, as I have said, through extended schools, contracts for voluntary sector groups, Home Start and the support agencies. We are relatively isolated structurally, which I think reflects the fact that the family justice system is not integrated into the mainstream of children’s services, and neither is the youth justice system. I think, if we are to deal with support properly we have to be in the mainstream of children’s services and classify many of our children as children in need, who are able to take advantage of local provision which other children in need in the community do.

Q270 Mr Dawson: That is music to my ears, but can you say that Family Assistance Orders actually are of benefit to children and families?

Mr Douglas: They have been in some cases. I think that some reinforcement used selectively is of benefit in some cases. All these disposals have some application to some children and some families, but neither of them are a solution in their own right.

Baroness Pitkeathley: I think the relative isolation in which CAFCASS operated in its early years did not help this, so that is why we have been very much at pains to develop the links with the rest of the voluntary sector, with local authorities, with social services, and so on, and we will continue to do that, of course.
Mr Dawson: The Committee has received evidence from the Solicitor’s Family Law Association and the Family Law Bar Association to the effect that it is not satisfactory for children to be brought to the courts for conciliation meetings. Does CAFCASS agree with that view?

Baroness Pitkeathley: I think they need to be where it is most appropriate for the child and that is why many of our offices have better facilities where such meetings can take place.

Mr Douglas: It is important to ask each child, where they are in a position to be asked, and some very much want to come and put their point of view. I spoke to an eight year old last week who was very strong, and I think represented most children in that age group, “I just want my parents to stop arguing.” It reminds me, when I was a social worker, of children who said “I just want whoever is abusing me to stop. I don’t want to leave home, I don’t even want them thrown out, I just want it to stop.” What children are going to say is an important statement and their voice needs to be heard, in some shape or form, or introduced. How we achieve for them what they nearly all want is the $64 million question.

Q272 Mr Dawson: There are lots of alternative ways of hearing children’s voices and that is a different venue rather than bringing them directly to court?

Mr Douglas: Yes, and we have some models, like the Principal Registry, where children do attend; others where the facilities are just grossly unsuitable and it would not be right for them to be there, there is nowhere decent. At other times we can talk to them and represent their views, and solicitors can, or we can introduce what they are saying on video. It does not matter really as long as we do introduce their voice into the proceedings.

Q273 Mr Dawson: We have seen and talked to the President of the Family Division about the new Private Law Framework and I have got a couple of questions about whether you have got the resources to meet the needs of a practice direction. Also, given that she is asking you to do more work face to face with children and a number of new tasks, doing a lot more conciliation work, for instance, will not that detract from the role of CAFCASS in ensuring that there is separate representation or tandem representation for children in private law? Will not that undermine the move to implement Section (122 ?) in September next year when it comes in?

Baroness Pitkeathley: Not necessarily, I would have thought. It depends on how we deploy our resources. I think the President has been very supportive in understanding that it requires a change in the behaviour of the judiciary as well as a change in the response of CAFCASS for this to work satisfactorily. Some of the things that we are already putting in place do seem to me to address those issues, leaving aside the problem that our shortage of resources is always going to be there.

Q274 Mr Dawson: Clearly you are making enormous strides to address the issues that this Committee and others identified in a previous incarnation, but really you are being asked to take on huge extra areas of work and develop skills in particular areas of work?

Baroness Pitkeathley: It was always envisaged that CAFCASS would take this on. The second S in CAFCASS is exactly what this is about, so I do not know that we are having a change of direction, merely fulfilling what we were set up to do in the first place perhaps.

Mr Douglas: We have had a significant increase in resources. It is never enough. Obviously, if many children are separately represented and if these cases take enormous amounts of time and consume additional resources then three into two does not go. That is why I think we can only do it over a period of years through collaborative working that is very different, so that the service in two to three years’ time looks different, and that will be our focus. We are much more settled now than a year or two ago. You mentioned training. There was hardly any training for the first two years of CAFCASS. I would approach that with some optimism because we are in the same position as any front-line agency, trying to manage more and more functions on fewer and fewer relative resources. We have got to do more about support, because it is already taking a long time when cases come back repeatedly with repeated applications and cases where they are intractable and consume huge amounts of time. I would just say that the report writing is a phase in the work. There has often been lots of direct work, lots of attempts to mediate within that, it is not just someone, the practitioners, sitting back and writing a report, that is the end of a process, but we are very grateful that you have raised it because it is of continuing concern.

Chairman: Thank you very much for your evidence this morning. You can be sure that we will continue to take an interest in CAFCASS, so long as we have some power to do so, because, of course, the report that we finished about CAFCASS was one of the first that this Committee produced, it was one of the most hard-hitting we have ever had occasion to produce and perhaps the most dramatic in its consequences. Indeed, your presence here, both of you, is a direct result of that report. Therefore, we do want to express our wish that your attempts to get the organisation meeting its targets and improving the service it provides will prove very successful, because it is very important to the lives of very many children. Thank you.
Tuesday 11 January 2005

Members present:
Mr A J Beith, in the Chair
Peter Bottomley Mr Clive Soley
Mrs Ann Cryer Dr Alan Whitehead
Mr Hilton Dawson

Witnesses: Caroline Abrahams, Director of Public Policy, and Susannah Weekes, Assistant Director, NCH; and Margaret Pendlebury, Vice Chair of the Board, National Family Mediation, examined.

Chairman: Welcome. We are very glad to have the help of our three witnesses for the first part of the session, Caroline Abrahams and Susannah Weekes from NCH, or still in the minds of some of us National Children’s Home, as it always used to be, and Margaret Pendlebury from the National Family Mediation Board. We look forward to learning from your own experiences in some of these difficult cases.

Q275 Mr Soley: I would like to look a little more at the question of delays in court and the issue of reports prepared by CAFCASS. The question really is to look a bit deeper into what the positive and negative aspects of delay are. In most cases I think most of us would accept that delays, certainly unnecessary delays, are highly undesirable and can be very damaging, but there are cases, I think, where you could argue that delay is useful in terms of allowing mediation and other factors to come into play. My first question to you is: can you tell us what you think are the main issues around delay? Do you think that delays are just unnecessary and ought to be dealt with as an efficiency system or are you saying that we should use delay in a more constructive way to achieve certain outcomes?

Margaret Pendlebury: I would say, firstly, that delay is nearly always very bad for the children concerned because these are children who at present have parents who are in conflict and who need to make decisions about their arrangements, and while they are waiting for someone else to make that decision and shoring up arguments against the other parent, then that is generally very bad for the children, so the sooner that effective means of sorting things out between the parents can happen, the better.

Q276 Mr Soley: Does that not assume that the child might not be going through a period of changing ideas itself about which parent it wants to see and in what circumstances? Might that not be the cause of delay in certain circumstances?

Margaret Pendlebury: Well, I think generally we know that the effect of parental separation, particularly when it is quite highly conflicted, is very, very tough for children and one of the things they do is feel under pressure to take sides and think that they might be the one who has to make decisions about who they should go with. When parents come to mediation, one of the first messages is that that is a responsibility that children really cannot cope with, do not need and they want parents to be able to come to some kind of agreed view that takes their views into account and takes their needs into account, but does not put them into the position of having to choose. I think what happens when there is a delay is that whoever the child is living with of course has a lot of influence on what the child is thinking and how they are and if that is a period when they are not seeing the other parent or they are seeing them in the most unpleasant circumstances, tense and difficult, then that is bound to affect their relationship with the other parent, and the less that that happens for children, the better.

Susannah Weekes: There is delay at different points really. There is delay in getting to court and then within the court process as well. I think at times it can be useful to have a period for some sort of conciliation work to be done between the couple and working out with the children and getting reports done. We are not expecting reports to be done within a week necessarily, but I think if it is a delay that is too long, that is not helpful at all for anybody, both parties and the children as well, so we would certainly think that some of it could be through efficiencies in the system, but some of it has to be through the court process and allowing people to go through the process. I see mediation and the whole separation being a process anyway and it is not just a fixed point of something happening.

Q277 Mr Soley: Can I now ask you about the issue of CAFCASS reports, both the purpose and also the delays inherent in them. At times it seems to me that reports might not be entirely necessary and it might actually be better to look at the process of mediating and trying to work out a solution to the problem rather than preparing the report and then presenting a possible solution to the court where it must produce delays simply in putting that package together. What are your views on that?

Caroline Abrahams: I have just one point about that. We had quite a lively debate about that in our organisation actually recently and there is a point of view in our organisation that actually the process of developing the report in partnership with parents in itself can be quite productive because in itself it can lead to more positive outcomes when the matter eventually arrives at court. Now, if that happens, that is great, but one fears of course that
it is not always like that and I think your initial statement really about unwarranted delay and being clear about what is an unwarranted delay and a hold-up in the process and what is a constructive period where it may appear to the outside world that there is not a lot going on, but where actually some constructive work is happening, I think getting the differentiation between the two is probably the key point that you yourself put your finger on.

Q278 Mr Soley: Because if a social worker was not appointed very quickly, then clearly that is an unreasonable and unacceptable delay, but if the process is going on, then in a sense the court needs to be flexible about the date, does it not, to bring it forward, move it backwards or whatever? Is that not right?

Caroline Abrahams: Yes, it is a fit-for-purpose test really, is it not?

Susannah Weekes: Yes, and I think for us as an organisation we are involved in mediation and providing mediation before it gets to the CAFCASS point anyway.

Margaret Pendlebury: I think that is a very important point, that when you remember what the purpose of the CAFCASS report is, it is to make an assessment and make a recommendation to a court when the parents themselves have not been able to decide between themselves how their children should be looked after, so it really should be a last resort, not a first resort, but for lots of people I think they think it has got to be a first resort that when there is a dispute, someone else has to make the decision. At National Family Mediation, we see many, many parents who come either before things have got to court or they have taken time out of court.

Q279 Chairman: Who refers them to you?

Margaret Pendlebury: They come from a variety of sources. Often their solicitors will suggest mediation and of course mediation got a great boost when it was determined that in order to apply for public funding for representation for family matters, applicants for public funding must first consider mediation. That is not that they have to mediate, but that they must consider it and the way that they consider it is that they must meet with a mediator, so that person comes along to the meeting with a mediator, often very suspicious, where “This won’t work. I’d be willing, but he wouldn’t come” is very often the starting point, and, “Anyway it wouldn’t work”, and so on, and by the end of that first session with them, when they hear how it works, what it may offer, what they stand to gain, how little they stand to lose by trying it, they are very willing to give it a go. However, as things stand at the moment, it only can then go on to mediation if the other partner is willing and he or she is not yet obliged to have that same meeting. He or she is invited, but not obliged and I think that our experience of working with couples who have come through the route of being obliged to come is that many that come very, very reluctantly actually find it very beneficial, but we would like it to become an expectation, compulsory, however you work that in, that everyone considers it in that way rather than just those seeking public funding.

Q280 Mr Soley: The preparation of the actual written report, if we are saying that the process is the important thing, why is it necessary in so many cases to produce a full written report rather than simply coming to the court and making the recommendation?

Susannah Weekes: When people just go through mediation and not through CAFCASS, there is usually a memorandum of agreement that is made between the parties as to the bits that they agree to and the bits which are perhaps still points of issue that need to be decided in court and some of those memoranda of agreement would not necessarily come to court anyway because if they have come to an agreement between themselves, that can stand. The issue then if it did get referred to CAFCASS would be how much they would use that memorandum of agreement and build on that and, equally, how much the solicitors and judge would use that and how much people would start from scratch and ignore all the work that had been done beforehand. I think that is one of the points of dispute, but mediators and those memoranda of agreement are not legal documents and they do not necessarily go into the court arena. At the point it does go to court, then the mediation work does not become a party to the court proceedings anyway, so they are separate proceedings.

Margaret Pendlebury: If I may, could I just finish the answer to the question before about how do clients come to mediators. Some come via solicitors, but many others come either by self-referral where they have heard about it and very often a lot of ours come via Relate, couples who have attempted relationship counselling where they have accepted that the relationship has broken down and then are referred on to mediation, so there is a mixture of solicitor referrals and private referrals from other sectors.

Susannah Weekes: The private referrals would tend to be those that would not be eligible for public funding.

Q281 Mr Dawson: It sounds like a good argument for lots more social workers and fewer lawyers.

Margaret Pendlebury: We are not social workers. We are mediators and that is again a point which I think is poorly understood because mediation is a distinct way of working. We are trained and it is very skilled. I have been a mediator for 12 years and, as it happens, my previous background was social work, but lots of mediators either are lawyers, counsellors or they have a background where they have been working with couples and families, but whatever we may have been or may still be in our other lives, as mediators, it is a distinct—
Q282 Mr Dawson: It is a specific skill. Would you all agree that it is a specific skill?

Caroline Abrahams: Yes, but I also agree with you that there is a need for more family support workers who will come probably more likely from a social care background. I think NCH’s view really is that at the moment what we have got is a lot of emphasis on the need to support families generally through things like SureStart, for example, a great scheme, and then we have got the court system which is to do with when couples break down with children and actually what we need is a much more joined-up, strategic approach to supporting families when they are intact, when they are breaking down and afterwards, whereas at the moment all the bits of the system are incredibly disconnected, the funding streams do not stack up, et cetera, et cetera, and it is not how the world is. Families do not see themselves in these little pockets, but they see their lives evolving and the way at the moment we have thought about these services makes it really difficult to respond in a timely and effective way for families and children.

Q283 Mr Dawson: So assuming it is in the best interests of children to reduce contested contact applications, what is the best way of doing it? You are advocating a sort of whole-system approach to supporting families?

Caroline Abrahams: We are absolutely and of course the big issue about that is cost, and one has to be upfront about that, but at the moment the system we do have seems terribly inefficient and an organisation like ours which runs a small number of breakdown-focused services, but works with tens of thousands of families every year that are breaking down, we struggle to be able to meet their needs within the rest of our family support provision because we are not paid to do so, but it does not make a hell of a lot of sense really. It would be much more sensible if the funding was a little bit more creative to allow us and many others of course to be able to do that.

Margaret Pendlebury: I speak specifically for family mediation because I am part of National Family Mediation which has been around, with a slightly new name in the last 10 years, but has been around in this country for 25 years or more, and it is a network of services. It is in place and it is very effective when clients get to us, but we still find after 25 years that it is still not very clearly understood and those that use it, yes, I frequently get feedback from clients, and some recently, who say they have achieved more in four mediation meetings than they have done in four years worth of litigation over their child and it is not unusual.

Q284 Mr Dawson: Good, but do you hear the voices of children?

Margaret Pendlebury: We do, yes.

Q285 Mr Dawson: You talked before about the voices of children.

Margaret Pendlebury: We do, yes, and more so than ever now. We have always had a child focus. The family mediation service was set up and the main aim was to reduce and minimise the negative impacts of divorce and separation on children and it is always focused on the needs and purpose of parenting issues. Increasingly, we actually invite children directly to participate in mediation so that their view is heard, which is not to say they are ever put in a position of being asked to choose which parent or what they think should happen.

Susannah Weekes: The difficulty with that is again that there is no money to actually do that, so the work that we do in that, because NCH services are members of NFM, has to be funded from somewhere.

Q286 Mr Dawson: I almost thought you were getting on to saying previously in answer to Clive, Margaret, that a mandatory referral to mediation would be something that you would think would work.

Margaret Pendlebury: We would welcome it and one of the really important principles of mediation is that the mediation itself, this is out-of-court mediation and other services, is voluntary and the parties are there voluntarily. However, what we found was that it was very effective to have a compulsory initial meeting where they consider mediation and they can then say no, but we are confident that we will persuade large numbers of people, as has happened with those who are publicly funded, that it is worth trying.

Q287 Mr Dawson: There will be some families where there would be issues which are not appropriate for mediation, will there not?

Margaret Pendlebury: Absolutely and that is again very much part of our training. That first initial meeting is to check the appropriateness of mediation and where there is such an imbalance of power where one could not be fairly heard or would be so intimidated and so on, we assess for that, we check for that, and we have screening processes. Suitability of mediation is something that not only both parties, but the mediator also has to agree.

Susannah Weekes: And if there are child protection issues already in concert, we would not be involved in that either because if social services are involved with the parties, to do mediation while all of that was going on would be inappropriate as well.

Q288 Mr Dawson: Thanks. I am glad you have clarified that. Are there circumstances in which child protection issues would arise during the process of mediation?

Margaret Pendlebury: There are, yes, certainly and we have a very clear message that whilst mediation is confidential, the exception to that is that if any issue arises that suggests a child is at risk of harm, we are not bound to keep that confidential and we would report that.
Q289 Chairman: In your experience, have you actually come across many cases where it appears to you that the views of the child are not emerging at all in the dispute between the parents?
Margaret Pendlebury: Yes.
Susannah Wekes: Yes.

Q290 Chairman: So that is a common experience?
Susannah Wekes: And part of the process of mediation then is to include the parents considering what the children’s views would be as well, so we would encourage parents to think about that.

Q291 Chairman: When you said that the resource or the money was not there for listening to the voices of children, is that because it would require a separate process from the mediation or can you not embrace it in the normal mediation process?
Susannah Wekes: You could for some cases include it in the normal meetings with the parties, but sometimes you would want to see the children separately from that.

Q292 Chairman: When I said “embrace it in the process”, I did not mean having them all in the room at the same time.
Susannah Wekes: No, but we do not get the funding for the children to be seen separately.

Q293 Chairman: So every bit of expenditure which arose from that, travel expenses or whatever, you would have to find from your own voluntary sources?
Susannah Wekes: Yes, or privately if the parents were to pay for that.
Margaret Pendlebury: One of the things that our contract with the Legal Services Commission, which funds mediation, does not allow for is the extra time that is spent on the additional session involving the child, so we fund-raise for that at the moment. At present, we offer it as a free-of-charge service to parents because when you ask whether the voice of the child is not heard, that is very often the case and it is not because these are parents who are not interested in their children, but because the experience of what they are going through means they lose sight temporarily of what their children need and that is what mediation can do. It can bring it right back to, “What’s it like for your children when they hear this? What do your children know?” and parents for the first time start to hear what each child is saying to both of them which is sometimes very different as children try to please both.

Q294 Chairman: The Family Resolution Pilot Project, which is currently being trialled, do you think that is worthwhile given that it does not involve the level of compulsion which you think could work and which one of the models on which it was supposedly based contained?
Margaret Pendlebury: What I am not saying is that one size fits all and I think for those who have got as far as contested court proceedings, there may well be a place for that with the parenting education. Yes, it is not compulsory and I think that an element of, if not compulsion, then a very, very strong message from the court that says, “What are we to make of your not having tried all possible means of resolving this?”

Q295 Chairman: And you have given us quite a strong message that an element of compulsion does not undermine the ability to make mediation a success.
Margaret Pendlebury: That is right, so long as it is compulsion to consider it fully, being to find out not just third hand, but to go along and see what it would be like, to hear from the mediator and anything that may go additionally with that, and I think it would be really helpful to have some more material to have parents made aware of the impact that their failure to sort things out for their children has on the children. There is research evidence that we have which shows what the impact on children is which can be demonstrated to them via videos and so on.

Q296 Peter Bottomley: In a Parliamentary Answer I got overnight, the Minister says that one of the reasons why the name of the project was changed was because of the late stage at which the separation of the parents takes place, and that the original proposals were for early intervention. Can you tell us what your views are on that sort of difference of either fact or view?
Susannah Wekes: Well, I certainly feel that having earlier intervention helps because the positions can possibly be less entrenched, and I am not saying that they will be less entrenched, but they are possibly less entrenched, and possibly more able to consider other possibilities or compromises, so my view would be earlier intervention would be better because I think once it gets to long court proceedings as well, it can be more and more conflictual with more and more sides being taken.
Margaret Pendlebury: Having said that, I do think that there is a question of timing for some parents where the pain, the betrayal and so on of the actual separation and what has led up to that puts them in a position where they simply cannot focus on their children at that point and, therefore, it should not be a case of you try it once and if you fail, then you are into litigation. I think there is a place for alternative dispute-resolution procedures at all stages. I do think it was good that the name was changed and my understanding is that it was not the only thing that changed about the project, but I am not familiar enough with it to go into too much about that, but my understanding is that it was quite significantly watered down.
Susannah Wekes: The other thing I would mention on the early intervention is that sometimes we have had referrals from solicitors where one party has gone to a solicitor, the referral has come to us the next day, but you find then that the couple perhaps separated the day before that, so there is a point of being too early in the process and they say, “Actually we are still exploring whether we are
Q297 Peter Bottomley: The question of resources has come up before. We have significantly higher amounts of money now spent on Child Benefit and Income Support for families and I have often wondered whether organisations in your sort of field might think it a good idea to allocate maybe one-third of 1% of this Child Benefit money to actually have organisations around in each community where parents can naturally be in contact when things go well and be in contact when things do not go well. Would that kind of approach help to solve some of the funding issues and the fund-raising?

Caroline Abrahams: That is the kind of question my kind of organisation tends to duck. I think it is the honest answer to that. Certainly we see the need for more resources generally. We think this is an under-resourced, Cinderella-type of field that just suffers generally from trying to get too much out of too little and everything is spread too thin. One of the difficulties for us and I think indeed with this whole debate is that you very quickly get into a debate about where is the greatest need and I think this area has suffered from that because it is tended to be seen that children who are caught up in very conflictual situations when their parents break down tend to be viewed in less need generally than, say, children who are in the looked-after system or children suffering at risk of abuse, and one can completely see why. I am sure what my colleagues who work in this area and mediate particularly would say is that as soon as you start taking the lid off what actually is in the private law system, you see all of those issues as well.

Q298 Dr Whitehead: I would gather from the discussion so far that essentially you are saying that the focus on the legal process itself and the limitations of that legal process and the debate which goes around that is perhaps itself the problem and that actually too much reliance is placed on legal solutions in their own right. Is that a fair summation?

Margaret Pendlebury: I think that is right because I take a step back and look again at what their children need and what is going on here. Having clarified that, think we know that only a small percentage of parents actually end up in court, but many, many more parents negotiate their arrangements in the shadow of what they think a court would decide, so much more education and clearer messages for all of those who are not ultimately going to end up in contested court proceedings would be very helpful. I think that the role of the CAFCASS officer who is asked to write a report, there always has to be a role for that eventually, but other things have to have been really seriously tried before even you get to that point where you are asking somebody else to make those decisions.

Q299 Dr Whitehead: But where parents have engaged with the court or are engaging with the court, for example, where parents have engaged with the court and possibly through the directions you have suggested they then agree a settlement subsequently, is there any evidence that they are more content with the outcome than by more formal processes, shall we say?

Margaret Pendlebury: I think there is quite a lot of evidence that suggests that agreements that are made by informed agreed proposals hold better than those that are imposed.

Susannah Weekes: Also I think there is evidence that very immediate agreements that are made generally from trying to get too much out of too little and everything is spread too thin. One of the difficulties for us and I think indeed with this whole debate is that you very quickly get into a debate about where is the greatest need and I think this area has suffered from that because it is tended to be seen that children who are caught up in very conflictual situations when their parents break down tend to be viewed in less need generally than, say, children who are in the looked-after system or children suffering at risk of abuse, and one can completely see why. I am sure what my colleagues who work in this area and mediators particularly would say is that as soon as you start taking the lid off what actually is in the private law system, you see all of those issues as well.

Q300 Dr Whitehead: There is a distinction, is there not, between where, as it were, parents go and sort a settlement out, having engaged with the court, and those parents who, as it were, come to a terminus in the court and the court then, as it were, directs mediation? Is there any evidence that that particular course of action is effective and that it actually leads to fewer, say, for example, enforcing-related issues than the more contested way of doing things?

Susannah Weekes: I certainly think that for some people who come to court without perhaps having had a solicitor or help with a CAFCASS officer and just come to court on their own and without the preparation beforehand, it cannot necessarily help the agreement process. I think some people who either are not eligible to legal aid or there are no solicitors locally, say, in rural Wales or wherever, who can help prepare them for the process, I think that does not bode well.

Margaret Pendlebury: Referral out to mediation, again I would come back to the distinction between a one-off, brief, quite pressurised, in-court conciliation meeting, which has its place certainly, but is very, very limited. I think, in its effectiveness, the difference between that and referral out to mediation in a setting with the sorts of things I talked about earlier, the legal privilege, the confidentiality, the fact that people can take a step back and look again at what their children need and what is going on here. Having clarified that, referral out to mediation, if both parties are willing.
because sometimes battle fatigue sets in and people are more ready to negotiate later on than they were at the beginning when they thought they had it all to win, a referral out to mediation at any time when they are willing can be effective, and that is my personal experience. I cannot quote you the research statistics on that, but certainly my personal experience is of as much success with some of those couples.

Q301 Dr Whitehead: What is your view of the Solicitor Family Law Association’s proposals on collaborative law, that is, not so much mediation, where both parties, as it were, have a lawyer who they are aware is working for them, but the circumstances are that the lawyers are seeking a collaborative outcome as opposed to an adversarial outcome?

Margaret Pendlebury: My view on that is that, as I said earlier, I do not really believe that one size fits all and I think there is room for different models. I think that the lawyers working in that way will very much use some of the mediation principles that we use. I think it is a more costly solution, but may well be right for some couples, particularly if some of the issues are so complex that people would not feel safe to negotiate alone. My feeling is that it may well be very good, but small-scale development, though I may be wrong, and I also think that there is scope for those collaborative lawyers to refer couples out to straight mediation when there are things that they do feel happy to work with on their own, so there is definitely overlap.

Q302 Dr Whitehead: So a further process where, as it were, you go from courts to collaborative lawyers to jointly convened mediation, that in itself may be a route?

Chairman: Thank you very much indeed for your help this morning. We have got some more witnesses to see, but we are particularly grateful for the help we have had from you.

Witnesses: Tony Coe, President, Equal Parenting Council; John Baker, Chairman, Families Need Fathers; and Celia Conrad, former law practitioner and a legal consultant and writer on family law matters,2 examined.

Chairman: Welcome, Mr Baker from Families Need Fathers, Mr Coe from the Equal Parenting Council and Celia Conrad, a solicitor experienced in this field. We look to you to get some interesting evidence about the position of non-resident parents, usually but not invariably fathers. Obviously we have received a lot of representations on this from your own organisations and from many other organisations and it is a major public issue, so we are very grateful to have your help this morning.

Q303 Mrs Cryer: Celia, you have said that, “The law may be gender-neutral in intent. However, that is not the perception of many non-resident parents who have been through the current court process. They have no faith in it to produce an unbiased result”. Why do you believe this, that the court system is biased against the non-resident parent and what empirical evidence do you have to sustain this?

Celia Conrad: If I can take you back just a couple of points in relation to the question, which is that my experience is from the research I have done for the book that I wrote and my actual experience of acting in the Family Court process. Also I think the question is quite broad really and is quite fundamental because really there is no inequality between men and women, but in the system there is an inequality, I believe, and as I have sort of said in my book and from the research that I have done between a resident and non-resident parent because the onus is on the non-resident parent always to be the one to make the application for contact or to prove that contact should take place. Now, the perception is that it looks as if it is more biased

2 Author of Fathers Matter—A guide to contact on separation and divorce, Creative Communication, 2003
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.

Q304 Mrs Cryer: But in your research, did you not come to some conclusion about the fact that resident parents often do need a bit of help, so in addition to the children needing the presence of the other parent, the actual parent who has custody does need a bit of time off occasionally? Celia Conrad: Of course. Obviously the children need to have a meaningful relationship with both parents, so I am not saying that the resident parent should not have time off. Actually many resident parents would like sometimes for the non-resident parent to have more time with the children and I have come across that as well and unfortunately you cannot make an order for someone to have more contact and that is often something that people have complained about to me when I have been in practice, so I do accept that, yes.

Q305 Mrs Cryer: To Tony Coe, given that the case law already indicates that contact is almost always in the interest of the child, what difference do you believe a statutory legal presumption would make and how would a presumption interact with the current presumption to act in the best interests of the children and, in the case of dispute, which would take precedence? Tony Coe: The first thing to say in answer to the question which you put to Celia is that probably the best evidence is the evidence from the President of the Family Division herself when she says that 60% of fathers lose contact with their children, so that is the first thing to say. Another thing to say of course is that Mr Justice Munby in his judgment, referenced in the representations we have made, made very clear how defective the system is. The reason that a legal presumption is essential is that we need to have a clear framework in place so that we address both ends of this argument. The other side of the argument is that we should not allow violent people to have contact with their children and that is quite right and the way that we deal with that is that we face up to it right at the beginning and say, “Look, what’s going on in this case?”, and if there is violence in the case, that is a criminal offence and we deal with it as a crime, but if we are dealing with fit parents, then both those parents ought to be having contact with their children and the only way that you are going to make that a reality, I suggest, is by having laws in place, as they do in North America, where the judge has to follow a certain format. When that happens, then the shared parenting, the both-parents regime that we all want to see, actually becomes a reality.

Q306 Mrs Cryer: But would you accept that 60% of non-custodial parents eventually lose contact with their children? Tony Coe: Yes.

Q307 Mrs Cryer: But quite a chunk of that 60% could well be where those, possibly, fathers have formed other relationships and are wanting to move on and perhaps do not want contact. Are you saying that the 60% are all parents who actually do want contact, but for various reasons they have lost it? Tony Coe: Well, first of all, I am not saying 60% and I am taking that directly from the President’s own mouth. The usual statistic that is quoted is that 40% of non-resident parents lose all contact with their children within two years. Of course there are parents who are bad. Of course there are parents who do not want to see their children and that pertains to intact relationships also. We all go to Tesco’s and we see parents who we think probably should have their children taken away, but what we are talking about here is if you have got fit parents, if there is not a safety issue, and the Government has put that right at the top of the page, it seems to me, in the Green Paper and it is very helpful that they have done that, that if it is safe, there should be contact and there has to be a system put in place that delivers that. We know it is not being delivered because the judges are telling us that. Lord Justice Wall himself came out in The Guardian yesterday effectively saying, “Look, it’s not as though we’re not saying that reforms are needed. Reforms are needed”.

Q308 Mrs Cryer: But the point I am trying to make is that quite a chunk of that 60% is not because they are not fit parents, the fathers, but it is just that they have moved on, formed another relationship and, therefore, some of that 60% must be because of choice, that they have chosen to sever relationships with their first family. Tony Coe: Well, you must be right, but I would have to say, “So what!” All I can say is that in our organisation, we see mothers and fathers every day of the week who desperately want to have contact with their children. What is the other side of that? The other side of that is a child who is being denied contact with that parent. Let’s put a system in place that delivers that. We all want that.

Q309 Mrs Cryer: I wonder if I could ask you all, do you believe that an expansion of section 1(3) of the Children Act, which contains the welfare checklist, to read that, “the court should have regard to the importance of a relationship between the children and a non-resident parent” would be of benefit to separating parents and their children? John Baker: We are certainly very enthusiastic about that. What we need to do is to change the culture and the culture at the moment is that if parents separate, only one parent has the lion’s share and the other is excluded, marginalised and is much less important. If we actually set it legally in legal practices and in the culture that the assumption should be that both remain important, a lot of things would follow.
Legal cases would be different and if people's private behaviour was taken, then shadow legal cases would be different, and where people formed a new relationship, they would not think, “Well, I can move on from my previous children”, and it would be clear that their obligation was to stay involved. To pick up a point which Tony Coe made, one way of doing this is to make formal, symbolic statements by changing primary legislation which is often the way of flagging up that this is being put. It is not legally necessary to do that and it could be achieved within the existing law, but there have to be bold statements that this should be the normal outcome unless there are contraindications and amending the Children Act in that way would be another way of doing that.

Q310 Chairman: Let’s get your view on this because these two are sometimes seen as alternatives, a new legal presumption of contact with both parents, on the one hand, and something in the Children Act about the importance of the relationship between the children and the non-resident parent, on the other, because having two legal presumptions operating at the same time is rather difficult for the courts to deal with. What happens if the two are in direct conflict and the interests of the child, even the spoken, articulated views of the child, are actually in conflict with the presumption that the child should have contact with both parents?

John Baker: I think it would always be that there is a presumption which would always be rebuttable for various reasons, of which the most obvious ones would be abuse or risk of continuing violence or something like that, so we are arguing for a presumption, not a mandatory fixed right. In the view of our organisation, it is the personal behaviour that needs to change, but since the personal behaviour is often taken in the shadow of the law and legal decisions, the best way of changing the personal behaviour is actually to make it clear what the law expects.

Q311 Chairman: Are you arguing that the existing presumption where the interests of the child come first should be removed or downgraded in some way?

John Baker: Absolutely no way. It is a red herring in lots of respects to say that children’s welfare comes first and in the normal case this has these following implications. We would not want to see the welfare principle changed in any way, but, say, in the normal case if the welfare of the child involves having ongoing relationships with both parents unless some particular reason is brought in that that is not the best for this particular child in these circumstances.

Celia Conrad: I think there is confusion with the presumptions. The thing is that we have the presumption of contact through case law, but what we do not have is the presumption of reasonable contact. The problem is that there are no guidelines anywhere, there is no definition anywhere of how much contact or how much parenting time a child is supposed to spend with each parent after separation, and this is the problem because under the current system there is nothing there to guarantee any time whatsoever. Tony is obviously talking about the legal presumption to guarantee some degree of contact post-separation and I know that Mrs Justice Bracewell said that she did not feel that was viable because she said that it would obviously conflict with the point you just made about the paramount consideration. I think essentially that it could facilitate that paramount consideration because at the end of the day it is in the child’s best interest to have reasonable contact with both parents to develop that meaningful relationship which facilitates the welfare principle, but I understand there could be conflict. I think that it is really looking at reasonable contact and how much contact, how much time the child should have with each parent post-separation which I think could be developed by guidelines or judicial guidance, and I think that was the emphasis of the Early Interventions Project which is distinct from the Family Resolutions Pilot Project because there is no parenting time definition within the Family Resolutions Pilot Project, so I think that is something that needs to be addressed, that there actually has to be some guidance somewhere as to how much parenting time the child actually has with the parent post-separation.

Tony Coe: What I wanted to say is that I do not see this conflict. If you have got two parents, we all agree and the Government says in its Green Paper right at the top that if both parents are fit, in other words, if it is safe, they say, but we would actually say that if both parents are fit, then it is in the best interests of the child for them to be having contact and, therefore, there should be a presumption making that happen. The pilot project you are referring to really emanates from the Florida system. Now, the Florida system has had a presumption not of contact, but of shared parenting, that is to say, frequent and continuing contact of at least a third of the time year round. That has been on their statute books since 1982 and the leading judge there has told me quite plainly that he does not see how we can make any progress in this until we have a presumption in place on our statute books.

Q312 Peter Bottomley: If any of you have a research study showing the change in outcomes in Florida over the last 20 years, it would be useful to have it sent to us. Could I just reflect back on what I think I have heard which is that if the interests of the child, which I look on as the long-term interests of the child, are maintaining contact and if the variety of cases that among the minority that come to court would be affected by a change in the law had such a wide range from where a parent is not thought to be fit or safe to have the child to one where the present caring parent might be less adequate than the non-resident, non-caring parent, how on earth is it possible to write into primary legislation anything that is going to be useful?

Tony Coe: Well, we do not interfere with the relationship. Going back to my rather flippant Tesco’s analogy, we do not interfere in the relationships between fit parents, the relationships with the children, when they are intact and the State
has no business, in my respectful submission, interfering in a relationship between a fit parent and their child. We may have different ways of bringing up our children, but we are entitled to have our different ways of bringing up our children and getting into the areas of which parent is more adequate is not, in our view, where the law should be going. We need a law that protects the human rights of the child and of the parent to have a family life together.

Q313 Chairman: But you are asking the State to interfere because you are asking the State to deal with the situation where one parent says, “I want more weekend contact with the child”, and the other parent says, “No”, and the child actually says, “Well, the trouble is that if I go at the weekend, I’ll miss my football or the society I belong to”. You have got three people whose views have to be reconciled and it does seem, on the face of it, odd that the State should be trying to resolve this.

Tony Coe: I do not think that is an interference, if I may say so, Chairman. I think it is a question of upholding the relationship between the child and the parent. They have a right to a family life together, and we know that from the European Court’s rulings on this, and what we have at the moment is a situation where many, many parents actually lose all contact with their children or have an unviable relationship. They have to go to McDonald’s once a week and spend a couple of hours with their child or maybe they have to go to a contact centre where there is no issue of safety involved simply because the custodial parent says, “Well, I want it to be supervised”, or “I want it to be in that particular regime”. It is so unnatural and when the oxygen of contact between the child and the parent is denied, then that relationship withers and dies and the court is left with the position where it has to say, “Well, the relationship is finished, so it’s not in the best interests of the child to order it”.

Q314 Mr Soley: If I could return to Celia Conrad, you have partly answered the question where you seem to agree with the Law Society that the resident parent has the advantage in a resident dispute as to where the child is. I just wonder if in your research or your work you have looked at the Society’s presumptions before that because I suspect that one of the things that happens here is that there is almost a tendency from the male and females roles in society that the male leaves and the female stays in the home and the child also has an identity with the physical situation at home. Now, if that is right, does it not all point to a much earlier intervention if the parents cannot agree?

Celia Conrad: The problem is of course, as you say, that when parties do separate, it is generally one parent that leaves the home and obviously becomes the non-resident parent and then obviously the status quo is changed because the child is living more or less all the time with one parent and obviously the other parent is trying to see the child to keep the relationship going. I think in terms of early intervention, the use of the phrase “early intervention” can be confusing because there is early intervention and there is early intervention. To be honest with you, I do not think it matters actually what it is called in terms of intervening. I think that something has to be done so that there is some form of early intervention and whether it is called the Early Intervention Project or the Family Resolutions Project or something else does not matter. I understand the argument that the name was changed from Early Intervention to Family Resolutions, although actually it is not the same project, but it was changed because they said that it was not early enough for some families, so that causes confusion, but then I think how early can it be because it can only ever be really as early as the parties ask someone else for assistance on it, whether it is phoning up Families Need Fathers or going to mediation or going to a solicitor, which I think is 80% of cases, where people come into the office, are emotionally driven and many of them just want a fight, and that is a major problem. I think. I think in terms of how early it can be, there are limits. I think Mrs Justice Bracewell did say that as well, that it was actually quite difficult to say how early we can intervene and there are limits to how much we can do in invading other people’s relationships.

Q315 Mr Soley: Your answer is very relevant, but I was not thinking specifically of the Early Interventions Project, but just talking about early intervention because the core of the problem in a sense, and Tony Coe touched on this, is actually the problem of why the State has to intervene, and the State has to intervene frankly not because it wants to, but because the parents cannot agree, so in a way the problem here is to find a way of helping the parents resolve the problem without the intervention stage and that is a lot easier said than done—

Celia Conrad: Yes, I would agree with that.

Q316 Mr Soley: —if you are also looking at the needs of the child which do at times get forgotten in the battle between the parents.

Celia Conrad: I think that obviously when a relationship breaks down and then the parties do not know which way to go, at that stage they need information to actually help them to decide. This is the problem because where parties cannot agree, they are going to have to have some form of intervention to help them come to some agreement, whether it is by mediation, whether it is by information from the court, having parent education classes or whatever or then going into the legal system which should obviously be the last resort because adversarial proceedings are very unhealthy. In my experience, most of the people who have actually gone through the process are very unhappy with the results and cases get compromised along the way, but that is not an indication of a good result either because a lot of people give up because they cannot afford it, they cannot take the strain, and it is such a long, protracted and expensive process. Something has to be done to stop that. It is a question of what type of early intervention is necessary and what is most relevant and what is
going to work. I do not think the Family Resolution Pilot Project goes far enough because the parties do not know what the expectation of the court is. They are just given guidance as to things that they can do, but there is nothing set out to say, “If you do not agree, this is what is likely to be ordered”. I really do think it focuses parents’ minds as to what is in the best interests of their children if they have a clear indication of what is going to come out of it if they do not agree, but in the meantime they have all the other resources to try and avoid going down the court route.

Q317 Chairman: If we accept the figure that the Government give of less than 1% of contact applications are actually rejected outright by the courts, the problem is, perhaps as you were hinting earlier, much more one about the amount of time, the extent of contact and, of course, issues about the forciability which we will come to later on in our session. You come up against real practical difficulties if the court starts to get involved or any other process in saying to the parents you must have x% of the time, you must have so many days, so many hours. Then you come up against all the practical difficulties about housing accommodation, how far apart both parties live and how disruptive it is to the child to meet this requirement because you are actually placing the requirement on the child as well as the parent that the child will travel 100 miles to some place or other and have a different circle of friends during that contact time.

Celia Conrad: I take the point exactly because obviously then you are imposing a certain number of days which is the problem anyway when you are looking at contact applications. What I am saying is that I think there should be some form of procedure whereby there are guidelines set down for categories of case. I think we can look at categories of case because they do exist for parents to work out their own parenting plan through a three-step process, whether the Early Interventions project or something else, which fits their individual child’s needs because essentially every case is different, that is the problem, we are all different. Family life is different in each family from the children’s requirements and what parents would like. Contact applications are all about time anyway. How much time would create that meaningful relationship for the parent and child? Really it would be a question of that family working out their individual needs with guidance which can be done through a procedural change rather than a legislative change essentially.

John Baker: A key thing for me here is the role of parenting plans. I think this question of fixed allocations of times is a red herring. We should have looked at it in terms of objectives to be attained. They will be things like both parents being effective parents and neither parent being excluded by the parenting plan from any important aspect of the children’s life, for example from school. Children should not be excluded from awareness of any important part of the parent’s life, for example the fact that they work as well as care. I think there is a check-list of these sorts of things which will not give a precise formula of this number of days and that number of days but would be a series of guidelines as to the amount and the best way of organising contact and that is the way forward here. Yes, there is an informal understanding that some contact is almost invariably given to the child, although it is not necessarily guaranteed, but it is not necessarily a meaningful amount and I think what we need is guidelines or parenting plans on what sort of experience the child can expect to have from its parents and that should lead the formula and the organisation.

Q318 Chairman: Would I be right in thinking that reaching that kind of agreement in many cases is prevented by outstanding other disputes, ie maintenance disputes, Child Support Agency issues, continuing resentment that the break up took place at all and that what sounds an obvious and ideal solution is extremely difficult to achieve in quite a lot of the cases?

John Baker: I am sure that is right. All of these things have to be seen as a package. What often happens now is the financial things are seen as the most urgent and they are settled earliest and then somehow the child welfare things can be dealt with in the fullness of time. The child welfare things are more urgent. They all need to be resolved as a package, with every issue sorted out at a very early stage. It is very difficult to distinguish between them.

Tony Coe: The beauty of this is that we do not have to reinvent the wheel here. These things have been thought about for years in North America. I think it is no accident that probably the most forward thinking judge here at the sharp end, as I think this Committee put it, is Nick Crichton and you can see the sort of way he deals with it, and it is a revolutionary way for this country of dealing with these sorts of things. I know he has had exposure to the North American system. He is part of the same organisation as I am which largely consists of judges over there. The other one is Mrs Justice Bracewell who has had exposure to those methodologies. There is a wealth of stuff from North America that can be deployed to good effect here.

Q319 Mr Dawson: We have all talked about the best interests of the child. I think one criticism that this Committee will face is that we have not listened to the views of children directly. What weight do you think should be given to the views of children?

John Baker: I agree with the lady from Family Mediation who said that children should not be asked to decide between their parents. There should be an assumption that unless something is awry they will want to go on having an important and meaningful relationship with both their parents. If they are talked to in a non-adversarial way with that assumption their views can be given quite a lot of weight. Children do feel they are ignored by their parents and by the system. So it is a question of the context and the way in which they are talked to. It would be appalling to have an adversarial system about which one do you choose and that is going to end up in court, that is appallingly child hostile. I
think if the context is right their views ought to be listened to quite carefully with the big precursor that, of course, the more you listen to children the more effort parents will put in to manipulating their children to get the outcome that they desire. So you have to have a very skilled and trained way of doing it. There has been some beautiful material done by Hamish Cameron about how this is done in the Australian system and it shows that if professionally and carefully done it can be very, very useful, but if done badly and crudely it can have horrendous results.

Q320 Mr Dawson: That is interesting because the thing that worries me about this commitment to parenting time is that I regard that as a crude approach to contact. Surely there are better ways of approaching children, particularly young people, over contact issues than simply saying we want to allocate so much time and here is a plan where you will have so much time with your father. Surely the last thing that many teenagers want is to spend a lot of time with either parent.

Tony Coe: What would be very interesting would be to get the views of children who have been through the system. What children who have been through the system tell us is that they desperately wanted to have contact with their non-resident parent but they dared not say so and nobody would have helped them. The judge did not hear them, the CAFCASS officer did not hear them and now all these years have passed and they have a nugatory relationship with that parent. So that is actually extremely important. You need the time linking because how else are you going to protect the child’s parenting time with that parent? There is no other way of doing it. You have to order it. It has to be underwritten by a court order.

Q321 Mr Dawson: What if the child says that they do not want contact?

Tony Coe: 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. Once a parent becomes unfit or unsafe we are in different territory and that is why it is so important to look at the case right at the beginning and decide whether one of those conditions applies. If it does apply then it goes off into a different room.

Q322 Mr Dawson: What if the child has been abused and nobody knows about it?

Tony Coe: That is something that the court must investigate. What if a child has been abused in an intact family, what could we do about it then?

Q323 Mr Dawson: That is too simplistic. Child protection, physical abuse, sexual abuse and domestic violence are not issues which come immediately to the fore. They are often disclosed over very long periods of time through relationships with people. The approach that you are proposing surely puts a child in a position where they may be heartily relieved that abuse which has been occurring has stopped, and now the approach that you are advocating would push that child back into that abusive situation or force them to disclose it when everything else might be working in them to say that they do not want to disclose it, they just want the abuse to stop.

Tony Coe: I do not know how you make the distinction between an intact parent where that is going on and separated parents where that is going on. Why do you wish to discriminate against a separated parent? Where is the evidence that a separated parent is likely to be an abusive parent? If that parent is abusive they should be shut out of the contact, there is no doubt about that. There is no difference between us on that. The difference between us is that we have to get this right at the beginning of the case and decide whether that is a possibility there on the basis of some credible evidence, otherwise how do you protect the relationship between the child and a fit parent?

John Baker: 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.

Q324 Mr Dawson: I think this is a failing of a lot of the evidence which has been put forward to us by fathers’ groups. We have heard evidence today about the problems which are revealed in separating families and from CAFCASS, but for some children who are being abused (and child abuse is not well enough recognised in this country at all) separation could create an opportunity for that child to be safe. You are failing to recognise the significance of child abuse in reality and the difficulty of detecting child abuse, and potentially forcing children back into a situation where if you equate contact at the same level as going to school then surely you are forcing children back into a situation where they could be abused.

Tony Coe: What you are effectively saying is that just by reason of the fact that two parents have separated you ought to consider that there is a high probability of something like that going on. We do not even have to get to that point. What is actually happening in the current system, indeed Mr Justice Munby wrote a scathing judgement about it, is that even when there is no allegation raised whatsoever against the parent the parent is still not achieving sufficient
contact or sometimes not achieving any contact with their child. I cannot believe that you think that that should happen.

Q325 Chairman: Would it not set that question in context if you were to recognise how many cases there are in which the non-resident parent is concerned that abuse may be taking place with a new partner as the resident parent?
Tony Coe: Sure. All these allegations must be dealt with as an allegation of a crime. It is a crime that is being alleged and if it is a crime then let us get it into the criminal court and let us get it resolved.

Q326 Mr Dawson: I wish that life was as simple as that!
Tony Coe: It can be.
John Baker: The assumption is put about, because a lot of these issues are driven by gender politics, that if there is a family where contact presents safety risks—and of course on occasions it does—and this is checked out and there are found to be risks, then no one sat at this table is going to be against any robust actions, but the presumption needs to be turned round the other way. Children are more at risk of abuse in situations where there is no contact than where there is. The figures from the NSPCC show that three or four children a year are killed by contact parents and about 100 children a year are killed by parents and carers very often in situations of stress and intolerable situations in which the less strong personalities crack. It is the relief of stress and making parenting easier that is likely to save children’s lives and shared parenting can have that effect. It is safer than contact denial. We all know that the people who are abusing are more often actually the residential parent’s new partner and again it is often in situations where the children are isolated from places they can turn to for help. There are safety risks and they need to be addressed if they are brought up. The presumption ought to be that shared parenting protects children and contact parents prevent more harm than they themselves can inflict.

Q327 Mr Soley: I get puzzled by this argument. You end up making, if I may say so, mountains out of molehills in some way. I do not think the schools’ analogy is a good one at all and the reason for that is that you are looking at a situation where parental relationships have broken down, very often parental-child relationships too and that is why the court is intervening; it would not do otherwise. I agree with you about the abuse. Abuse is a criminal offence. Let us take that out of it. Take out the other one which is manipulation. I agree that is a difficult one to deal with. In between that there is a relatively unusual situation where a child refuses to see the other parent because they are intensely angry and very often it is because that parent has left and maybe for no other reason. You can spend an awful lot of time working at that trying to resolve it, but if you could not, this is why the schools’ analogy is so inappropriate, you had to do what was done in the distant past, which is you would pick up the child and carry it kicking and screaming to see the other parent and I hope nobody is suggesting that. That all suggests that what you need is a process of intervening more effectively and to get away from some of these, in my view, rather misleading analogies about whether it is this gender or that gender or whatever. It is actually a situation where the child’s interests need to be central and they need to be understood, but they might just be very, very angry because the two adults cannot get their act together. Is that not right?
Tony Coe: Of course it is. If you are saying you should remove that influence aspect then I am afraid that is rather unrealistic because if there is litigation going on and a child is feeling that way then the parent who has the influence does not have to say very much, it can even do it through body language, but it can send signals to the child that really that parent does not want the child and also the child feels, as you can easily understand, as though he or she has been abandoned by the other parent. So the other parent needs to be able to have some time in order to regain the trust.

Q328 Mr Soley: And you would enforce that?
Tony Coe: Most certainly.

Q329 Mr Soley: You would literally pick up the child and take it if it refuses to go?
Tony Coe: Most certainly.

Q330 Mr Soley: You would?
Tony Coe: I would, and I am supported in that by mental health professionals the world over.

Q331 Mr Soley: I am not worried about who supports and who does not support the argument, I am interested in how it works for the child and ensuring that child has a satisfactory upbringing. It is a long time since I worked in these situations, but one of the most difficult ones was the situation where you could work out the manipulative bit, you can identify that in the case of the worker who feels that contact with both parents would be beneficial but the child is distinctly saying no. If you get to a situation where you are forcing it you are in trouble.
John Baker: I think it is going to be very, very difficult to take that enforcement line. I think there should be an obligation on the authorities to regard this as a continuing problem that is yet to be resolved and I think it will probably come up elsewhere. The support service part of CAFCASS should be an area where there is ongoing work with a family assistance order or some other procedure in place. It should not be what happens now, that nothing can be done.

Q332 Mr Soley: I have described situations from my own experience where we did carry on working with it. Are you saying that that does not happen now? I do not see it. I have been talking to people who do this type of work and they think they do.
John Baker: I would like to know who it is who is carrying on that ongoing work because I do not see any service out there that actually provides this ongoing work. I think there is a gap. There ought to be that ongoing work.

Q333 Mr Dawson: Do you think more could be done to involve other family members, grandparents, aunts, uncles, older siblings in efforts to achieve workable compromises?

John Baker: In both legal and non-legal terms all the evidence is that grandparents are very useful mediators at bringing people together. We need to look at the whole family, particularly in our diverse societies where grandparents and other wider relatives are much more important in some communities than in others when it is just the parents. Grandparents should be involved. They should have a legal right to apply for contact without permission. So 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.

Q334 Peter Bottomley: Celia Conrad asked a question about whether grandparents should be required to apply for leave. Would you agree that they should not?

Celia Conrad: I think grandparents are very important because they do provide the majority of the day-to-day care for these children. I do not think they should have to have leave. Generally speaking, if you look at the categories of cases and the people who have to apply for leave, grandparents are there but I think they should be in a distinct class of their own because they are very important, they are the backbone really, they are family members and children generally feel secure with them. Going back to the point that John was making about grandparents generally. Currently under the system, because of this non-resident/resident parent thing, in my experience I have noticed that where the resident parent does not encourage the grandparental contact with the non-resident parent’s parents then that does not take place. This is another example of how the system works against the members of the extended family as well and it pans out all the way. So I do think they are important, yes.

Q335 Dr Whitehead: You appear to be saying that the process of a report in many instances in itself moves the issue beyond the scope of the report itself just by the delay inherent in the report.

Tony Coe: Yes, the delay inherent in the report and the report process itself. I often liken CAFCASS to the fire brigade turning up to the scene of a fire and sitting outside in their engine writing a report about how the building is being consumed by fire and ending up with the conclusion that the building has now burned down and there is nothing they can do about it and off they go. That is flippant but that is really effectively what the report process involves. Very often by the time they have written their report there is zero contact and they are not interested in that. They say their job is to write a report. That is beginning to move with this reform process going on now, they are beginning to talk in terms of wanting to conciliate and to mediate. They see their job, as the Chief Executive says, as coming down on one side or the other and making a recommendation. That was very telling to me because that is exactly what is wrong. We should not be coming down on one side or the other, we should be coming down on the side of the child, the child needing a relationship with both their fit parents.

Q336 Dr Whitehead: You appear to be saying that the main person to blame for the delay is the system because of the lack of presumption. There is a lack of presumption and there is the “no order principle”. The “no order principle” says to the court “Thou shalt not make an order unless it is in the best interests of the child”. The court interprets that, it seems to me, quite understandably, on the basis that they must first of all do an investigation. That is why they press the investigation button and in comes CAFCASS. You are then into lots of delay and lots of unnecessary heartache where a report is produced saying he said this and she said that. You will have seen our reform proposals. We do not think the report should be written in cases where there is not a safety issue. I think the evidence that the new Chief Executive of CAFCASS gave to this Committee was very interesting when he said their social workers are trained to come down on one side or the other and make a recommendation. That was very telling to me because that is exactly what is wrong. We should not be coming down on one side or the other, we should be coming down on the side of the child, the child needing a relationship with both their fit parents.
possible. That is the service there needs to be so that parents can have recourse at a very early stage to a parenting plan. Only occasionally in hard cases will the full weight of the law be needed and that is the big gap in the service. They should be guided by the assumption that a parenting plan should achieve for the child the objectives that I outlined earlier on.

**Q337 Dr Whitehead:** On the other side of this, turning to the adherence to court orders themselves point, when that process has been completed and a court order has been set out, what are the particular reasons why the court orders are simply not adhered to?

**John Baker:** It is widely and generally known that solicitors say you do not need to bother, you do not need to do anything about it. Nothing will happen and, even if something does happen, it will be months and sometimes years later when a lot of other processes have happened to the child as well. One thing we are very keen on is that the message that must go out is that if there is a court order it must be obeyed. Whatever is done in response should be the least conflictual, the least distressing and the most child centred as possible, but there must be a clear message that this court expects that what we order will happen.

**Q338 Dr Whitehead:** I think a rejoinder to that could be that the idea the court has to be obeyed suggests that the issue is normally the resistance of one parent. Do you accept that quite often it is because of both parents sabotaging how that process works?

**John Baker:** I am sure in the whole range of family break up you will have examples of everything. If there is a case where one person is obstructing conflict—you could argue about how many of them there are, but it does happen—that must be stopped and not least it must be stopped because it holds out to everyone else who might be tempted to take that road the hope that that might be a successful outcome. There are many other situations in which contact stops, yes.

**Celia Conrad:** There are categories of cases that people fall into. There are some who refuse to abide by the contact order at all. When there is an order parties then become quite inflexible because they nit-pick and there is no give and take at all. Children are not commodities and things change sometimes and there can be problems with that. Sometimes they will have a sports match and one parent is not going to give way on it and they want one hour’s time back. People need to use common sense as well. Quite a major problem I found when I was dealing with people is that they are not practical in terms of really dealing with the order. This is the problem about having an order in the first place where parties cannot agree, because if they could agree then they would be flexible. There is a little bit of inflexibility with an order and that is something to bear in mind.

**Tony Coe:** You cannot really look at an enforcement order in isolation and it really goes back to the early interventions point. There are two things that have been found to be successful in best practice jurisdiction. The first one is probably the most important and that is education. The parents’ education primes the mediation pump. We had an expert over from California, a mediator, who said they do not even start mediation without having the parent education component first because the parents have not heard all this good stuff about how they should be conducting themselves to make it easy on their children and if you get that parent education piece right at the beginning that then has a knock-on effect throughout the process because they now understand, their mindset is different. I have attended a high conflict parent education programme as an observer in Arizona. It was done in court which I do not think was a great idea. When I arrived in the waiting room it was filled with really angry people who just did not want to be there. They had been ordered there by the court. I was really amazed as the morning went on and we had this education class with these mental health professionals and mediators and so on at the way these people softened, it was like the light had come on.

**Q339 Chairman:** The opposite effect from the Jerry Springer show!

**Tony Coe:** Exactly right, but it really works. I have seen it.

**Q340 Dr Whitehead:** Mr Baker, you say enforcement has to take place and we know that where enforcement takes place either repeated returns to the court to implement enforcement are undertaken or, if the enforcement is undertaken, it is arguable on occasions that the interests of the child is thereby compromised, ie someone is locked up or removed from the process of parenting and there is a catastrophic outcome. Is that something you would advocate?

**John Baker:** No. This is why the judges need to have a battery of provisions, not just the crude ones but quite a long list, of which my favourite one is community service of some sort, so that while the child is seeing the parent the other person has to do community service. I think there must be in the last resort, if the whole legal process is not going to be compromised from the beginning, some idea that there is going to be enforcement in the end. I would say anyone who puts themselves in prison and lets their children be neglected while they are in prison rather than letting them see the other parent is carrying out appalling parenting. It is not like criminal proceedings where sometimes it is unthinking actions or irrational people. Contact disputes never get to the point of enforcement without it being a deliberate, conscious, chosen decision with the options to drop out being available at every stage. It is precisely the sort of behaviour where certainty of result will change the behaviour that leads up to that.

**Q341 Dr Whitehead:** Having seen some transcripts of repeated attempts to obtain enforcement, is there not a point at which, notwithstanding the points made about the fact that the behaviour of parents in potentially going to prison rather than agreeing to
access means the situation is that the court is faced with a position of colluding with making that happen in the absence of any other way forward and the courts may be reluctant to do that.

**John Baker:** I think they may be reluctant to do that. With the lack of options that they have now it is a very real dilemma. Nobody is going to want to see anyone going to prison over this sort of thing, of course they are not. There has got to be another more satisfactory outcome except in flagrant and extreme cases, but the principle is that people cannot voluntarily set aside a decision of the court, that is the important thing. I do not think too much should be made of these very rare cases.

**Q342 Mr Soley:** If the British system were to be relaxed what would be the parameters to it? How far should we relax it and in what way should we relax it?

**Celia Conrad:** At the moment there is a slight contradiction because obviously in the first hearing everything is completely anonymous, the children’s names are not known or anything, but if it goes to appeal, the initial of the children are there and people can find out who they are. That is slightly silly because it defeats the purpose. I certainly think that judgments could be given in public. People need to understand a little bit more how judgments are given because then they would understand the process. Everyone thinks it is closed at the moment and we do not know anything about it and it is all in secret and that breeds for more discontent. I definitely think we should be more open. I know of experiences in other jurisdictions where they do have more of an open system, they do not have reporters there all the time reporting on things, they are not that interested in family cases. That might be a concern which one should not be overly concerned about, but I certainly think that we should be looking to open the system up a lot more, yes.

**John Baker:** We have seen in criminal jurisdictions the protection of the identity of the children and that seems to work quite well and I would advocate transporting that to the Family Court, but all the substance of the issues needs to be out in the open and needs to be researchable as well. It would diffuse a lot of the arguments my organisation gets of stories of the most appalling decisions made against fathers. You go to Women’s Aid and you hear stories of the most appalling decisions being made that are failing to protect women and children. The odds are they are both true because there is not the consistency of procedure across the court and in part it can be inconsistent because it is not subject to examination and people do not know what happened exactly and rumour spreads. I think it should be on the same basis as the criminal courts. There is a further issue which affects my organisation very crucially and that is the confidentiality of court documents. There was a case when somebody approached my organisation about their CAFCASS welfare report and therefore we had to talk about the welfare of the report and this was brought back as a contempt of court and later thrown out. People need to be able to seek advice and assistance as part of their services and that involves the court documents not being confidential except with this protection of the identity of the children and that is what needs to be done, that is the position of my organisation on this and we think it will benefit the procedures of parents.

**Tony Coe:** There is a lot I could say on this issue. As far as we are concerned the administration of justice must be open. On the radio this morning there was mention of a case where a mother cannot get compensation from the Home Office because she was wrongly imprisoned. It reminds me of the Sally Clark case. It was only really because people were determined enough to get the matter in the public domain that the Court of Appeal the second time around did the right thing.

**Q343 Mr Soley:** Would you include naming the child?

**Tony Coe:** I do not see any reason for not doing it. I can certainly see the other side of the argument and I do not have any particularly strong feelings that one should name the child. I do have strong feelings that we have to be as open as possible.

**Q344 Mr Soley:** Would you recommend that the child has no secrecy protection?

**Tony Coe:** I would recommend total openness and I should not be overly concerned about, but I would point again to the North American system where they have total openness. My organisation has not heard of any cases where publicity has adversely impacted a child or anybody else. On the contrary, I feel openness leads to fair and balanced justice.

**Q345 Chairman:** I think we have covered the ground we wanted to cover and we have had some very helpful evidence from you on a number of points which have been of great concern to this Committee. You have also given us detailed written submissions and indeed occasionally supplementary ones and this process will continue and we shall put forward some proposals at the end of it. Thank you very much for your help this morning.

**Tony Coe:** Thank you, Chairman.
Tuesday 18 January 2005

Members present:

Mr Alan Beith, in the Chair
Peter Bottomley
Ross Cranston
Mr Hilton Dawson
Mr Clive Soley
Keith Vaz

Witnesses: Baroness Ashton of Upholland, a Member of the House of Lords, Parliamentary Under-Secretary of State, Department for Constitutional Affairs, and Rt Hon Margaret Hodge MBE, a Member of the House, Minister for Children, Young People and Families, Department for Education and Skills, examined.

Q346 Chairman: Good morning, Mrs Hodge, Baroness Ashton. As you know, the Committee has been working on this issue for some time. Why did you decide to make a statement of policy on the day you were due to give evidence to the Committee and just before you did so?

Baroness Ashton of Upholland: Can I first of all apologise, Chairman, that the venue change was not given to you, as it should have been, so that you were not able to attend. I know I have sent to you the notes of Lord Falconer's opening remarks, but I can only apologise. It was a cock-up. It should not have happened. The reason was one of logistics. We were ready to give the statement and, as you know, it is quite important to timetable these things in consultation with colleagues across government. We ended up in the position where this was the best day in order to get the kind of coverage this issue deserves. We did, of course, talk to your clerk and make sure that the Committee was fully informed, and I was delighted the Committee was able to alter the timing in order to facilitate that.

Q347 Chairman: We altered our timing so that we could know what was happening in the press conference, which you then moved without telling us.

Baroness Ashton of Upholland: I have already apologised for that unreservedly.

Q348 Peter Bottomley: As a matter of interest, when were the press told it was being moved?

Baroness Ashton of Upholland: I think we would have to consult our press officers, but I assume during the last 24, 48 hours. It should have been reported to you. There is no excuse for it. I cannot give you an excuse for it. It was a cock-up.

Margaret Hodge: I think the reason for it, just to put it into context, was the security arrangements. Clearly you should have been informed. I think we both sincerely regret that you were not.

Q349 Chairman: We have gone to some trouble to make some security arrangements for your benefit.

Margaret Hodge: I know you did. Thank you very much.

Q350 Chairman: A decision we made, indeed, when you were subject to an attack. All our subsequent meetings on this subject have had additional security, so we do not find it a very convincing reason for not telling us.

Margaret Hodge: I do hope, Chairman, you were also given information as to what—. I was told that you were given information prior to the announcement today as to what we would announce so that you would know what was in there, and that was our attempt to be both courteous and inform you for today's proceedings.

Q351 Chairman: Yes, we were. Is the Government objective to remove private cases from the Family Courts money driven or outcome driven?

Margaret Hodge: Outcome driven, absolutely and totally without hesitation outcome driven. This is, as you know from many years of looking at these issues (much longer than we have been doing), a highly contentious area. It is very difficult. We know that for the child's best interests we need to do all we can to ensure that parents decide between themselves on the best arrangements for their children and maintain a meaningful relationship with their children, where it is safe for them to do so. We know that there has been a growing number of divorce and separation, we know there are a growing number of parents, both mothers and fathers, who are unhappy with the outcomes of the decisions that they themselves take, or the courts take on their behalf, and we know that there are a growing number of children who suffer from the consequences of separation, divorce and the acrimony that is caused if the arrangements are not properly established; so it is for the child’s interest and it is outcome driven. It is utterly completely focusing the work we are doing.

Q352 Chairman: That being the case, you recognise, do you, that some of the alternatives cost money and that resources will be required for that?

Margaret Hodge: Indeed, and you might quite rightly say that we wish we were to have more resources than we currently have. I am quite pleased with the additional resources that we have been able to secure to take forward a lot of the proposals that are contained in today's announcement. It is never enough. I would love to be able to say to you there will be even more money, for example, going into training and funding, more counsellors for more mediation, but it has been a growth area. We will
continue to look at how we can expand it in an effective way to secure the outcomes, and I hope that the Committee will welcome, in the same way as we have done, the additional resources that we have secured both around introducing the Adoption and Children Acts, issues around harm and domestic violence, which are going into the court, the money that we could put into CAFCASS, the extra money that we are announcing today for contact centres, which is another element in it, and using money better, so changing the way in which CAFCASS works so that we can better promote mediation, conciliation. All those, I think, are putting resources in the right direction as well as adding new ones. It does not mean we should not have more, and I will argue that case all the time.

Q353 Chairman: We will come on to CAFCASS a bit later this morning, but why have you ruled out a statutory presumption that children should have contact with both parents?

Margaret Hodge: We start from the principle, which is enshrined in the 1989 Children Act, that the welfare of children should be paramount; and you can only have one paramount principle, as you will know, and I know that the Committee has discussed this and, reading the evidence, obviously this has been an issue that has been raised. It does seem to us very clear that for the vast majority of children, providing it is safe, contact with both parents on an on-going loving, sustained way is critical to their development. One only has to look at issues surrounding the development of children in terms of even just educational outcome to see the impact it can have when children do not have that, but, because it is in their best interests, we would want to see it happen on that basis, and we think that is the right way of approaching it.

Q354 Chairman: You did not address in today’s presentation, as I understand it, an alternative suggestion, which is that section I(3) of the Children Act, which has a welfare check-list in it, could include a requirement that the courts should have regard to the importance of a relationship between the children and the non-resident parent. Why did you not consider that point?

Margaret Hodge: I think we have to be really careful in this debate that we do not promise parents something which we are then not delivering. The reality, as you know, is that all the case law that has been built up over many years recognises that the best interests of the child are served by a continuing relationship with both parents where it is safe for them to do so. It is pointless, in a sense, to change the law, pretending you are changing something when incrucial signal, and I do not want to muddy that statement.

Q355 Chairman: Experienced practitioners, like those represented by the solicitors from the Law Association, recommended the addition to the welfare check-list as opposed to the changing presumption, and judges we asked about it did not seem concerned about doing that so long as the drafting was carefully considered. It seems strange to me that a suggestion that has reasonably wide backing amongst those who have to practise within the courts should not have received more serious consideration.

Baroness Ashton of Upholland: Obviously I have only read the evidence; I was not at the Committee. I did not interpret what was being said as wide backing. I think you are right, of course, Chairman, that the SLFA did raise this, but, as Margaret was just saying, I think it is quite important that we address the problem that people have identified to be the problem; and the problem is not that the courts look at this and say anything other than that it is in the child’s best interests, nor, indeed, that we would all wish to see on-going relationships for children with both parents, the problem that was identified is how does one make sure that actually happens? Simply looking to adding into a check-list something that is already well understood, is in law, is certainly viewed by the courts as being of critical importance, is not affected by a change of that nature. What matters is how you make sure that down the line what is being sought for these children actually happens. The way that we have approached it is to say that the principle is right, the law is clear; what do we now do to ensure that the reality for families and, most importantly, for children is that they get what is in their best interests?

Margaret Hodge: Can I add something to that? I too have read the evidence that you had before this Committee, but the vast majority of those who responded to the Green Paper that we published in the summer did not favour a change in the legislation. I just put that to you. Even the SFLA, who I know have argued for that, see it as symbolic rather than—

Q356 Chairman: That is exactly the point I was going to put to you. The Government quite often makes changes in the law because they think a signal needs to be given, even though they do not think it will have an immediate practical effect.

Margaret Hodge: Let me come back on two things. First of all, I think the important signal that we all need to consistently give is that the interests of the child must be paramount. That is the absolutely crucial signal, and I do not want to muddy that signal at all. However, because we know it is in the child’s best interests to maintain a meaningful relationship with both parents, again where it is safe for them to do so, we need to demonstrate to parents that that means that they need to comply with contact orders; and the signal at the other end, which is the sticks that we are talking about this morning
and which will be considered in draft legislation shortly, the stronger set of levers that we are proposing to give to judges, that is the way of signalling that it matters that contact is maintained. I think muddying the waters at the earlier end does not help, and I genuinely believe would raise false hopes.

Q357 Peter Bottomley: One of the things that children benefit from the most is consistent continuing care and control from parents. One of the things which, I think, has been absent, both from the evidence to government, from government and to this Committee is the fact that at least a quarter, if not significantly more, of children whose parents get involved in court proceedings, or their children get involved in court proceedings, get into persistent trouble with the law, and this is particularly relevant at the moment because of something happening in my constituency, Worthing, where old people’s homes are turning into children farms, children’s homes, without the caring authority even notifying local social services or police that troubled and troublesome children are coming. We will be having a separate meeting with Lord Filkin about this. What is there in all the processes and procedures that in some way, first of all, alerts parents to their children’s needs for this care and control so they have worthwhile activity rather than being involved in worthless activities where they create other victims and become victims themselves, and how does the integration of government start setting some kind of aim, if not targets, in reducing the dramatic increase in the trouble that children get into when they have troubled family backgrounds?

Margaret Hodge: I am not sure this is the appropriate forum in relation to the programme, but I am happy to talk about the issue of looked after children and those particularly placed outside their area where I think you are quite right to raise the issues that I know are particularly pertinent in your constituency at present. I am happy to deal with that, but I am not sure it is totally relevant to the debate. Parenting Plans. There is a lot we are doing today, there is a real menu of propositions that we are putting forward, but the Parenting Plans and the developments we have made there which demonstrate in a much more practical way the decisions parents can take around arrangements for their children which really put the child’s interests first, are part of the practical things that we are doing in our armoury to get parents to focus on the interests of the child and give them the stability, continuity and consistency that, I agree with you, is utterly central to the good outcomes later in their lives. What are we doing? There they are. I hope Committee members, if they have not received them, will receive them. I will make sure that you receive copies of those today. What are we doing to try and counter some of the poor outcomes that children from separated families can have if we do not manage to get the contact arrangements sorted out? That is part of my much wider programme of reform for children’s services, and I would simply say two principles underpin that reform. One is to try and spot the signs of things going wrong much earlier, so as to intervene earlier to strengthen the preventative services, whilst always realising that the protection service is important, but getting a shift focused to prevention. The second principle which underpins the reform programme is trying to reconfigure the way people respond to children’s needs by building the services round the needs of the child, with the child’s voice being central. Instead of having a child, for example, who may show in a school the first signs of distress by truanting or bullying or whatever it is, just having that happening in isolation, people working in the school will be working much more closely with the family doctor or with the health visitor or with other relevant professionals so that they really do work round the needs of children. There are lots of ways in which we are doing it, but those are the two principles underpinning our reform agenda.

Q358 Peter Bottomley: Can I observe that that is a proper response for what the professions might do, but if I try to talk about more confident, more competent parents, good enough parents at a time of fractured or fracturing relationships, is there anything in the Parenting Plans which mentions children getting involved in crime and is there anything in what parents can be alerted to about the extra practical things they do to fill their children’s lives with worthwhile activities rather than just being cut adrift?

Margaret Hodge: There is a lot in there about the practical things that parents should do. Do we talk about crime? I think the answer is, “No”.

Q359 Peter Bottomley: Yet one male child in four by the age of 18 or 20 has been convicted of a serious criminal offence?

Baroness Ashton of Upholland: Can I add two things on that? The first is that within the proposals, the curriculum and PSHEs the whole question of family breakdown is going to be more fully developed in terms of teaching materials so that young people understand (a) that it may happen and (b) the consequences of it for themselves and for their own children potentially of which the impact on the children would be a critical part. Secondly, looking at some of the mediation proposals that we have and the family resolution proposals too, part of that is the opportunity to talk about the impact on children of parents not reaching agreement and not finding ways through to the benefit of their children, of which precisely the point you make about a child who feels in an impossible situation, who may find themselves suffering educationally, socially and otherwise (which, as know, can be the slippery slope, as such), would be part and parcel of it. We do cover it, not in a heavily profiled way, but in terms of those two different aspects. All of this is part of Every Child Matters. All of this is about the integration across government to develop policies for children that mean that they get the best start, the best future.
Margaret Hodge: One final point. These are consultation documents, so no doubt the Committee also will wish to express its view, and I hear what the Honourable members say.

Q360 Chairman: What do you say to the charge that these proposals announced today are unambitious and do not carry us any further forward, indeed represent a step back, in some respects, from the proposals that were produced in 2001, the Making Contact Work proposals to which the Department responded in 2002?
Margaret Hodge: I am disappointed by that assertion.

Q361 Chairman: It is a question lots of people are asking.
Margaret Hodge: Are we going to make people happy out of this? Are we going to find an answer to every individual problem that individual families face? I think the honest answer to you has to be “No”, we will not be able to do that: because the best way of resolving these issues is for adults to change the way in which they behave when they try and determine the future for their children. What we are attempting to do, and I think the package is pretty comprehensive, Chairman, if I may say so, is to put this whole emphasis on supporting parents to mediate, conciliate, find their own solution without recourse to the adversarial litigation that takes place in the court room. There are a lot of carrots, in a sense, in that side of the agenda to bring people together, and at the other side of the agenda what we are then doing is introducing a set of sticks. I think it is an ambitious package; I think it is a comprehensive package. Will it work in 100% of cases? No. That is because there is a limit to what we in the government, the courts, the mediators, anybody, can do to actually reconcile conflicting adult individuals.

Chairman: You will have to come back to us at that point because it really comes up here to compulsory mediation, which is the notable absence from the proposals announced today. Mr Dawson.

Q362 Mr Dawson: We had some excellent evidence last week from the National Family Mediation Service which was very encouraging about the benefits and potential of mediation, and it is good that the Government are committed to it, but certainly what we have got from a very experienced practitioner there was that it was a view that, where it was safe (and mediation would not be used where it was not safe anyway) there was nothing wrong with the degree of compulsion placed upon people to undertake mediation. Why have the Government not chosen to go down that particular route?
Baroness Ashton of Upholland: We did consider that. We talked to a lot of people involved in mediation. 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”, because the situations that arise with some of these cases, as you will know, Mr Dawson, are very intractable. People find it very difficult. It just might not be possible in all cases, and it might not be the right solution in all cases. Therefore we did not want to make it compulsory. That does not mean, in any way, that we do not think it is a really critical and important path to go down for a huge number of people, but, we felt, compulsion suggests that it is a solution, but it cannot always be.

Margaret Hodge: There is an expectation, or there will be—there is in some instances and there will be increasingly—right through the system that the first port of call is mediation, where it is safe to do so. Looking at the evidence that you did get last week, the argument appears to be whether there should be compulsion about whether mediation should be considered, nor whether there is compulsion about whether mediation should be entered into. I think, again, we are on the margins here, because certainly in the Family Resolutions Pilot, in the work that Elizabeth Butler-Sloss (the President of the Family Court Division) has done, there is an expectation right through the system that the first port of call will be a consideration of mediation, and I think that is an important distinction.

Q363 Mr Dawson: Do we not have a significant anomaly at the moment? You are quite right to point out that the requirement would be to at least explore the option of mediation, but that is something which is imposed on publicly funded court users at the moment in order to guarantee the continuation of that public funding. Obviously the same pressure does not apply to people who are funding themselves, and the evidence that we have heard is that that can undermine the whole process where you have one party with significantly less pressure on them than the other?
Margaret Hodge: The judgment is difficult on this one. It is whether you think it is appropriate to force people into sitting in a room staring at each other and refusing to talk each other.

Q364 Chairman: You do think it is appropriate if public funding is involved?
Margaret Hodge: What we are saying is that where public money is strongly involved, it would be sensible to try and go down that route. 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 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.

**Q365 Mr Dawson:** I am encouraged by the statement and by Next Steps that you are also looking at other ways of involving children in mediation. Are you able to say anything more at this stage about how you are proposing to do that?

**Baroness Ashton of Upholland:** We are looking at the whole question of how do you make sure the child’s voice is heard across the court system? For many children the voice can be heard through the parents, even though they happen to be in court, and I would not wish to take that away. For quite a lot of children that will be not appropriate, and the role of the CAFCASS officer—and Margaret may want to talk more about that—will be critical in listening to the child’s views. I know there is some discussion about where to position that within the process, whether the child should be listened to first before meeting the parents, and that is in a sense an operational question to look at what works best as we roll out some of these initiatives, and, of course, finally, there is the question of whether a child needs to be legally represented at the other end of the spectrum, but that will be there, quite rightly, because having a solicitor to represent you does not necessarily equate to learning effectively what the child wishes to have. Central to this must be the child’s position in the process and making sure through the courts that we know the child’s wishes and feelings, but—and it is a huge “but”—not asking the child to decide or make choices, for all the reasons that you would expect.

**Q366 Mr Dawson:** Moving on, if I may. We have touched on funding already, but I am certainly not one of those who thinks that no changes have been made. I think that what has been proposed would be a transformation and a huge cultural shift in the way that the courts and society deal with the problems around relationship break up; but in developing Parenting Plans, in court conciliation, Family Resolutions Pilot Project and in developing mediation, in developing the other S in CAFCASS much more effectively than it has been, there is a massive results implication in this, is there not? Can you say more about the ways in which these particular things are going to be funded, and are there, in fact, any savings that could develop from changing the emphasis so much away from the current system?

**Margaret Hodge:** We have over time put more money into mediation, and I have said we will continue to seek to add to the resources there. When I first got responsibility for contact centres there was not a budget line. We now have a solid budget line, and we have announced today we are increasing that in 06–07, 07–08, to £7,000,000, if my figure is right, £7,500,000, extra, which no doubt you will want to talk about in greater detail. I think we have now put the building blocks in place which ought to ensure that CAFCASS provides the sort of service that the Committee aspires for it and that we aspire for it and actually the families and children aspire for it, and included in that I think the budget—again my figures may be wrong, and I will correct them to the Committee if I have got them wrong—when we inherited it, was about £95,000,000.3 We are talking now about an 05–06 budget of £107,000,000. So that is a pretty considerable increase, some of which we have secured at a time when public funding has been rather less generous than before. We have also secured the money to ensure that the issues around domestic violence with the new definition of “harm” and the forms and the training have been properly funded. I feel pretty good about the extra money that we have been able to put into the system. I also think if we can get CAFCASS right, particularly in relation to these issues around private law, and if we really can get everybody involved, the judges demanding fewer reports and CAFCASS officers not writing these lengthy documents, which are not only costly to write but costly to consider, there should be some resource redistribution towards the conciliation and the mediation that we seek. Just to correct my figures: £107,000,000 is 04–05, not 05–06.

**Q367 Peter Bottomley:** The Family Resolutions Pilots Project, which we understand to have been running for some time, why was it not possible to have an early interventions project alongside to see which worked better?

**Margaret Hodge:** I know there has been a lot of discourse on this issue, and probably, if I reflect on it, the mistake we made was renaming it. We did it for very good reasons, and I think it reflects better what we are doing, but I think the renaming has caused greater hassle and misunderstanding than the benefits we gained from having a new name. This is an attempt to ensure that before matters get locked into court there is an early intervention.

**Q368 Peter Bottomley:** I am sure we will find some way of incorporating the very useful parliamentary answer I got, which can maybe save us a bit of time now. The only question I was asking was would it not have been possible to have had the Early Interventions Project Pilot running alongside the Family Resolutions Pilot Project?

**Margaret Hodge:** We are back on the issue of compulsion around mediation, and our current legislative framework does not allow us to have compulsory mediation. We could not, therefore, have had the same structure which existed in the Florida experiment. We could not have done that. What we have done is adjust, learn from the Florida and other experiments in this to fit in with our appropriate legislative framework. We have already had that debate. We could change the legislation and then we might try and do the experiment, but at the moment, under the current legislative framework, we have framed an appropriate pilot for our UK circumstances.

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3 Note by witness: Financial year 2003–04
Q369 Peter Bottomley: I think the Committee need to understand, in the absence of compulsion you cannot make it compulsory. I am not sure the Committee yet understands why it was not possible to have a project that brought in early intervention: because one of the reasons for changing the name was the fact that Family Resolution Pilot Projects are not as early as the Early Resolution Intervention Projects were intended to be?

Margaret Hodge: I would be interested in hearing from you, what earlier point before the first point when somebody tells the court they want to engage in litigation are you referring to? What earlier point?

Q370 Peter Bottomley: Again, I do not want to go through your parliamentary answer, which was useful?

Margaret Hodge: I do not understand it; I genuinely do not.

Q371 Peter Bottomley: I hope you do understand it, because I thought I understood it when you made it.

Margaret Hodge: But I do not understand the earlier point. The moment people appear in court the expectation is that they will engage in the process of the Family Resolutions Pilot. At what point could we have sought an earlier intervention?

Peter Bottomley: I recognise that the roles have been reversed?

Chairman: Is this customary? It is for us to ask you the questions!

Q372 Peter Bottomley: The earliest is when parents start believing they are not going to reach agreement without the use of a court, and from that point the time they actually appear in court provides a gap which would allow early intervention?

Margaret Hodge: I am sorry to interrupt, because this is quite an important point, because I know there has been a lot of criticism. If parents decide they cannot take a decision without going to the court. What do they then do?

Q373 Peter Bottomley: They then get professional advice, normally, and they then find themselves in a queue to go to court and then weeks follow. Once they get to court, the present—

Baroness Ashton of Upholland: That brings in two of the proposals. One is the role of the professional advice, which is from a solicitor. Two things on that: one is the accreditation, so that we are clear about what the role will be, and also what we call family help, which is enabling solicitors to provide a longer session with parents in a sort of mini-conciliatory role to see whether there is room for manoeuvre, which I think is quite important when you look at that; also for the parents to think about the other opportunities that they will have to get the kind of information and advice as well. So, when they arrive at that point, what we are doing is ensuring that we have provided for them to get the support. The other one is collaborative law, which is where they have an option to each have a solicitor, a model that seems to be working quite well in Canada particularly, also in the US, but Canada is the model I would look to, where they each get a solicitor and the four of them, in a sense, within a court setting, quite often, but not in a court room if I can make the difference, agree to try and reach a decision. If they completely fail, then those solicitors go out of the picture and it goes through the normal court process. Those are examples where we have tried to develop new models that will fit different circumstances, because the difficulty for this group of people who arrive in court is that they are very varied in their relationships with each other and with the children in question. I am sure, if you have talked to some of our judges, they will describe how different and difficult it can be. Those are some other models that, alongside the pilot, we hope will provide different opportunities, depending on the needs of the parents in those circumstances.

Margaret Hodge: Can I, finally, make it absolutely clear to Mr Bottomley that the moment an application is lodged with the court the applicants are referred to the Family Resolutions Pilot. They do not wait for that first court appearance. The moment the application is lodged, before that application lodged, the court will not know about the family.

Q374 Chairman: The difference might be, of course, if the solicitor was saying to the family, the two parents. “There is no point in my making an application to the court unless you first go into this project and you embark on a Parenting Plan straightaway as part of this process”?

Margaret Hodge: I hope that will roll from the fact that the moment they do make the application they will be referred. That follows, in a sense, does it not?

Chairman: Before I call upon Mr Vaz and Mr Cranston, I am going to ask anyone to declare any interests they might have.

Keith Vaz: I am a non-practising barrister and my wife holds a part-time judicial appointment.

Ross Cranston: I am a barrister and Recorder.

Q375 Keith Vaz: In its written evidence the Equal Parenting Council has complained that “the children minister, Margaret Hodge, has looked my colleague and me straight in the eye and told us that if a custodial parent is determined enough to exclude other parent, there is nothing a court can do about it. With that sort of leadership on this issue the Government is beaten before it starts.” Do you remember that conversation?

Margaret Hodge: Those precise words I do not, but, in a sense, I have said not a dissimilar thing this morning at the Committee, that at the end of the day the authority and power of the courts, the Government and any other agency will not of itself resolve very, very conflicting relationships, and to pretend that we can I think is wrong. It is an interesting area, because we are often, Chairman, accused of being the Nanny State on many issues, and this is an area where I am saying actually recognise the limits of the state to resolve issues within the family, and that was really the point I was making. If it was interpreted in that way, I apologise, because clearly the propositions that we are putting
forward today are trying to strengthen the armoury of both judges and ourselves, but we may not be able to resolve all of these things.

Q376 Keith Vaz: There is no need to apologise if the statement is true and that is what you believe, but do you accept that the court system is currently failing fathers?

Margaret Hodge: I think the court system is failing families, and, importantly, the court system is failing children. Probably I would say that as children’s minister.

Q377 Keith Vaz: Do you think that there is perceived to be a bias against fathers?

Margaret Hodge: I am absolutely clear that there is not a bias; there is not a gender bias at all. The reality, as we all know, is that in most families the mother takes prime responsibility for the care of the children, and if one needs to decide with whom the child will live, you will tend to place the child with the person who has prime care and responsibility. That is changing a bit, and I welcome that, and I welcome the increasing role of fathers in the family, but, equally, do not let’s look at this through rose-tinted spectacles. That is the reality of the situation. Where I do think there is a problem in the court process---and I think we all agree on this in government---is that because it often takes so long to get to court, to get the final decision, you are then in a situation where the status quo becomes the best interests of the child, and, if there is a sort of bias in the system, it is the length of the proceedings which then lead to a situation which could of itself be interpreted as a bias.

Q378 Keith Vaz: Baroness Ashton?

Baroness Ashton of Upholland: If you look at the evidence that I know the Committee has already received, I think the President (Dame Butler-Sloss) talked about an average of about 40 weeks in private law, but I know you have also had evidence talking around 58 weeks.

Q379 Keith Vaz: That is the delay. I am I am talking specifically about a particular group: fathers feeling that the system is letting them down because of what they perceive to be a bias in favour of mothers?

Baroness Ashton of Upholland: Indeed. I was adding on to the point---

Q380 Keith Vaz: I take the point about delay?

Baroness Ashton of Upholland: ---about how the perceptions of bias would be there. I am clear, and I know the judiciary in all their evidence to you have been clear, that it is not about any kind of bias in the proceedings that go before the court; and if one looks at the numbers of orders that are given for contact, and so on, I think that is very clear. The question is two-fold. I think, the underlying issue, because particularly for fathers who feel, quite rightly, totally aggrieved and distraught on occasions about what happens, we need to look beyond what they perceive to what the practical realities are of the problem that they are faced with in not seeing the children who they clearly love and wish to see and should see. The answer to that comes in the whole series of ways in which we try to address it, and it is about delay, it is about enforcement; it is also, if I might say, about the real cultural shift which we need to make, which is recognising that fathers play, and should play, an incredibly important role in the upbringing of their children and that needs to be recognised in a societal way. If it has been determined to be in the best interests the child to see dad, it is completely unacceptable for another parent, unless there are issues of harm, to refuse that. It is about the message getting out from the courts, but also from all of us that this is a really important statement, and the implications for children will be entirely negative if that is not done.

Q381 Keith Vaz: I asked the President of the Family Division if she had met the various groups, some of them more moderate than others, and her response was that she would not; she would obviously meet people she felt appropriate. But, as politicians, there is nothing to stop be you meeting the likes of Sir Bob Geldof and other groups to discuss these issues. Presumably you have had meetings with Fathers4Justice, the Equal Parenting Council, Sir Bob and Uncle Tom Cobbly and all, because it informs you better about the subject that you are involved in. Is that right?

Margaret Hodge: I have had meetings with Sir Bob Geldof himself, in fact a lengthy two hour attempt to see a coming together of views, and I have met the other main fathers’ groups. I have not met Fathers4Justice, and I think I would not do so.

Q382 Chairman: Except in rather unfriendly circumstances.

Margaret Hodge: They attempted to meet me!

Q383 Keith Vaz: In the ministerial foreword today obviously we have three cabinet ministers who will tell us that they have 10 children between them, so they must have some practical knowledge of dealing with children it says, “The Government firmly believes that both parents should continue to have a meaningful relationship with their children after separation as long as it is safe and in the child’s best interests.” This is not happening at the moment, is it?

Baroness Ashton of Upholland: It happens in a great number of cases. I do not think we should lose sight of how many cases are resolved out of court (90%) and how many cases within court are resolved and work. Nor should we lose sight of the fact that a lot of parents who do have prime responsibility for children would love their children to have more contact with a non-resident parent. I think it is important to put it in context. Having said all that, which I know the Committee accepts, there are cases where it does not work and where we have a parent, quite often but not always the father, who feels quite understandably aggrieved, and the work that we have done with the fathers’ organisations, who have been very important in the work that we have now produced, has been to try and address what I
describe as the underlying practical issues that will make the difference for them and enable them to see the children they love. 

**Margaret Hodge:** The ONS study, which no doubt your Committee is well familiar with, showed I think this really interesting finding, that there are twice as many resident parents who felt that there was not enough contact with the non-resident parent than there were non-resident parents who felt there was not enough contact with the child. I know the statistics are far from perfect in this area, but that is an interesting perception. Again, if you think about that in practical terms, CSA issues and all that sort of stuff, there are too many fathers who disappear from their children’s lives, not because the mothers try to stop them—the mothers want a continuing relationship—but because they chose for some reason or other to do so. There are lots of features and aspects to this issue, part of which you are addressing in your inquiry.

**Q384 Keith Vaz:** But, going back to my original question, if the resident parent digs her heels in—because it would be more likely to be a woman than man on these issues on the statistics that we have—there is nothing we can do about it. Even though the foreword says, “In time it needs to be socially unacceptable for one parent to impede a child’s relationship”, it is one thing saying it should be socially unacceptable, which means a cultural change, and another thing about government action to try and do something to prevent this happening.

**Margaret Hodge:** The draft legislation, which we are deliberately putting through pre-legislative scrutiny so that people have an opportunity to consider it properly, is largely about the additional enforcement powers that we wish to give the courts to ensure that there is greater contact between children and the non-resident parent.

**Baroness Ashton of Upholland:** And at speed.

**Q385 Chairman:** Would you like briefly to describe those for us: the new powers that you are intending to introduce in the new Bill?

**Margaret Hodge:** What will be in the Bill?

**Q386 Chairman:** On this particular point: enforcement?

**Margaret Hodge:** I think I am in some difficulty. I am never quite sure about the protocols about this issue.

**Chairman:** You gave an indication, certainly ministers on the radio this morning gave an indication, that there would be powers of enforcement, and I think we are therefore entitled to know what they are.

**Q387 Ross Cranston:** It is at paragraph 98 of the document. 

**Baroness Ashton of Upholland:** As you will know, it is quite difficult when you look at enforcement to ensure that in doing enforcement you do not, in a sense, act against a child’s interests, so we have considered issues to do with whether you had a custodial sentence or whether you fined a parent. In the end those are questionable in terms of whether they are acts for the child, so the areas we are examining are the question of community service, looking at whether we can make parents go into parenting classes to understand the implications of what they are doing, and to look at areas such as curfew, because one of the things that is raised is that there will be a dispute between—. Let us put mum and dad in the stereo typical view. Dad turns up for a visit. Mum does not answer the doorbell. Dad goes back to court. Mum says he never came. He says, “I came, but you were not in”, and so it goes on, so trying to enforce the person being in the house available for when the child goes on the visit. Those are examples of the areas that we want to look at in pre-legislative scrutiny.

**Q388 Chairman:** You have not quite decided yet whether you want to take these powers?

**Baroness Ashton of Upholland:** We are going to take powers. The issue in terms of the pre-legislative scrutiny is are these the most appropriate enforcement opportunities to give the courts a range of possibilities, again, so they can look case by case and try and enforce it? I do not want in any way to suggest that the cultural change is not what I think ultimately has to happen, but I would not want Mr Vaz, in particular, to feel that we are not also backing that up by saying it is unacceptable. The other question is the speed with which it comes back to the court: because one of the issues around delay is that if months and months go by and dad does not see the child, the status quo in a sense is that the child has not seen him, and if the child is quite young it is a long time in the child’s life.

**Q389 Keith Vaz:** Yes, but, as the Chairman as said, it is not just about contact: because you can get these orders, but if they are not enforced—I have had many examples of fathers in particular who have come to my surgery to complain exactly describing the situation that you have described. We also had the President giving evidence to us telling us that she felt it was wrong for people to clock-watch, but I have some fathers who come and plead with me and they say, “She did not open the door for 10 minutes, so I have lost 10 minutes.” Those 10 minutes, if it is one visit every fortnight, are absolutely crucial, and unless parents believe the courts are going to act to enforce, since there are no other measures that we can adopt to increase contact if there is not an order, then there is going to be no confidence in the system?

**Margaret Hodge:** Cathy has mentioned a range of the community service based orders. There are others. I can give you another instance. There is something about a big heavy fine on a poor mother which seems inappropriate, does not appear to serve the interest of the child. However, for example, fining a mother for the cost of the travel. If the father travelled and was not able to see his child, fining for the cost of a holiday that did not happen. Those sorts of things are the community-based orders we are looking at. Can I make another point? This is a CAFCASS point. If a court makes an order, at the moment nobody does anything, and, if the order
does not work, one of the parties has to come back to the court. What we would like to see CAFCASS doing over time, and it is clearly part of this refocusing and reconfiguring of their work, is part of their job ought to be that the order is implemented; so you ring up.

Q390 Keith Vaz: But some of them are very proactive; they actually check whether the access has taken place. They ring up on a Monday morning?
Margaret Hodge: Quite. The earlier you intervene the better you can do it, the more you can conciliate, the more you can mediate.

Q391 Peter Bottomley: Early intervention is a good idea?
Margaret Hodge: Early intervention is a good idea. I have to say to Mr Bottomley—that might have been said in facetious way—we have always said early intervention is a good idea.
Baroness Ashton of Upholland: Can I add one other thing to Mr Bottomley on that? One of the other issues I am sure you have had from parents in your surgery as a constituency MP is where children simply refuse to come on an access visit because they have been told that dad is impossible, and this that and the other. One of the things we are going to look at—I do not have any solutions to this, but I did not want you to think that we have not got this under consideration—is what advice and support we can give to children in that context so that they do get impartial support to deal with those issues and not feel, again, that they are having to make the kinds of choices that are inappropriate for them to have to make. That is an important issue as well.
Chairman: I think Mr Soley wants to come in.

Q392 Mr Soley: One question and part observation. First of all apologies for missing the earlier part; I had an appointment. This issue of the perception of fathers, which actually is very important because the perception is real even if there is not actually legalistic discrimination, how much have you considered this: that it is partly the role of the man in our society where it is almost an expectation, though it is not totally, obviously, that they get to be the ones who leave the home? The representation of the issue of the resident parent being in a stronger position anyway, that is compounded by it. I also ask you this: are we not under-estimating the feelings of the child on this, because the child will often be angry or dismayed as a result of the parent who leaves the home and may also find that more difficult to cope with in terms of the parent coming back to see them. Is it not right that the three factors that come together here that we have to give more attention to is obviously the issue of delay and clearly also the issue of enforcement, because that allows manipulation by the resident parent, but the other factor is the CAFCASS work plan paying more attention to this very difficult area of the frustration of the child about the person who has left the home?
Margaret Hodge: I agree with everything that you have said. I think one of the reasons that this is an issue that we are all thinking about at present is the changing nature of the family—and I do not underestimate that at all—in two regards: first of all, that more children are going to experience separation and divorce of their parents—it is a third now of children who will go through that, so it is impacting on a large number of children—and, secondly, there is a change in the role of fathers. In my lifetime, from when my kids were little to now seeing my grandchildren, you see a fantastic difference. When I used to go to the primary school there were not any men there. You now go to a primary school and there are a growing number of men picking up their kids. Even as I go round Sure Start centres, which I spent a lot of time doing, and they did not exist 20 years ago, but you would not have seen dads there and now you see a growing number of dads with their very little babies who have care of the babies. That means that the demands of society and the legislators and all the agencies working with children and families has to alter to have regard to that, and I have no doubt—it is one of the interesting things—we will to return this again over time as the nature of the family changes. If I look at it now, I think a sort of legislative framework putting the interests of the child first, an emphasis on mediation and conciliation and getting it outside the courts and then a tougher armoury around the enforcement area is the appropriate response in society as we know it today, but all the social workers I talk to, all the CAFCASS workers, all the lawyers, the judges, all the solicitors are all beginning to think through the changing nature of the family. If you had gone to a solicitor 20/25 years ago, they would have said, “Mum will get the child”, and actually that is no longer necessarily true, which is why these allegations that the courts are gender bias are false.
I think over time that will evolve and it may require a different legislative settlement in five, 10 years’ time.
Baroness Ashton of Upholland: Can I add to that. One of the issues, though, again talking about children, is continuity for the child. What happens in so many families in the tragedy of family break down is that parents will try and think about keeping the child with its familiar lifestyle—its home, its school, its friends, and so on—and that, almost by definition, has an implication about where the child will stay, not necessarily with whom, but where, and I think we need to make sure that we do not lose sight of that as being a critical factor in how children develop. It is certainly a factor, we know, in what happens to looked-after children when they not only lose their family, which may be for very good reasons, but they then get moved away from the things that they need, which are their family and their friends, which I think goes back to the point Mr Bottomley was making about children’s homes as well, where children get moved away and lose all of that and have to start afresh, which is incredibly difficult if not impossible in some circumstances.

Q393 Mr Soley: But that also compounds the problem for the parent who has moved away, because all the other things in the child’s life stay
constant—school, friends and so on—the one thing that is not constant is the parent who has gone, man or woman, and that creates a problem for the child in understanding why that is and why they cannot come back. We all know the tear-jerking statements you get in situations like that. I do not think we draw any grand conclusions about that. I think it is important to put it in the perspective of understanding why the non-resident parent is in a much more vulnerable position than the resident parent in terms of dealing with that stress.  

Baroness Ashton of Upholland: But there are some wonderful examples where parents make it work as well, and there are some fantastic examples where children love having what often turn out to be two bedrooms, two homes, two stereos, two this, and it can work. I do not think we should under-estimate that children, given love and care, will make it work for themselves as well as long as parents can act in a proper and reasonable manner. There are lots of children all over the country for whom this works because parents do it well.  

Mr Soley: I agree with that.

Q394 Ross Cranston: I would like to ask a series of questions about courts. I, for one, certainly welcome your commitment in the paper to back improved case management. You mention at paragraph 76 target times, and I was wondering how they are going to be developed and what they might look like. Is that going to be you or the Court Service or the judges?  

Baroness Ashton of Upholland: I am sure you have seen the President’s work this morning as well.

Q395 Ross Cranston: Yes.  

Baroness Ashton of Upholland: What the President is outlining—because it will be for her to work on it, it will be for the judiciary in this context—is that we will have first hearings within four to six week is her ambition, and this deals with the issue, as has been already noted by the Committee, of delay in getting that initial hearing in place, and she goes on to talk about other aspects of the Court Service in terms of continuity of the judiciary, and so on. So that is the ambition for that.

Q396 Ross Cranston: So it is her statement?  

Baroness Ashton of Upholland: Yes, it is.

Q397 Ross Cranston: Which you are supporting?  

Baroness Ashton of Upholland: Yes.

Q398 Ross Cranston: You also mentioned, and you foreshadowed this earlier, the improvements in terms of enforcement, and, again, I for one would welcome that, and you have mentioned draft legislation. When is that going to be available?

Baroness Ashton of Upholland: That is for the Department for Education and Skills.  

Margaret Hodge: Very soon.

Q399 Ross Cranston: Good. We might hold you to that one.  

Margaret Hodge: Yes, do.

Q400 Ross Cranston: May I just ask you two very specific questions and it may be that you cannot answer. Just comparing the Next Steps document published this morning with Making Contact Work in 2001, it seems to me that there were at least two points which seemed to be dropped. First of all, there was the power to allow courts to refer parents to a psychologist or psychiatrist, which was going to be publicly funded at first instance, and the other one was to allow courts to have the power to refer a non-resident parent to a specific education or perpetrator programme. Has it been a conscious decision to abandon these and, if so, why?  

Baroness Ashton of Upholland: What Lord Justice Wall was talking about in that particular context was the opportunity to look at whether one could have a professional assessment. 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 not work like that. I think they would find that unacceptable in terms of clinical practice.

Q401 Ross Cranston: So the problem is not the public funding side?  

Baroness Ashton of Upholland: No, it is not. It is that one would not be able to refer somebody in that manner without breaching all of the ways in which we deal with medical good practice.

Q402 Ross Cranston: What about the education programme, the second aspect?  

Margaret Hodge: It is the point at which there will be a power to refer either party to particular programmes as part of the enforcement powers.

Q403 Ross Cranston: The Making Contact Work document suggested that might come earlier. Could you write to us about that one?  

Margaret Hodge: Yes. I am just trying to think through the compulsion point. It comes back to the compulsory mediation point and whether at some point you could say to someone you have got to go to mediation, you have got to go a parenting class or you have to go to an anger management class or whatever. I think that would be difficult.

Baroness Ashton of Upholland: One of the pieces of work that we are doing, which is being led by Baroness Scotland, in terms of the whole question of domestic violence and perpetrators is to examine where best referrals and perpetrator programmes might take effect, because critically beyond this discussion there is an issue about ensuring that those who perpetrate domestic violence do not continue to do so and there are real issues about their relationship with their children as well. I will write to
you in that context to set that out because I think that overlays this in a sense and it is being looked at by a group of ministers.

**Q404 Chairman:** On page 25 of the paper there is a passage which bears the signs of a bit of redrafting. Maybe I am being too forensic, but it looks as though someone decided at the last minute that it needed to be changed. It raises the question about how you are going to deal with the judiciary. It says, “We will work with the senior judiciary to find out the best way to strongly encourage parties to attend mediation.” It looks to me as though somebody changed that sentence at some point. What does that mean? Is it that you are going to work with the senior judiciary who are not going to be given a power of compulsion in circumstances like mediation or the situation we have just described but they are going to tell you of some other way in which you can make parties go to mediation?

**Margaret Hodge:** I think this is part of things like the Family Resolutions Pilots where there is an expectation there. The way that that has been designed is that there is an expectation that people will participate in mediation and conciliation processes. We want to see how that works. We want to learn from that and the evaluation of that scheme as to whether or not there are other ways that we can use, through directions or expectations or whatever, to strengthen the trend towards mediation and conciliation.

**Q405 Chairman:** Are you sure it was not just a vague aspiration, someone saying, “We’d better tighten this up a bit”?  
**Margaret Hodge:** No, it is not. All the collaborative law changes, the in-court conciliation, the changes within CAFCASS, are quite dramatic changes. We need to evaluate them consistently and then, if necessary, make further changes to improve the process more.

**Baroness Ashton of Upholland:** We have had conversations with the judiciary and they are clear that, again bearing in mind that each case is different, there are critical fault lines in the process where the judge is able to strongly recommend things to the parties that might be successful. What that is suggesting is that we need to think through, in the light of what the President is doing in terms of the way she is looking at private law cases and the proposals that she has put out this morning, how we build on that and inject in to that some kind of mediation services that might be available. So it is not just a woolly aspiration. I apologise for the grammar.

**Margaret Hodge:** We could look again, if experience tells us to, at the court rules and see whether or not we need to amend those in any way. I hope the Committee will continue to keep a vigilant eye on this area and see how some of these proposals work in practice.

**Q406 Ross Cranston:** I think paragraph 51 is in your defence. I want to take you on to this issue of resources. Our special advisers dug out the figures for between 1979 and 2004 in terms of “judge power”. The Queen’s Bench Division went up from 47 to 74 judges, Chancery went up from 11 to 17, but the Family Division only went up from 16 to 18, which was a much lesser increase. You might want to comment on that. In particular, can you comment on whether you think there is the “judge power” available, first of all, to implement general case management and, secondly, the President’s framework? Is there an intention to increase “judge power”? I should say by way of preface that, having worked on the issues of case management over the years, I do not believe that “judge power” is necessarily a solution, but the Family Division increase is certainly much less than in other divisions of the High Court.

**Baroness Ashton of Upholland:** And certainly the President in her evidence to you was suggesting that there was a need to increase “judge power”. There is a review going on at the moment involving the senior judiciary looking at whether we have the right number of judiciary at present but also looking at future trends as well, because it is quite important to be ready for that and that will come to some conclusions in the not too distant future and recommendations to the Lord Chancellor will take into account these issues. So that is under review. The second thing I would say is that when one looks at the unified courts structure that we are examining, as well as some of the proposals to shift from the crisis management in the sense that that is the court process to trying to get resolution earlier, the ambition is that the resources will be used differently as well as the additional resources coming into play. What we are trying to do by virtue of the review and also the implementation programme for this is to see whether we have enough judges in the right place and whether we have also got the right level of support being shifted, if that is the right decision, to look at what happens before people end up in the courtroom.

**Q407 Ross Cranston:** Have you got any idea when this might report?

**Baroness Ashton of Upholland:** It is in the next few weeks or the next couple of months the review is due to finish. I am not sure whether it will report formally. It is for the Lord Chancellor to determine, having looked at this whole thing holistically, whether the resource is in the right place so that we address those issues, but certainly the President has made that point and we listen very carefully to what she says.

**Q408 Ross Cranston:** We would like to know as soon as any decisions are made about that because obviously if you do not have the resources to provide case management and to implement the framework then you are not going to achieve anything.

**Baroness Ashton of Upholland:** If one looks at the framework that the President has put out, quite a number of those things are about the best of good practice, they are not necessarily about new resources.
Q409 Ross Cranston: That is why I made the point that “judge power” is not necessarily the answer.

Baroness Ashton of Upholland: But because the President feels very strongly about these issues they are taken very seriously by the Department.

Q410 Mr Dawson: Is the quality of our judges good enough? The President said in evidence to us that if judges ignore issues of abuse and domestic violence she would consider removing their ticket from them. There have been some disastrous decisions in the contact cases made by judges, have there not?

Baroness Ashton of Upholland: I am aware of a disastrous case that has come to my attention.

Q411 Mr Dawson: 29 children have died on contact visits, some of them ordered by judges against the advice of CAFCASS for instance.

Baroness Ashton of Upholland: If one looks at the 29 cases that have been put forward, the vast majority of those have never been near a court. There are real issues when one looks underneath those figures to try and establish where the courts have played a role and what role that is. We all know from the press reports we hear about these awful tragedies that sometimes there is no indication the parent is going to behave in that manner and murder the children. They are issues often around severe distress or mental health or other issues of abuse and domestic violence. So it is not necessarily the case that there is any history or any suggestion of violence in advance. Where the case has gone to court, the President would always look very carefully at it and it would be for her to look at what the implications would be in those circumstances. They are all terrible cases. I simply make the point that not all of them have been anywhere near a courtroom where the courts could have intervened if they had been able to.

Q412 Mr Dawson: But any death is completely unacceptable.

Baroness Ashton of Upholland: I accept that.

Margaret Hodge: Mr Dawson knows better than anyone that these professional judgments around what is the appropriate decision to take in the interests of the child are incredibly difficult to make and sadly they are not always right, but they are not always right in the courts, they are not always right by social services, they are not always right by paediatricians and medical practitioners as well. Although we have got some very real, really tragic instances and we have all read that report, I do not think we should immediately leap from that to questioning the quality of the judiciary where they are being asked to make incredibly complex judgments just as social workers, doctors and others have to do.

Q413 Mr Dawson: I think everyone's judgment is open to question. Can we be assured that the new President of the Family Division will keep the actions in these very difficult cases very firmly under scrutiny?

Baroness Ashton of Upholland: I am sure the new President will do a fantastic job. He is a judge with an amazing record in terms of the work that he has done and I am delighted that he has been appointed. I think the critical factor in this as well comes back to making sure that the court, when it is making a decision, has as much evidence as it possibly can have. We all know that there is a link between violence to children and domestic violence. I hope the new forms that we are producing will play some part in that by being able to work with parents to ensure that if there are issues around domestic violence, those are recognised and recognised quickly.

Ross Cranston: I would just associate myself with your answers to Mr Dawson's questions and say that Lord Justice Potter is an outstanding judge and humane person.

Chairman: This is not a confirmation hearing!

Q414 Ross Cranston: Hilton and I also disagree about the next issue that I want to ask you about, which is the confidentiality or secrecy surrounding the courts. The President said that she thought that the courts ought to be more open. Yes, you would have to protect the names of children, you might have to protect certain of the evidence that is given, but in as much as there was to be more openness, that would have to be a change agreed to by the Lord Chancellor in terms of some of the rules. First of all, can you comment on the general principle about openness? We have had background notes about the situation in other countries. Secondly, could you say whether or not the Department is prepared to agree to a change in the rules?

Baroness Ashton of Upholland: You will know, Mr Cranston, from the 1992 or 1993 report on this through to the work that Sarah Harman has done in her reports on Canada, which I know have come forward to the Committee as well, that there is a huge amount of interest in this and the President herself has commented on this. The position of the Department is that we are very firmly of the view that the anonymity of children must be protected. I think one of the persons giving evidence to you talked about their clients, on arriving at court, saying, “This is going to be in private, isn’t it?” and that is because there is a fear that people have. The issues around if one had a public presence what kind of public one would get, campaigning groups able to stand in the gallery and shout, that kind of thing, these are incredibly difficult circumstances where people are often in huge distress. 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 such an open situation that in a sense that risks justice being done. Justice must be done and justice must be seen to be done. The position of the Department is that we are in conversation and dialogue about this and I think the Lord Chancellor earlier this week said that he was interested to explore what we might do but within the very strict ground rules about the protection of children.

Q415 Ross Cranston: So you are going to take the lead from what the judges say, are you? Is that your approach?
Baroness Ashton of Upholland: It is not that we will take our lead from the judges. The judiciary have raised an important question, others have raised it too and we want to look very carefully to see how best we address that whilst recognising that what the judiciary are saying is that this is not about removing anonymity, this is not about creating a situation where people feel intimidated by who is in the gallery or anything like that, but about a greater understanding of how the family courts work.

Q416 Ross Cranston: Quite apart from that, the utilitarian argument, to make people understand the system better, there is the principle that we run our courts on a basis of open justice.
Baroness Ashton of Upholland: Indeed. There are differences, as you will know very well, between what happens in the magistrates’ courts and what happens in the county courts and as we move to a unified courts system we will need to review this in any event because the two systems are different.

Q417 Ross Cranston: Is there going to be a consultation paper about this or how are you going to take this forward?
Baroness Ashton of Upholland: As we move towards a unified courts system we will need to review the procedures in any event because we have different procedures. In doing that we will be taking account of all that has been said and trying to move towards our proposals on that. It will be for the Lord Chancellor to decide if he wants to do a formal consultation on that, but certainly we will consult and listen very carefully to the views that are being brought forward.

Q418 Chairman: Does that mean that you are going to discourage the judiciary from taking their own action where they think it appropriate, as they have done in a number of cases and giving judgments in open court, for example?
Baroness Ashton of Upholland: Not at all. That is for them to decide and it must be for them to decide. What I am merely describing is that as we move towards the new unified system, if one looks across and says what makes most sense, the judiciary will take their own decisions in their own courts as appropriate, as indeed they do. As they said in evidence to you, there were some circumstances, as in the case of the two babies, where, because there was a lot of press coverage, it was appropriate to keep that in the public view. That must be for them to decide.

Q419 Peter Bottomley: Among the helpful submissions was the Department for Constitutional Affairs one on 1 November 2004 where on pages 20 and 21 there are references to “changing the law to make sure that families could consult their Members of Parliament without breaking court restrictions.” I do not see any reference in the Green Paper today to that. Could we know at some stage what the proposals are and whether actual changes to the law are necessary?
Margaret Hodge: I think we have issued a consultation paper on that. I will make sure that you get a copy of that.

Q420 Chairman: We have it. We were anxious to know whether there is going to be progress because people come to their MPs wanting to reveal that they too and we want to look very carefully to see how

Q421 Peter Bottomley: Can we just make clear that at the moment there is no inhibition on someone talking to a Member of Parliament, it is actually disclosing information that is linked to the court?
Margaret Hodge: I do not know the answer to that. Do you want me to write to you on that?

Q422 Chairman: I think it might be wiser for you to write to us. My suspicion is that the party giving information might be at risk of contempt of court.
Margaret Hodge: Just in terms of timeframe, we want to have the changes in place by the summer of this year, but we do need to have a proper consultation on it.

Q423 Keith Vaz: What operational benefits have been obtained by the transfer of CAFCASS from the Lord Chancellor’s Department to the Department for Education?
Margaret Hodge: I think the Committee did an extremely thorough bit of work, which I took very seriously when I first got this job, on the way in which that transfer had not been handled very well. I think we all recognise that in its initial stages the creation of CAFCASS was not a success for children

4 Note by witness: The Minister was referring to CAFCASS’ creation rather than the transfer from DCAn to DfES
Q429 Keith Vaz: Earlier in your evidence you talked about funding and you gave us some figures for 2004–05. Is there going to be an increase next year?

Margaret Hodge: There will be an inflationary increase. It was £12 million extra we gave them, which is a pretty substantial increase in their budget. I want to see that working properly. You have to give that time to work. The answer is not just money.

Q430 Keith Vaz: One of the problems is that if you do not have enough CAFCASS officials then the reports do not come out and that adds to the delay in the system. Is there any knock-on effect of the problems in CAFCASS, which obviously are being addressed but there are still problems, to the courts system?

Baroness Ashton of Upholland: We rely on having a good complement of CAFCASS staff. I am very, very hopeful that the changes that Margaret has put in place and the new board and new chief executive will make a great difference. One of the critical changes which is being looked at is the way in which CAFCASS operates and the move away from the lengthier report, which may on some occasions be inappropriate, to focusing on the issues that need to be addressed and it is also about using the CAFCASS resource more appropriately. So linked in to the changes that we have got today and, of course, linked with the courts is making sure that we use these very valuable, highly trained specialists as appropriately as possible. If we get that right then we will be able to use that resource better, which of itself will make a huge difference to them and to their morale.

Q431 Keith Vaz: I think both of you coming to give evidence to us today is great. There is a ministerial committee meeting, is there not? As ministers you meet to discuss these issues, do you?

Baroness Ashton of Upholland: We do.

Q432 Keith Vaz: How often?

Baroness Ashton of Upholland: Geoff Filkin and I meet regularly. We have a steering group which deals specifically with the public law issues, because we have a target around the 40 week expectation which includes all the different organisations and it includes CAFCASS. Geoff and I are considering whether we ought to incorporate into that some of the issues around private law without moving off the track. Geoff and I meet regularly, probably fortnightly to monthly depending on diary commitments, to go through all the issues. This morning before I came to the Committee we were talking about setting up a group to consider how we take forward all of the proposals in the Green Paper.

Q433 Keith Vaz: Obviously ministers will meet. Where does the liaison kick in at official level?

5 Note by witness: This is incorrect—there will not be a further inflationary increase in 2005–06. In 2004–05, CAFCASS was allocated a budget of £107 million, which represented a £12 million increase to its 2003–04 budget, in order to enable CAFCASS’ backlog of unallocated cases to be cleared. It has now been decided to sustain this increase into 2005–06. The budget of £107 million represents a 12.6% increase over the period 2003–04 (£95 million) to 2005–06 (£107 million)
Margaret Hodge: We have a sponsoring group of officials in the DfES who have responsibility for CAFCASS and they have very close links in with officials working in the DCA. When we first looked at the CAFCASS problems I think we were particularly concerned with the public law issues because these are the most vulnerable children in our society and the delays incurred there in simply not even allocating cases were horrendous. I often laugh when we say we have the 40 week protocol because 40 weeks is a heck of a long time in a child’s life and that must not be the end of our ambitions. On the public law cases, in a year, from November 2003 to November 2004, the number of unallocated cases almost halved. There are still some unallocated cases and there should not be. We still need to make further progress. We are beginning to see those shoots and changes.

Q434 Keith Vaz: Are you satisfied that they look at their report from the children’s perspective? I do not want to start this daddy stuff again, but fathers will say to me that they write the reports biased in favour of mothers and mothers say the same thing about fathers. Where is the vision in this? Where is the ethos to ensure that it is the child’s interest that is paramount?

Margaret Hodge: The vision is that the child’s interest ought to be paramount and children’s voices should be a much stronger focus of all the work in this arena. Does CAFCASS do it now? The best do and the training will ensure that the best becomes the practicable.

Q435 Chairman: You have told us of the progress CAFCASS is making and we are very interested in that progress and pleased to see some of it has taken place, but there are very serious criticisms that we had to make about it. You are about to give CAFCASS a greatly enhanced responsibility that is within its terms of reference, but it is a new area of work given that at the moment they are unable to meet their targets which themselves are somewhat unambitious.

Margaret Hodge: I agree. I had concerns about that. As they were settling down in a reconfigured organisation I had to be absolutely clear that they simply fail to deliver in the way that CAFCASS has. They were saying they spend too much of their time enables those who might be victims of domestic violence to be overlooked. I think the political imperative was such that we have to watch it very carefully.

Baroness Ashton of Upholland: If one looks at what the President has said this morning in terms of how the courts should operate, she describes the purpose of the first hearing and how that CAFCASS should be doing to be much more about focusing on the areas that need to be addressed rather than the broader, lengthier report that covers all the issues. If one puts that together with what we have been saying about the role of CAFCASS, I think you find the two come together. What we were not prepared to do was say to the judiciary they did not need CAFCASS reports because that is clearly untrue. The judiciary feel very strongly in some circumstances they might need lengthier reports. It is not about getting in the way of that relationship but being clear about the nub of it, which is getting to the issues that need to be addressed in those reports.

Margaret Hodge: You are right, as the Minister responsible for CAFCASS I do not want to promise more than we can deliver and 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”. 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.

Q437 Mr Dawson: We have seen the amendment to the existing definition of “significant harm” and the introduction of the Gateway process. Can you assure me that accusations of domestic violence, which is a thing we would all acknowledge is significantly under-reported and I think these reforms are designed to address that, will not be ignored when people do not initially make complaints at the Gateway stage?

Baroness Ashton of Upholland: I certainly would want to reassure you about 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. There is an enormous reluctance on the part of the victims, for all sorts of reasons which I am sure the Committee is fully aware of and certainly I know Mr Dawson is, to come forward and use that and it is to do with being a victim and all that that brings with it and feeling it is your fault and guilt and so on. We want to make absolutely sure that where it 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.

**Q438 Mr Dawson:** Will there be a stage before any enforcement is applied where the possibility of domestic violence and/or child abuse is very closely looked into?

**Baroness Ashton of Upholland:** Indeed. It would be failing the children if those allegations were not looked into. What we want to do is to make sure, wherever possible, those issues are addressed before we got to the point of a contact order being made rather than having the order made and then the parent who has residency rights saying they are not allowing that child to go because the person is violent, which in a sense would have to be looked into. We want to try and get those issues addressed early in the process. I think that is a critical point.

**Q439 Mr Dawson:** There are people who e-mail me almost on a daily business to tell me that accusations of domestic violence are frequently false. Is there any truth in that?

**Baroness Ashton of Upholland:** We do not have any statistics about unfounded allegations because as they are unfounded they are not pursued. Where they are made then the courts have a responsibility to make a finding of fact and to get the evidence as to whether to support that claim or not. Occasionally it is one word against another and the court has to use, as Margaret was saying earlier, its best judgment in those circumstances, but where you have children, it is also an opportunity for the CAFCASS officer or others involved with the child to determine whether those allegations are correct as well. That is the process. We think that is the right process. It works well. It enables us to rule out the unfounded allegations by looking for fact, but it also makes sure that the bigger problem of victims not coming forward is enabled to happen more often.

**Q440 Mr Dawson:** Would it be helpful for the Government to study perhaps when the Gateway process gets underway not only the number of complaints of domestic violence but also how many of those complaints are found to be proved? That seems to be an important piece of research.

**Baroness Ashton of Upholland:** 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. We need, if nothing else, to see whether it works.

**Chairman:** Thank you both for the full and frank evidence you have given us this morning. These are important issues in the lives of many children and families. We will report on them shortly. Since you have quite a good track record of taking notice of our serious recommendations, as in the case of CAFCASS, we trust that you will do so on this occasion.
Written evidence

Evidence submitted by Rt Hon Dame Elizabeth Butler-Sloss DBE, President, High Court, Family Division

THE ADMINISTRATION OF FAMILY JUSTICE

The present system is open to criticism, much of it well-founded. It is, however, difficult to focus on the problems that have arisen in the private law sphere without taking in to account the administration of the entire family justice system.

PUBLIC LAW

In the field of public law, where children may be removed from their parents in care proceedings, the process requires a court hearing and a care order. The main justified criticism is in relation to delays in completing the necessary decision making process. The delays are caused by many factors, notably social work reports, appointment and reports of CAFCASS guardians, medical expert assessments and reports, and a shortage of judges to hear the more complex cases within a reasonable period. All these problems, among others, are being tackled, although not all successfully. A Public Law Protocol is now in place (since November 2003) across England and Wales, which embodies close and firm case management by the family proceedings courts, by circuit and district judges in the county court in the more difficult cases, and by High Court judges in a minority of cases of the greatest complexity or sensitivity heard in London and in different parts of the country. The Protocol requires, as far as possible, continuity of the judge in giving directions and in hearing the care applications. The effectiveness of the Protocol is being closely monitored by a Ministerial Group chaired by Baroness Ashton of which I am a member.

PRIVATE LAW

In an ideal world disputes by parents about their children ought not to be resolved in a court setting. The majority of parents, about 90%, resolve their disputes over their children without coming near to court. Some come to court and settle through alternative dispute resolution, in court conciliation, or accept the decision of the judge or magistrates. It is the minority of the total number of cases which cause the difficulties and create the tensions. Many of those generate a plethora of long reports and lengthy judgments and keep returning to court.

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. Courts have the right to require evidence to be called or to refuse to hear irrelevant evidence which may have the effect of exacerbating the already fraught situation between the parents.

It is important to remember that certain groups of cases may not easily be susceptible to or indeed appropriate for mediation or in court conciliation. Issues of domestic violence towards the other parent, physical injury or sexual abuse of a child require resolution, unless admitted. Separate issues arise if such allegations are proved and the protection of the child and, in domestic violence cases, of the parent who was the victim, requires careful consideration.

There are good features in the way in which private law cases are dealt with but there are a number of obvious problems. These problems have been with us to some degree for some years. They have been exacerbated by a number of factors, including lack of CAFCASS court reporters, lack of resources for the problem families to obtain mediation, counselling, anger management courses, mental health or similar help and the lack of a general follow up of cases to try to avoid a return to court. An additional factor has been the frustrations and disappointment of unsuccessful parents coming into the public domain with the emergence of a number of highly publicised organisations.

Some of the main problems as I see them are:

1. Competing pressures with public law work

The pressure of public law work and the importance of getting these cases listed for hearing have an inevitable impact on the hearing of the more difficult private law cases. The need for circuit judges to hear a raft of more difficult care cases and for High Court judges to hear the most complex cases referred up to them results in concentration of the time of High Court and circuit judges on care work. This has a knock on effect upon the availability of judges at both levels to hear the more difficult private law family disputes within the family. 20% of private law cases are heard in the family proceedings courts. This leaves 80% to be heard in the county court with a few intractable disputes heard by High Court judges or deputy High Court judges. A large proportion of child family disputes are now heard by district judges.
2. Delay

Delay at all levels, including the Family Proceedings Courts ("FPC"), contribute to the overall difficulties which arise in private law cases. There are also delays in hearing financial disputes (ancillary relief applications) in the county courts and other private law applications, since these cases are all heard by the same pool of judges. One cause of the delay is most simply a lack of enough judges (and in some areas courts) available to hear the cases.

3. Judicial continuity

Ideally the same judge should hear the case from beginning to end. However, in some places there is a significant shortage of courtrooms and the family work has to be balanced against the demands of criminal trials. The increase in the number of private law cases heard by district judges should make it easier for arrangements to be put in place for the judge to keep the case and provide continuity. However, it has been and remains difficult for circuit judges who try public law cases to be able to manage continuity in respect of private law cases (but see the Private Law Framework below). Lack of enough judges will inevitably affect judicial continuity as well.

4. Flexibility

There is a lack of flexibility in the movement of cases between the county court, particularly the district judges, and the FPC with the adverse effect on the speed with which cases can be disposed of. One strong impediment to the easy movement of family work is the different method of payment to the Bar and to solicitors by present Legal Services Commission policy and the reluctance of the LSC to permit a fee for a barrister in the FPC. I should like to see the easy movement of cases across courts under the same roof, such as Birmingham, or within walking distance, so as to use the available judges or magistrates and the courts to the best advantage.

5. Information technology

The IT is not compatible between the county court and the FPC, a problem which will become even more obvious when more courts are placed under the same roof in new buildings such as Liverpool next year and Manchester in 2006. This increases the problems of joint listing and identifying judge or magistrates' availability and courtroom space.

6. Enforcement

There is a lack of enforcement procedures for judges in the more difficult private law cases, principally where a parent refuses contact between the non-resident parent, generally the father, and the children. These are set out in detail in the Children Act Sub-Committee Report “Making Contact Work: A Report to the Lord Chancellor on the Facilitation of Arrangements for Contact Between Children and their Non-residential Parents and the Enforcement of Court Orders for Contact” (2002) and in the judgments of Munby J in Re D (Intractable Contact Dispute: Publicity) [2004] 1 FLR 1226 and Bracewell J in V v V [2004] 2 FLR 851.

Solutions

I very much welcome the Green Paper, Parental Separation: Children’s Needs and Parents' Responsibilities and the issues it has raised and seeks to address. Any starting point needs to acknowledge that the child has to come first; that they are not packages, but people. Parents must realise this and put their own power battles behind them. They must also take responsibility for their actions and decisions which affect their children. The court should be seen as the place of last resort and any improvement to the current system will require all involved to look more imaginatively at engaging parents with children who separate without going through the court process. This requires a widespread culture shift for all those engaged in the process.

I set out below, and in an annex to this paper, the new proposals which I hope will improve the situation. It is important, however, to remember that there is likely to remain a hard core of cases which may have to be resolved by the court process, some of which are beyond the power of anyone, including judges, to resolve.

The private law framework programme attempts to deal with some of the problems raised above. It is in principle agreed by the judiciary, CAFCASS, the Court Service, DCA and DFES, the Family Bar and Family solicitors. While I very much hope it will have a significant impact on the current private law climate I am certain that the framework on its own is not a solution to all the problems. Some important aspects of the framework are:

— On the first application made by a parent there should be a first directions hearing if possible within four to six weeks.
— Once proceedings have been commenced, the requirement of both parents to attend the first hearing (as well as older children if appropriate), with a view to seeking settlement with the assistance of the court at the first hearing and a CAFCASS officer.
— If conciliation fails and the matter is to be tried by a judge that the issues between the parents are identified by the district judge at the first hearing so as focus the CAFCASS report on the essentials and to reduce the ambit (and the length) of the court hearing.
That orders for contact are monitored by CAFCASS officers (eg by way of telephone). If handover does not take place, or if an order is breached, all efforts should be made to get the case back before a judge within a short timeframe, eg within two weeks, in order to try to avoid the parties becoming entrenched in their dispute.

Judicial continuity of cases (all of which will be dependent on the pressures on judges who may also hear public law care work, finance work, domestic violence cases and any other cases that compete for their time).

In the small number of cases that cannot easily be resolved more flexible and imaginative procedures used to deal with the issues with the hope that the judiciary may be provided with enforcement tools to encourage compliance with contact orders (an example is a Family Assistance Order which has not proved to be of as much benefit as it had been hoped. An amendment to the legislation to improve its application and usefulness would give considerable support in some cases to make contact between the non-residential parent and the child more successful).

It is hoped that the private law framework will have two main effects:

1. A reduction in the overall number of cases in dispute; and
2. A speedy resolution to the issues of disagreement between parents on arrangements for contact, leaving only a small number of cases requiring court intervention.

A national rollout of the framework is intended to take place over the next few months, particularly the introduction of in court conciliation in all county courts (which do not already have in court conciliation projects) which hear residence and contact cases. The successful implementation of the private law framework will of course be subject to a number of factors including the availability of CAFCASS officers and suitable court facilities.

In addition to the framework there is at present an early resolutions pilot being run at three centres. Cases are screened for the pilot either by legal advisers or judges and, once admitted to the pilot, parties are given an information pack and are expected to attend separately two facilitation groups over a period of eight weeks, with a final meeting attended by a CAFCASS officer and both parents to develop a suitable contact plan. It is hoped that this early intervention will minimise the need for contested hearings.

I see these initiatives as engaging parents to take responsibility. If we encourage conciliation and mediation both parents, and even the child, can take ownership of the problem instead of being one step removed and leaving it up to their lawyers and the judges to resolve. If we can achieve a culture shift in this direction then I can envisage invaluable progress.

Some members of the legal profession need also to be engaged to reduce the adversarial nature of family proceedings. It is important to encourage the legal profession to be facilitative in order to resolve the disputes. Members of the Solicitors Family Law Association and the Law Society Family Committee, have an excellent protocol for dealing with private law children cases which includes putting the interests of the child first and run courses for solicitors. Members of the Family Law Bar Association run useful seminars designed to train barristers to deal with these issues. I would like to see all lawyers who work in family justice to have a set of minimum standards to enable this shift.

The judiciary who try these cases are largely specialist; are all selected to sit in family work and all receive instruction from the Judicial Studies Board when they start sitting in family cases (induction courses) and also attend specialist continuation courses.

FURTHER EVIDENCE SUBMITTED BY RT HON DAME ELIZABETH BUTLER-SLOSS DBE, PRESIDENT, HIGH COURT, FAMILY DIVISION

I refer to evidence submitted by the President of the Equal Parenting Council (“EPC”), Mr Tony Coe, dated 18 November 2004, a copy of which has been passed to me. I wish to raise a number of points to clarify what I consider to be some inaccuracies with that evidence.

Paragraph 28 of Mr Coe’s evidence seems to indicate that when I gave evidence to the Committee on 9 November 2004 I referred specifically to meeting the EPC. I did indicate that I had in the past engaged with a number of parenting organisations and that “we [the judiciary] had no problem in meeting fathers or mothers” but as you will be aware there was no specific mention of the EPC by any of the judges during their oral evidence. You ought to be aware that it would be difficult for a judge to meet with a member of the public who has been involved in proceedings before that judge, especially given the possibility that the individual may appear before that judge in future.
In relation to paragraph 29 I am not clear who the health professional referred to is. In any event, I do not accept what is said in that paragraph.

I am sure you will give whatever weight you consider appropriate to all the evidence you receive. I did, however, wish to raise these issues with you at the earliest opportunity.

Dame Elizabeth Butler-Sloss
President of the Family Division
2 December 2004

Supplementary evidence submitted by Rt Hon Dame Elizabeth Butler-Sloss DBE, President, High Court, Family Division

On 9 November 2004, the Select Committee asked for further evidence on the subject of openness of proceedings in the Family Courts.

I referred the Select Committee to a consultation paper issued by the Lord Chancellor’s Department in August 1993 entitled “Review of Access to and Reporting of Family Proceedings”. Although it is not entirely accurate, since there have been subsequent changes, it has a helpful background to the complicated and somewhat inconsistent primary and secondary legislation. It also sets out various options which remain useful as a possible guide for the future. I attach a copy for your information.

CHILDREN CASES ONLY

The following comments are my own and are confined to family cases involving children, which principally involve children the subject of Children Act 1989 proceedings, whether public law or private law, adoption under the Adoption Act 1976, wardship and inherent jurisdiction, and Hague Convention child abduction cases.

PRIVACY

The basic rule in the High Court and the county court is that the proceedings are “private”, that is to say closed to the Press and to the public unless the court specifically directs that any part should be open (Family Proceedings Rule 4.16(7)). The majority of cases are heard in private although increasingly judgments of High Court judges are given in open court or made available to the law reporters and the Press. The identities of the children and their families are usually protected by anonymity. Recently, two cases involving terminally ill babies, Charlotte and Luke were heard entirely in open court. In both those cases the mothers had already been to the Press.

The basic rule in the Family Proceedings Court (the FPC) under the Magistrates Court Act 1980 is to exclude the public but to allow the Press to attend. Section 69(2) provides:

In the case of family proceedings in a magistrates’ court other than proceedings under the Adoption Act 1976 no person shall be present during the hearing and determination by the court of the proceedings except:

(a) officers of the court;
(b) parties to the case before the court, their legal representatives, witnesses and other persons directly concerned in the case;
(c) representatives of newspapers or news agencies

Adoption Act proceedings are always heard in private.

Applications for permission to appeal and appeals to the Court of Appeal are almost invariably heard in public and recently the procedure whereby anonymity was given almost invariably has changed to a case by case decision whether to protect the identity of the family.

The advent of Unified Administration (UA) has the effect, among others, of requiring a single and comprehensive set of rules to cover the High Court, the county court and the FPC. They are in the process of being drafted now.

It seems clear to me that post UA, we cannot continue to have a different rule in the High Court and the county court from the FPC.

The 1993 consultation paper helpfully sets out at Part IV the suggested options for change.
Access
My own view has changed and I now consider that we should open the hearings of all children cases, except adoption, to the Press unless there are good reasons to exclude them in a particularly sensitive child case such as where sexual abuse allegations are raised. I would recommend that there should be a presumption of access by the Press unless specifically excluded by the judge or district judge. I would not wish to open the court to the public in the majority of cases since it is likely to add a burden to those giving evidence, particularly the parents, to have possibly large numbers of people in the courtroom.

Access and reporting
On the assumption that the Press but not the public may attend the majority of child cases in the High Court and the county court, it is important to distinguish between permitting the Press to attend, and, if they are entitled to attend, whether they may report some or all of the proceedings. In the FPCs the Press can attend and report but are subject to restrictions (see section 69(2)(c) and section 71 Magistrates’ Courts Act 1980 in conjunction with section 97 Children Act 1989).

Reporting
My own view is that the Press should have the right to report the judgment in the case; possibly to report the final submissions; but not however, to report the evidence given by the witnesses. This proposal has some similarity to the rules for divorce and nullity proceedings where, in the days of defended divorces, the Press and the public had access but there were reporting restrictions which permitted the reporting of the judgment but not the evidence. It should be noted that access by the Press may not be entirely easy in the rooms and small courts in which the district judges (DJs) often sit in the county court. The current lack of suitable courtrooms for family judges and DJs in certain parts of the country may impede the opportunity for more than the minimum access by the Press at some hearings.

Anonymity
In my view the Press should not have the right to report the names of the children or families, nor details which would have the effect of identifying them. I consider that the restrictions on reporting currently contained in section 97 of the Children Act 1989 (as recently amended by the Children Act 2004) should continue to apply.

Changes required
I have suggested to the High Court judges that their judgments should more often be given in open court. I would not be able to make a Practice Direction with the concurrence of the Lord Chancellor which had the effect of overturning Family Proceedings Rules (Rule 4.16(7) and 4.23) and the statutory regime. As I said above the rules are in the process of being revised and rewritten. We shall also have to look at the effect of primary legislation. To grant access to the Press but not to the public is in primary legislation in the FPC and it may well require primary legislation for all the courts to have the same rule.

Other jurisdictions
I enclose a summary of the approach to privacy in some other jurisdictions for information (Annex).

Dame Elizabeth Butler Sloss
President of the Family Division
21 December 2004

Annex

Publicity in proceedings involving children: practice in some other jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Current Practice</th>
<th>Legislative/Other Basis</th>
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</thead>
<tbody>
<tr>
<td>Australia—Federal Court</td>
<td>Attendance Since 1983, proceedings before the Family Court of Australia have been open to the public and the media.</td>
<td>Section 97(1) Family Law Act 1975 (as amended)</td>
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<tr>
<td>Jurisdiction</td>
<td>Current Practice</td>
<td>Legislative/Other Basis</td>
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<td></td>
<td>Reporting</td>
<td>Section 121(1) Family Law Act 1975 (as amended)</td>
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<td></td>
<td>The news media is free to publish accounts of family court proceedings provided they do not contain information which identifies the parties, witnesses or others associated with the case.</td>
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<td></td>
<td>However, publication of any report in any publication that is of a bona fide professional or technical nature intended for circulation among members of the legal or medical professions is permitted.</td>
<td>Section 121(9) Family Law Act 1975 (as amended)</td>
</tr>
<tr>
<td>Australia—State Courts (Western Australia)</td>
<td>Attendance Proceedings in the Family Court of Western Australia echo the position as stated above.</td>
<td>Section 97 Family Law Act 1975/Section 212 Family Court Act 1997 (Western Australia)</td>
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<tr>
<td></td>
<td>Reporting The reporting restrictions on proceedings involving children in the Family Court of Western Australia are as stated above.</td>
<td>Section 121 Family Law Act 1975/Section 243 Family Court Act 1997 (Western Australia)</td>
</tr>
<tr>
<td>Canada—Provincial Courts (Nova Scotia)</td>
<td>Attendance Proceedings in the family court are generally heard in private. The following persons are permitted to attend proceedings involving children: (1) Officers of the court (2) The parties and their legal representatives (3) Witnesses (4) Any other person whom the Judge may require or permit to be present.</td>
<td>Section 10(3) Family Court Act RSNS, c 159</td>
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<td></td>
<td>Reporting There is no provision generally permitting media representatives to report on family proceedings.</td>
<td>Section 10(1) Family Court Act RSNS, c 159</td>
</tr>
<tr>
<td>Canada—Provincial Courts (Ontario)</td>
<td>Attendance Proceedings involving children are generally held in private unless the court orders otherwise. However, media representatives are permitted to attend provided no more than two media representatives do so.</td>
<td>Section 45(4) Child and Family Services Act RSO 1990 c C11</td>
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<tr>
<td></td>
<td>Reporting It appears that the media is free to publish accounts of family court proceedings provided they do not contain information which identifies the parties, witnesses or others associated with the case. However, subject always to the power of the court to restrict such publication where to do so would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceedings.</td>
<td>Section 45(7) Child and Family Services Act RSO 1990 c C11</td>
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<tr>
<td>Canada—Provincial Court (British Columbia)</td>
<td>Attendance Proceedings concerning children are open to the public and the media. However, the court may exclude any person (other than the child, a party to proceedings or heir legal representatives) if it is satisfied that a person’s presence may materially prejudice the best interests of a child; will substantially prejudice the interests of an adult party to the proceedings; or will interfere with the administration of justice.</td>
<td>Section 3(1) Provincial Court Act RSBC 1996 c 369</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Current Practice</td>
<td>Legislative/Other Basis</td>
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<tr>
<td></td>
<td>The media is free to publish accounts of family court proceedings provided they do not contain information which identifies the parties, witnesses or others associated with the case.</td>
<td>Section 3(6) Provincial Court Act RSBC 1996 c 369</td>
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<tr>
<td></td>
<td>Publication of any report in any publication that is of a bona fide professional or technical nature intended for circulation among members of the legal or medical professions is permitted.</td>
<td>Section 3(7) Provincial Court Act RSBC 1996 c 369</td>
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<tr>
<td>Ireland</td>
<td>Attendance</td>
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<td>Reporting</td>
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<td>At present statutory provisions provide simply that family law proceedings are to be heard &quot;otherwise than in public&quot;. The courts have interpreted this as restricting the public reporting of what has occurred in family law hearings or any documentation arising therefrom. There is no authoritative Supreme Court decision on this however. The result is that there is no reporting even of decisions in the District and Circuit Family Law Courts, where written decisions are rare. Written decisions of the High Court and Supreme Court in family law matters are, however, regularly reported both through ordinary law reporting channels and in the public press, though with identifying details removed.</td>
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<td>Future changes</td>
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<td></td>
<td>An amendment to the present law is contained in Section 40 of the Civil Liability and Courts Act 2004. This section would allow for a limited number of reporters of family law, who would in general be either barristers or solicitors, to be appointed who would provide reports of family law case, and in particular decisions, of the family law courts. No identifying details would be permitted. This provision is not yet in force, as court rules have first to be provided. The relevant Rules Committees are at present working on this.</td>
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<tr>
<td>New Zealand</td>
<td>Attendance</td>
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<td>Proceedings in the family court are generally heard in private. The following persons are permitted to attend proceedings involving children:</td>
<td>Section 166 Children, Young Persons, and their Families Act 1989 (as amended)</td>
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<td></td>
<td>(1) Officers of the court</td>
<td>Section 159 Family Proceedings Act 1980 (as amended)</td>
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<td>(2) Parents/guardians or other person having the care of the child and their legal representatives</td>
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<td>(3) The child and its legal representatives</td>
<td>Section 22 Adoption Act 1955 (as amended)</td>
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<td>(4) Any other person who is a party to proceedings and their legal representatives</td>
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<td>(5) Any barrister or solicitor appointed to assist the Court</td>
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<td>(6) Any near relative of the child</td>
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<td>(7) Any member of the child’s whanau or family group</td>
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<td>(8) A representative of any appropriate Social Service</td>
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<tr>
<td>Jurisdiction</td>
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<td>(9) Any Director of a Child and Family Support Service or a representative of any such person</td>
<td>Section 169(1) Family Proceedings Act 1980 (as amended)</td>
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<td>(10) Any Care and Protection Co-ordinator</td>
<td>Section 169(5) Family Proceedings Act 1980 (as amended)</td>
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<td></td>
<td>(11) Any Social Worker</td>
<td>Care of Children Bill</td>
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<td>(12) Any lay advocate who appears in support of the child or young person or any parent or guardian or other person having the care of the child or young person</td>
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<td>(13) Any other person whom the Judge permits to be present</td>
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<tr>
<td>Reporting</td>
<td>There is no provision generally permitting media representatives to attend family proceedings, even though they may be reported with the leave of the court.</td>
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<tr>
<td></td>
<td>However, publication of any report in any publication that is of a <em>bona fide</em> professional or technical nature intended for circulation among members of the legal or medical professions is permitted.</td>
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<tr>
<td>Future changes</td>
<td>The practice as noted above is in the course of being updated by way of the Care of Children Bill which is currently going through Parliament and is expected to be on the statute book by the end of the 2004 Legislation Programme.</td>
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<tr>
<td>The Bill will:</td>
<td>(1) Allow accredited news media representatives to attend hearings of family proceedings</td>
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<td></td>
<td>(2) Allow the courts to permit other persons, including support persons, to attend hearings</td>
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<td>(3) Allow any person to publish reports of children proceedings, but require identifying information to be withheld.</td>
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**Northern Ireland**

- **Attendance**
  - Proceedings involving children are heard in private unless the court directs otherwise.
- **Reporting**
  - No person may publish any material which is likely or intended to identify any child involved in the proceedings. In practice anonymised judgments are produced which are given to the parties' lawyers in advance of publication for comments on further anonymisation. Thereafter they are posted on the internet.

**Scotland**

- **Attendance**
  - All cases relating to Children’s Hearings are held in private whether first instance or appellate, Children’s Hearing, Sheriff Court or Court of Session.
- **Reporting**
  - The identification of children in civil proceedings and any details such as address or school which could have the effect of identification is prohibited. The court has the power to relax the restrictions in certain specified circumstances.
  - Any judgments are anonymised.

**Notes**

- Article 170 Children Order.
- Rule 13 of the Children’s Hearings (Scotland) Rules 1996.
- Section 44 Children (Scotland) Act 1995.
- s 47 of the Children and Young Persons (Scotland) Act 1937.
Evidence submitted by District Judge (Magistrates Courts) Nicholas Crichton

INTRODUCTION
1. I am the resident DJ(MC) at the Inner London Family Proceedings Court, Wells Street. I am the only DJ(MC) in the country who sits solely in family proceedings, and have been so for more than 10 years. I also sit as a Recorder holding both private and public law tickets.

2. I have had sight of the response of the Legal Committee of the Greater London Family Panel. I agree with that response and would wish to be associated with it.

3. I welcome the Green Paper “Parental Separation: Children’s Needs and Parents’ Responsibilities”. Since the passing of the Children Act 1989 the concept of interdisciplinary training has been developed. Judges have had the opportunity to learn from other professionals in the field of child development. Among other things we have become keenly aware of the needs of children to maintain significant relationships with both parents after parental separation. Unless there are significant and identifiable reasons to the contrary, it is crucial to the emotional well-being of the adolescent and young adult that they shall have had the freedom to know and to love, and to know that they are loved by, both of their parents.

4. It is important that courts should deal with private law applications against the background of this knowledge. As the Green Paper points out, it is the one in 10 more difficult cases that come before the courts. It is often said that the courts are not the right place for these problems to be resolved. I agree. However, every society has to have a mechanism for the resolution of disputes between its citizens, and in most societies it is the court system. Mr Justice Munby has been quoted as saying that the family justice system is failing children. I believe that it needs to be acknowledged that the first responsibility for meeting the needs of children lies with the parents. This is not to say that the family justice system has no responsibilities, and it is clear that in some cases the system has continued to fail children and their families.

5. There is a general acceptance that “judicial continuity” is important. If the parties know that each time they come to court they will meet with the same judge who will take the case on from where he left off on the last occasion, I believe that would build greater confidence in the system. Sadly this is extremely difficult to achieve. As the resident DJ(MC) in my court I am able to provide that continuity in a significant number of cases and I believe that some successes have been achieved.

6. For some time I have been urging the appointment of more specialist DJ(MCs) to sit in the FPC. The problem is that historically DJ(MCs) have been appointed to sit in crime. In London approximately one in three has obtained a family law “ticket” and sits in the FPC for six to eight weeks per year. I would prefer to see full-time specialist family DJ(MCs). The FPC is a part of our jurisdiction, and I believe that it deserves a more specialist and professional approach. I know that there are many family law practitioners who would wish to sit in the FPC, but are put off by the requirement to sit the majority of the time in the criminal courts.

7. When I sit as a Recorder I meet many Circuit Judges who are extremely conscientious and committed to family work. I also meet others who are not suited to the work and who would prefer not to be doing it, but who have been pressured by their court managers into obtaining their family law tickets. I believe that the skills needed for family law are very different from those needed for other branches of the law; and that it is therefore essential to recognise and encourage specialism, and to ensure that the responsibility for sitting in family is entrusted only to those who have the particular interest and commitment.

8. I believe it to be important to minimise the adversarial nature of family court proceedings. I believe contested adversarial hearings to be contrary to the interests of the family, and specifically the children. An order imposed by the court after such a hearing is bound to make at least one party unhappy and resentful. That resentment will almost inevitably be fed into the lives of the children. Better to assist the parties in arriving at a compromise which offers something to both and diminishes feelings of resentment. I chaired the working group which reported to DCA/DfES in October 2003. That report has given rise to the Family Resolutions Project just starting at three court centres, including my own. It was the hope of the working group that the culture in which these disputes are decided could be turned around. Rather than courts deciding whether or not the children should have contact with the non-resident parent, the starting point should be the assumption that unless there is good reason why this should not occur the children should see the non-resident parent for approximately half of their free time, ie alternate weekends and half of all school holidays. Of course different working and geographical situations might make that difficult for many parents, but the point is that this should be the starting point when deciding what is in the best interests of the children. I am aware that there are many conciliation initiatives going on in courts around the country.

9. One issue which arose during the planning for the Family Resolutions Project is whether or not a court can or should direct parents into a programme designed to avoid contentious proceedings. This is routinely done in America, but in this country we are perhaps reluctant to be so prescriptive.

SPECIALISM
3. I welcome the Green Paper “Parental Separation: Children’s Needs and Parents’ Responsibilities”. Since the passing of the Children Act 1989 the concept of interdisciplinary training has been developed. Judges have had the opportunity to learn from other professionals in the field of child development. Among other things we have become keenly aware of the needs of children to maintain significant relationships with both parents after parental separation. Unless there are significant and identifiable reasons to the contrary, it is crucial to the emotional well-being of the adolescent and young adult that they shall have had the freedom to know and to love, and to know that they are loved by, both of their parents.

4. It is important that courts should deal with private law applications against the background of this knowledge. As the Green Paper points out, it is the one in 10 more difficult cases that come before the courts. It is often said that the courts are not the right place for these problems to be resolved. I agree. However, every society has to have a mechanism for the resolution of disputes between its citizens, and in most societies it is the court system. Mr Justice Munby has been quoted as saying that the family justice system is failing children. I believe that it needs to be acknowledged that the first responsibility for meeting the needs of children lies with the parents. This is not to say that the family justice system has no responsibilities, and it is clear that in some cases the system has continued to fail children and their families.

5. There is a general acceptance that “judicial continuity” is important. If the parties know that each time they come to court they will meet with the same judge who will take the case on from where he left off on the last occasion, I believe that would build greater confidence in the system. Sadly this is extremely difficult to achieve. As the resident DJ(MC) in my court I am able to provide that continuity in a significant number of cases and I believe that some successes have been achieved.

6. For some time I have been urging the appointment of more specialist DJ(MCs) to sit in the FPC. The problem is that historically DJ(MCs) have been appointed to sit in crime. In London approximately one in three has obtained a family law “ticket” and sits in the FPC for six to eight weeks per year. I would prefer to see full-time specialist family DJ(MCs). The FPC is a part of our jurisdiction, and I believe that it deserves a more specialist and professional approach. I know that there are many family law practitioners who would wish to sit in the FPC, but are put off by the requirement to sit the majority of the time in the criminal courts.

7. When I sit as a Recorder I meet many Circuit Judges who are extremely conscientious and committed to family work. I also meet others who are not suited to the work and who would prefer not to be doing it, but who have been pressured by their court managers into obtaining their family law tickets. I believe that the skills needed for family law are very different from those needed for other branches of the law; and that it is therefore essential to recognise and encourage specialism, and to ensure that the responsibility for sitting in family is entrusted only to those who have the particular interest and commitment.

8. I believe it to be important to minimise the adversarial nature of family court proceedings. I believe contested adversarial hearings to be contrary to the interests of the family, and specifically the children. An order imposed by the court after such a hearing is bound to make at least one party unhappy and resentful. That resentment will almost inevitably be fed into the lives of the children. Better to assist the parties in arriving at a compromise which offers something to both and diminishes feelings of resentment. I chaired the working group which reported to DCA/DfES in October 2003. That report has given rise to the Family Resolutions Project just starting at three court centres, including my own. It was the hope of the working group that the culture in which these disputes are decided could be turned around. Rather than courts deciding whether or not the children should have contact with the non-resident parent, the starting point should be the assumption that unless there is good reason why this should not occur the children should see the non-resident parent for approximately half of their free time, ie alternate weekends and half of all school holidays. Of course different working and geographical situations might make that difficult for many parents, but the point is that this should be the starting point when deciding what is in the best interests of the children. I am aware that there are many conciliation initiatives going on in courts around the country.

9. One issue which arose during the planning for the Family Resolutions Project is whether or not a court can or should direct parents into a programme designed to avoid contentious proceedings. This is routinely done in America, but in this country we are perhaps reluctant to be so prescriptive.
**Enforcement**

10. One problem is enforcement. Not without reason fathers’ pressure groups argue that courts do not enforce orders when mothers fail to make children available in accordance with a court order. However, judges will always be reluctant to send a mother to prison or to fine her. It is difficult to see how sending a mother to prison can be in the best interests of the child—the child is deprived of his/her mother for whatever period, and thereafter will always be in a position to tell the child that his/her father had her sent to prison. It is difficult to see how fining a mother is in the best interests of the child—most families we deal with are in financially straitened circumstances and this would merely add to their difficulties. I wonder whether it may be possible to devise a scheme where mother might have to serve a number of hours community service (preferably child focused) on a Saturday whilst the children have contact with their father . . . We need to search for more imaginative ways of dealing with obstructive mothers.

**Delay**

11. Another major problem is the issue of delay. Children cannot wait for courts to work through overloaded lists before making decisions in their lives. It is the responsibility of the court system to hear a case at the optimum moment in terms of the information having been gathered and the case being ready for hearing. It is important to keep in mind that two months represents 1% of the child’s minority. If a court takes six, or even 12 months longer than it should to resolve a case, that is 3% or 6% of the child’s life which has been wasted and which cannot be given back. It is therefore the responsibility of the court system to hear cases as and when they are ready. I believe that a specialist, committed and experienced judiciary would have the capacity to get through the work more quickly.

**Nicholas Crichton**
District Judge (Magistrates Court)

*October 2004*

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**Further evidence submitted by District Judge (Magistrates Courts) Nicholas Crichton**

1. Please note that I speak from the standpoint of family proceedings courts only. I have sat solely in family proceedings for the past 10 or 11 years, and I believe that I am still the only District Judge (Magistrates Courts) to do so.

2. I believe that issues of delay and the ability to get on with work efficiently without undue haste are closely connected to the commitment to prepare properly and to gain the confidence which comes from experience. In his oral evidence given on 9 November, Wall LJ said that “pro-active judicial management is absolutely crucial”. I agree. A family judge must prepare in advance. He must have the confidence and experience to identify the issues. He must have the confidence to be proactive and to get everybody in the courtroom to focus on those issues. Only an experienced judge will say “I do not need an expert in this case”. It is hard for an inexperienced judge to refuse an application for an expert.

3. I am certain of the need for greater judicial specialism. The skills required for sitting in family law are very different from those required in other branches of the law. There has been a steady move away from the adversarial approach, except in the most contentious cases. I believe that we need more judges sitting full-time, or at least for the greater part of the time, in family work. We need judges who are committed to family law and willing to undertake the considerable amount of preparation that is required, and who have a clear understanding of the needs of the children and families whom the courts seek to help. We would then be able to offer significantly greater judicial continuity which in turn would lead to a more efficient service and swifter conclusion.

4. At the present time in my court we have about 18 DJMCs who hold family tickets and who come to the court for some five to eight weeks per year for one or two weeks at a time. However hard they try I do not believe that this is sufficient to enable them to become confident in providing pro-active judicial case management. I believe that the situation outside London is much the same. Indeed, I believe that there are District Judges who hold family law tickets who cannot get very much work. The pressure of work at Wells Street is such that I would very much welcome another full-time resident family law DJMC.

5. The bench of DJMCs are all appointed from the ranks of criminal practitioners. I am confident in saying that no DJMC at present in post would want to sit full-time in family. However, I am also confident that there are many family law practitioners, both solicitors and barristers, who would wish to apply to sit full-time in the family proceedings court. I believe that we should be developing a job specification and advertising specifically for deputies to sit in the family proceedings court, without requiring them to sit in crime.
6. I appreciate that there may be an argument that if we follow these thoughts through to their conclusion we will be denying DJMCs who sit in crime the opportunity of having the wider experience of sitting in family law. I understand the point. I am more concerned to improve and develop the service for disadvantaged children and their families, but see no reason why the system cannot be sufficiently flexible to allow DJMCs who want to do the work to continue to do so.

7. It follows from the above that I agree with the view expressed by Munby J that there are not enough family law judges. Whenever these issues are discussed with practitioners there is always agreement on one issue—we need more courts and more specialist judges. Two months represents 1% of a child’s childhood. We must be available to hear cases and make decisions crucial to children’s lives as close as possible to the optimum date, i.e., when all the information has been gathered and the case is ready to be heard. There are enough delays in waiting for assessments to be completed and reports prepared. The courts should not be adding to the delays because there are insufficient courts and judges available to hear cases when they are ready to be heard. Further delay is failing and sometimes harming the child. It also adds to the public expense in terms of longer time spent in foster care. It bears repeating that more full-time experienced judges will mean greater judicial continuity and will lead to cases being decided more quickly.

8. Please see Munby J at p 32 of the transcript, and my own comments at p 59. There is a growing need for fact finding hearings, to decide whether or not allegations of domestic violence are true, the extent of the violence and its relevance to the issue of contact. These hearings often take as much as one, two or three days and need to be resolved quickly. Lack of judges and court time means that often they cannot be listed for months, and children are left in limbo.

9. In my oral evidence I referred to the value of legal advisers (formerly court clerks). As the Unified Courts Administration approaches there are increasing rumours that DJMCs may be required to sit without the benefit of legal advisers. I understand the point. Lay magistrates require the assistance of legal advisers, but DJMCs may not. However, legal advisers are of enormous value in assisting family courts in many ways. They have limited judicial powers which enable them to give directions and to case-manage. They free up the judge’s time so that he can get on with hearing a case. They will have handled earlier directions hearings and will have some knowledge of what is going on in a case. They keep notes of evidence and note the judge’s directions as and when they are made. They draw up orders with extreme efficiency. When I sit as a Recorder in county court I have to make a conscious effort to slow down and can work at only half the pace because I do not have that assistance. I believe that if DJMCs were to be deprived of the assistance of legal advisers they will be unable to work at the same speed, thereby increasing delays yet further.

Nicholas Crichton
District Judge (Magistrates Court)
February 2005

Evidence submitted by Mrs Justice Bracewell

I agree with the submissions of DJ Chrichton who has been a key player in supporting and implementing the Family Resolutions pilot schemes which have judicial support and enthusiasm.

It was unfortunate in retrospect to change the name from Early Interventions to Family Resolutions, although there were sound reasons for doing so. This change caused misunderstanding in that supporters of the Early Interventions project wrongly concluded that a different scheme was being piloted and that the aims and ethos of the Early Resolutions project was being abandoned in favour of some less effective scheme.

There are differences between the two schemes:

1. Early Intervention as practised in Florida USA is compulsory, whereas Family Resolutions is not. The reason 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. However, in practice, the lack of compulsion should not be detrimental because in the pilot areas there is a clear expectation among the Judges, legal advisors, court staff and welfare organisations that the normal procedure involves participation in the scheme. Litigants are unlikely to protest about a system which will give the best chance of satisfactory resolution at the earliest opportunity.

Judges are enthusiastic in promoting the pilot scheme in expectation of compliance. Upon conclusion of the pilot scheme, there will be evaluation in order to determine whether primary legislation is required.

2. 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 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.
3. The Steering Committee has been well aware of the Early Interventions and Florida project which have underpinned discussion and planning for the pilot schemes. In no sense has there been any abandonment of the Early Interventions initiative—rather an adaptation.

4. The Family Resolutions project has not been produced in-house by civil servants. There has been judicial input throughout and the result is a team effort.

5. There is a misconception in some quarters that CAFCASS have hijacked the pilot schemes when there should have been the commission of an independent management agency which would have retained the project originators of Early Resolutions. In the time scale it would not have been feasible to use an independent organisation to train and provide the teams required. CAFCASS, despite the pressures on their service, demonstrated that they could and would provide the officers who were enthusiastic about the pilot schemes and who would be proactive in resolving disputes, as opposed to reacting by providing reports ordered by the courts as has occurred to date.

Hon Mrs Justice Bracewell
High Court Family Division
19 November 2004

Evidence submitted by Hon Mr Justice Ryder, High Court Family Division

PRIVATE LAW

Disputes involving parents and children are frequently characterised as intractable. Fortunately, for the vast majority of those involved, they are not. Most parents are willing and able to come to wholly appropriate agreements about the way they share their equal parental responsibilities so as to provide for the best interests of their children. When relationships break down, some parents and some children need help, whether that be informal assistance from a lay advisor or voluntary agency or more formal relationships with professional advisors and ultimately the family courts. Even in these circumstances a significant majority of problems are resolved without a contested court hearing.

The modern emphasis on residence and contact orders is no more than a reflection of an historic fact: prior to the Children Act 1989 there was a similar emphasis on obtaining custody, care and control and access orders. Despite the statutory intention of the “no order” principle, it remains an aspect of adult human nature to construct a defensive position by court applications and orders. For some, most particularly those who have been abused or who are at risk, there are very real safety issues that demand the earliest intervention and protection of the courts. For others, unless there be rapid, enforceable and consistent access to a humane family justice system, the very system and its use by others can become an instrument in an adversarial battle.

Modern case law and judicial commentaries, examples of which are before the Committee, have repeatedly emphasised why the family justice system fails the most needy. Until recently, the very existence of a family justice system might have been questioned (rather than simply the existence of specialist judges and courts). Some of its defects are merely structural and can be remedied by effective management of existing resources; others demand the acceptance of the need for new remedies, better enforcement, a strategy for the justice system and for each case that is heard within it and the better targeting and allocation of scarce resources.

The implementation of CASC recommendations to improve remedies, support services, education, modification and treatment options and enforcement is long overdue. This has been a constant theme of the judiciary for a number of years. The commitment to implement is welcomed but concern remains as to the timescale, the commitment to Parliamentary time (ie the priority of that commitment), the lack of engagement of the NHS (see below) and the funding of the options that should be made available.

— The draft family justice strategy identifies the earliest window as 2006—this is simply unacceptable.
— The green paper excludes the possibility of referral to a health services professional (eg a consultant psychologist or psychiatrist) on the apparently false basis that that would provide for an unethical compulsion to receive healthcare treatment. The proposal was for compulsory referral for consultation (not “treatment”) with named experts who were willing and able to provide the advice services which are necessary and which are so frequently engaged much later in the court process when sadly they can be less effectively used because of the increasing entrenchment of parties over time. There is equally no proposed compulsion on a healthcare professional to provide the service—the clinicians who are able and willing to work in this field already make themselves available. It is probably the case that there are resource implications to a formal commitment by the DH/NHS which are being avoided by the private instruction of clinicians or their funding by the Legal Services Commission.
— The Green Paper proposal should be expanded to include this option which was unnecessarily removed: the merits of funding can be determined by the judge on the facts of the individual case.
— The commitment to funding of inter-disciplinary support services needs to be clear. Just as in the case of CAFCASS and its implementation, it would be less than helpful to give a commitment to
provide support services, improved remedies and enforcement options if the burden falls on existing agencies without new money or the voluntary sector without funded service level agreements.

The judiciary are committed to identifying and implementing case management systems that provide for judicial continuity, consistency of approach and the earliest emphasis on out of court conciliation and alternative dispute resolution options. The President announced the implementation of a new Private Law Programme by the immediate introduction of a Private Law Framework (a template to enable forward planning) on 21 July this year. The details of the Framework were shared with Government during the writing of the Green Paper and have informed the proposals set out in the Green Paper. The Programme was issued on 1 November 2004 and will be implemented in all 52 family court areas by local agreements under the direction of Designated Family Judges approved by the President. The main features of the Framework/Programme are:

- Introduction of an early first hearing (a First Hearing dispute resolution appointment) for every private law application commenced in the county court by “gateway” district judges with family tickets.
- Gradual roll out of an in-court conciliation service provided at selected centres hearing family cases with the attendance of CAFCASS Officers at the First Hearing.
- Development of locally available court directed referral opportunities for family resolution and other services, support, facilitation, treatment and therapy alternatives to court proceedings.
- Introduction of listing arrangements to provide judicial continuity and case management, urgent review by judges at short notice, monitoring and facilitating of contact orders and enforcement hearings.

The private law programme has the potential to significantly enhance the quality of outcome of private family law disputes as follows:

- By the referral of families to family resolutions pilot projects, conciliation and mediation services as an alternative and necessary precursor to the court based process.
- By the constructive use of the existing CAFCASS services so as to facilitate the court’s orders and the parties’ agreements.
- By diverting scarce CAFCASS resources from report writing to problem solving and facilitation.
- By the ability to measure the outcome against the aim.
- By the provision of judicial continuity and urgent enforcement and review to act before disputes and positions become entrenched.
- By more effective consideration of safety issues at the earliest stage to protect the vulnerable from actual and system abuse.

The concept of a “strategy for the case” identified by Wall LJ in a lecture delivered to the NAGALRO Autumn conference (entitled “Are the courts failing fathers?”) is strongly supported. Likewise, a more positive emphasis on the representation of the child is recognised (see President’s Practice Direction—Representation of Children in Family Proceedings [2004] 1 FLR 1188, and Munby J’s paper “Making sure the child is heard” May [2004] Fam Law 338). They are two of the keys to the provision of a non-adversarial system. The private law programme gives effect to the strategy for the case by requiring the parties and the court to identify what it is that needs to be achieved as an aim (and a timescale where that can be identified) so that the parties positions and the case management and conduct of the case can be measured against the aim. The emphasis on CAFCASS and the court identifying the aim, the issues and each of the parties’ positions is designed to help parents understand how their decisions and positions affect their child enabling them to construct a plan which responds to their child’s needs, wishes and feelings as well as their own. The renewed emphasis on the child’s wishes and feelings in private law proceedings (whether represented on paper or through an advocate) is a timely reminder of the statutory provisions and good practice principles that already exist.

It must be recognised that from the perspective of the falsely accused parent or the victim denied the truth, an adversarial approach to the facts in issue is necessary and in any event there are the essential protections in articles 6 and 8 of the ECHR. Those protections must be distinguished from the often mis-directed criticism of the family courts as being adversarial. The system is inquisitorial, it is the parties that are adversarial. What is needed is a strong(er) emphasis on mechanisms that re-inforce the inquisitorial process, such as those suggested by Wall LJ and Munby J.

The private law programme will only be able to be implemented in full if:

- The CASC recommendations are given legislative effect.
- The family resolutions pilots are extended nationwide.
- Funding is guaranteed for CAFCASS to provide support and facilitation services.
- Funding is provided for other agencies (eg for mediation and support) by way of service level agreements.
— Sufficient specialist judiciary and courtrooms in dedicated specialist family justice centres administered by family court staff are guaranteed.

**PUBLIC LAW**

The Public Law Children Act Protocol implemented on 1 November 2003 was a judicial initiative to dramatically improve the outcomes in public law cases, in particular by reducing delay. It built upon a previous and very successful project to change the manner in which matrimonial finance proceedings are determined. The exercise was completed in partnership with the Court Service, CAFCASS, the LCD (as it then was) and their identified stakeholders in the family justice system. The judicially led process was undertaken by a Lord Chancellor’s Advisory Committee convened at the request of the President. The report to the Lord Chancellor of the advisory committee was unanimously supported by the contributing interest groups. Not only has the Protocol and its associated Practice Direction begun to demonstrate real improvements in the quality and timeliness of family justice in public law proceedings but the essential principles upon which the exercise was based have apparently been adopted by the DCA and the Court Service to inform their development of a future justice strategy.

The principles upon which the report and subsequent Practice Direction and Protocol were based were developed by a judicial working party having regard to research and empirical analysis in this and other jurisdictions (eg Australia, New Zealand, Canada and the USA). They are the first modern re-statement of multi disciplinary non-adversarial (ie inquisitorial) good practice in a generation and warrant close examination by the Select Committee. The Practice Direction, Principles and Advisory Committee Report are to be found at pp 81 to 95 of the Protocol. While it is inadvisable to summarise further that which is already in the form of an aide memoir, the principles can be stated as follows:

— A statement of principle that is both human rights and best interest compliant known as the “overriding objective”.
— Continuous and consistent judicial control of proceedings by a trained specialist judiciary (including the magistracy)—“judicial continuity”.
— The identification, promotion and application of multi-disciplinary “best practice” to the family process which encourages out of court alternative dispute resolution and minimum predictable standards for in court resolution.

Despite the unanimity of approach to the production and implementation of the Protocol, the advisory committee identified what were described as “major obstacles” to the success of their endeavours, which remain very relevant one year later:

— The shortage of family court sitting days (ie both the availability and number of trained judges and courtrooms for them to sit in).
— The acute shortage of trained professionals in social services departments and CAFCASS.
— The declining pool of specialist lawyers who wish to undertake family work under the existing public funding regimes.
— The shortage of experts who wish to assist in best practice multi-disciplinary family dispute resolution.
— The need for a radical change of culture in the administration of justice so that the allocation of judges and the listing of cases (both of which are judicial not executive functions) is facilitated.

A subsequent report commissioned by Ministers and written by Mr Ernest Finch in May 2004 strongly supports the advisory committee’s conclusions. It is to be hoped that the Government and Her Majesty’s Court Service will continue to have regard to these materials in their plans to improve the delivery of justice year on year. The Committee may wish to consider the detail of some of the problems that can be identified, for example:

— The continuing shortage of trained professionals who are willing to work in local authority social services departments and CAFCASS.
— The benefits of providing and improving advocacy and support services (lay not just legal) for vulnerable people (children and adults) at the earliest opportunity.
— The lack of any effective electronic diary system for judicial listing of cases.
— The inadequacies of the existing IT resources available to the new unified administration and in particular in their production of court orders, reliable statistics and as a court record or file.
— The need to make more effective the judicial oversight of all family court resources by the local senior family judge (known as the Designated Family Judge).
— The need to co-locate family court resources to improve the use of scarce resources and their management by the DFJ.
— The need for oversight of family justice by an inter-disciplinary National body with local fora (now implemented by the creation of the Family Justice Council).
There are coincident themes from the recent judicial analyses and proposals:

- The need to build upon the identification of a family justice strategy.
- The need to build upon the principles underlying the judicial initiatives of the Protocol and the Programme to provide a high quality and rapid inquisitorial system of family justice.
- The need to identify and fund pre-court and out of court alternative dispute resolution mechanisms.
- The need to re-emphasise the local management of family justice by the DFJs.
- The need to co-locate family justice resources.
- The need to provide sufficient specialist judges and sitting hours.
- The need to provide sufficient court rooms and associated facilities.
- The need to provide effective electronic diary, listing and court record systems.
- The need to ensure that the funding of CAFCASS and other specialist support services is guaranteed.

Hon Mr Justice Ryder
High Court Family Division
28 October 2004

**Evidence submitted by Hon Judge Meston QC**

**The legal framework**

The existing legal framework for determination of private family law questions derives from the Children Act 1989. The Act replaced the concept of parental rights with “parental responsibility”. It replaced the old terminology of “custody” and “access” with “residence” and “contact”. It provided a rational and useful checklist of considerations to which regard must be had when deciding the outcome of any question based on the welfare of the child. It provided a range of orders which can be made to meet the requirements of the individual case. It introduced what has come to be known as the “no order principle” which requires the court not to make any order unless it considers that doing so would be better for the child than making no order at all. It specifically provided for the court to have regard to the general principle that any delay in determining the question before it was likely to prejudice the welfare of the child. The Children Act 1989 introduced substantial changes to the law and practice which have worked well, and certainly improved on what went before. The Act has allowed for continuing developments through decisions of the higher courts. Recent developments in case law have allowed the courts to make “shared residence” orders without there necessarily having to be a history of parental co-operation or exceptional circumstances.

In contact cases the well-established case law principles are as follows:

(i) It is almost always in the interests of a child whose parents are separated to maintain personal relations, and to have regular direct contact, with the parent with whom he or she is not living. To deny a child contact with a parent is to deny that child important part of his or her upbringing.

(ii) The court is concerned with the interests of the individual child and not with those of the parents except insofar as they bear on the interests of the child.

(iii) Wherever practicable the court should maintain and encourage contact, and short-term problems should not be given undue weight.

(iv) Contact should only be denied or restricted if there are cogent reasons for so deciding, reasons which would make contact or a less restricted form of contact detrimental to the child.

Those principles are now reinforced by the application of the European Convention on Human Rights.

The operation of these principles by the courts ensure that the great majority of cases are settled with little or no involvement of the court process, and also that only a very small minority of parents are prevented from having direct contact.

Circuit judges, like family judges at all other levels, have long understood and supported the proposition in the 2004 Green Paper that the damaging effects and risks of parental conflict can and should be reduced by swift resolution of disputes or potential disputes between parents. The judiciary strive to encourage and assist the parties to reach agreed resolutions as amicably as the parties’ circumstances and personalities.
permit. The task of the court in almost all cases is to try to provide the parties with a pragmatic and workable solution, providing arrangements which will last. If such arrangements can be achieved by negotiation and agreement they have a better prospect of success.

It should be emphasised that whatever the perceived weaknesses of the existing court processes, the present system does operate to ensure that cases involving disputes about children which have to come before a judge for decision involve only a very small proportion of separating parents. The present system is already geared at every stage to encouraging co-operation, negotiation and agreement, intended to spare all concerned the distress of court proceedings and to minimise the burden on children who have already suffered parental conflict and separation. Contested cases will only reach a judge for decision because the parents have been unable to agree between themselves arrangements for the children, and have then still been unable to reach agreement after whatever conciliation procedures are available in the area and then after the further efforts and recommendations of CAFCASS officers. If lawyers have been instructed then almost certainly they too will have tried to negotiate a settlement. However, it is inescapable that some parents are resistant to efforts to attempts to conciliate and mediate and do not appreciate or accept the approach adopted by the professionals that there are no winners or losers apart from the children. It has to be recognised that some estranged parents do not find co-operation or communication easy, and that some find the continuation of conflict to be preferable. It is also inescapable that there are certain cases in which a judicial decision is essential to resolve important factual issues relevant to the future arrangements for the children, particularly where violence, sexual abuse, neglect or a threat of abduction is alleged. In an increasing number of cases now issues are raised about the risks to children because of alleged drug misuse by one or more adult. To try to avoid or suppress important factual disputes in an attempt to produce a compromise can, in some cases be a disservice to the parties, particularly if those issues continue to fester or are likely to re-surface.

There are other cases where a judicial decision is still required to decide unresolved disputes as to the arrangements for residence of the children (with too many still referring to “custody” despite the changes in terminology introduced by the Children Act 1989), or as to the nature and extent of contact. In these cases the court has to try hard to look realistically at the competing proposals and at the other possible options and to consider the possible consequences of all such options, particularly the effects on the child or children. Sometimes even agreed contact arrangements can impose considerable demands on children however resilient.

In the small proportion of contested cases the adversarial process is used to test evidence, but the court’s function remains investigative, which enables the court to control the conduct of the hearing including the content and manner of the cross-examination of parties and witnesses. The specialist advocates who usually appear in these cases act with restraint. All judges are careful to try to keep the “temperature” down without allowing hearings to become too informal, remembering that the parties and children have to live with the decision of the court.

**Conciliation**

Court based conciliation schemes as a mandatory first stage of proceedings seem to have a high rate of success. Such schemes provide early intervention with professional help from CAFCASS in a privileged setting. Although the feelings of the parties may still be running high, particularly if a volatile relationship has just ended, experience of conciliation schemes shows that in many cases they can be encouraged to think through the realities of the situation for the children and to reach sensible agreements before positions become more entrenched. The availability of a neutral CAFCASS officer is of particular value when one of the parents is without legal representation. When agreement is reached the court can record it, and if appropriate underpin it by converting it into a consent order. If agreement is not reached the court can make properly focused case management directions.

There is no national model for court based conciliation schemes, and so the nature and the availability of such schemes still vary from area to area. These variations seem to be largely the result of differing demand and differing local court and CAFCASS resources. There is a long established and well-regarded scheme at the Principal Registry of the Family Division (see article in Family Law, October 2004 “Conciliation is Working”) and there must be a strong case for bringing together the best practices operated throughout the country to provide a national model at least at County Court level.

**Case management and delay**

There has been firm and proactive case management since the implementation of the Children Act 1989, underpinned by the Family Proceedings Rules 1991 and Practice Directions and most recently by the President’s Private Law Programme Framework Document. The major causes of delay, including unexpected adjournments, continue to be the difficulties in obtaining CAFCASS reports (even when the court has tried to confine the focus of a requested report to the essential issues) and difficulties with expert witnesses (in the small number of private law cases when outside experts are required). In these and other cases where the timetable fixed by the court starts to slip the court can only act and regain control if the slippage is brought to its attention. Many responsible practitioners will inform the court if a problem arises, giving the court the opportunity to adjust the timetable usually without delaying the
overall progress to final hearing. There is otherwise a limit to the control which the court can exercise between hearings (as distinct from at hearings) in the absence of mechanisms and manpower to monitor the progress of individual cases and to chase up failures to adhere to court directions and timetables.

**Judicial continuity**

Judicial continuity is now increasingly recognised as important to ensure effective and efficient control of cases, as well as public confidence. It can be obviously disconcerting for the parties when another (or yet another) judge becomes involved once the case has been allocated to the appropriate level of judiciary. Most judges prefer to have dealt with a case throughout so that they can gain proper familiarity with the issues and personalities and understanding of how the case has developed over time. In practice the difficulties with maintaining continuity have been and will continue to be the result of the other work commitments of full-time circuit judges, most of whom are expected to work at several court locations and in several jurisdictional fields (criminal and civil as well as family). Even those judges who concentrate mainly or wholly on family law are already heavily committed to public law cases where the new Protocol governing care cases also places a strong emphasis on judicial continuity and on early completion of legal proceedings (with a 40 week target). Continuity is also difficult to maintain when cases are allocated to Recorders (part-time judges). Given existing resources there is a continuing tension between judicial continuity and the avoidance of delay.

**Contact centres**

Contact centres are an invaluable facility, particularly as a short-term measure to allow (typically) the mother to regain confidence in the father’s behaviour and attitude, to test the reliability of both parents and to allow contact to continue or resume where there have been real difficulties. The use of contact centres has certain limitations. They will normally not accept families where there is a significant history of alleged violence or abuse. With the exception of a very few specialist centres they “support” rather than supervise contact. They are staffed by volunteers who are not expected or allowed to provide reports or other evidence for court proceedings; and so any supervision or observation of contact has to involve CAFCASS workers who are not often available at weekends.

**Family assistance orders**

This is one aspect of the Children Act 1989 which has not really lived up to expectations, mainly because of the other demands on CAFCASS and local authorities to whom such orders are addressed, and perhaps also because of uncertainty about what such orders are supposed to achieve. They can be used to try to support children who are upset or bewildered by the conflict surrounding them, or in cases where there remain unresolved problems and as a means of maintaining communication between the family, CAFCASS/the local authority and the court. However, there is quite often delay in allocating orders to the responsible officer which reduces the value of such an order which is limited by statute to six months duration.

**Enforcement powers**

This topic was fully considered by the report of Mr Justice Wall “Making Contact Work”. Effective and flexible enforcement powers are a necessary part of the court’s armoury in those very few cases where the court’s orders are deliberately flouted. There are some cases in which the court gets involved in a form of brinkmanship with defiant parents and the court needs to be able to make meaningful threats to secure compliance with orders. The limited range of powers presently available under the Contempt of Court Act 1981 can make it really difficult to exert the authority of the court and can lead the court to prefer not to make threats which may sound empty. Committal of a parent to prison or a change of a child’s residence are plainly remedies of very last resort. The only advantage the civil court has over the criminal court at present is in the power to impose a suspended prison sentence without there having to be “exceptional circumstances”. The lack of powers to enforce the orders of civil courts by the type of community punishments which are available to the criminal courts has been noted for a long time, (see R v Palmer [1992] 1 WLR 568). The ability to impose suitable programmes of treatment on parties in contempt would be a useful addition to the court’s powers, not just in cases involving children. In cases involving children such a power would provide a potentially useful vehicle for positive therapeutic work, as an alternative to merely coercive punishment.

*James Meston*
Circuit Judge
Bournemouth County Court

*4 November 2004*
Evidence submitted by The Association of District Judges

1. The Association of District Judges represents all 414 district judges of the county courts of England and Wales. Prior to their appointment as district judges, many would have had lengthy and successful practices as lawyers in the family law field either as solicitors or as members of the Bar. Included within the Association’s membership, but not formally represented by the Association, are some of the district judges of the Principal Registry of the Family Division. The Association does not represent the District Judges (Magistrates Courts).

2. The district bench exercises a wide jurisdiction in the family justice system. In the area of private family law district judges can hear all disputes relating to contact and residence. District judges deal with all undefended divorces, give directions in those few which are defended, and in all divorces deal with the division of the parties’ capital and income, save for matters reserved by statute to the Child Support Agency. In the public law area of care work, specially trained district judges, known as Nominated Care District Judges, act in teams with the family care judge and case manage to trial those care cases being heard in the county court.

3. District Judge Walker has been the Hon Secretary of the Association since April 2000. He sits at Wandsworth County Court which, as a Family Hearing Centre in London, has a private law, but not care/public law, jurisdiction.

4. “A Vision for the Future” is a paper which the Association wrote in the summer of 2004, before the present inquiry was commenced, to help inform a debate which Dame Elizabeth Butler-Sloss P had already initiated into proposals for change in the family justice system. A copy of the paper is annexed as Appendix A (not printed); annotations below indicated as “Vision” are references to it.

5. “Parental Separation: Children’s Needs and Parents’ Responsibilities” was a paper from HM Government welcomed by the Association whose response is to be found at Appendix B (not printed). References in the text below are indicated as “Response”.

6. Is the present system working well? The Ministerial Foreword to the present consultation paper suggests that the present system is not working well. The Association does not necessarily agree. The vast majority of separating parents (90%) are able to make satisfactory arrangements for their children without the need for intervention by the courts and the paper records a high level of satisfaction with those arrangements by the parents who are able to reach agreement. Much credit must go to those couples experiencing a separation or divorce who are yet able to remember that they both remain parents of their children and are able to communicate with each other as such. The immense amount of work offered by solicitors in resolving, amicably and quickly, potential contact disputes must equally be acknowledged. The courts are therefore concerned with only the remaining 10% of parents who are unable to reach agreement.

7. Within those 10%, it has to be accepted that there are parents who will place considerable difficulties in the way of meaningful contact; there are others who will fail to enjoy the contact which it has been ordered should take place. The courts cannot prevent family and social discord; they can only deal with it when it happens. Often in that minority of cases the relationships within the family are complex and there are no quick and easy solutions. Trust between warring parents is lost very easily but takes a long time to restore. Resolving these problems can be immensely difficult. Courts constantly emphasise to the parents the benefits of reaching a mutually acceptable solution. Where issues remain unresolved it is vitally important that the case is dealt with as expeditiously as possible in order to minimise the harm to the children and their parents of a prolonged dispute. This calls for the best and most effective use of available resources (Vision para 74). Families and their children are the most important resource that any country has; they are its future.

8. A Unified Administration will be introduced into the court system on 1 April 2005. It will bring together under the umbrella of HM Court Service what previously has been the Court Service, providing the administration for the High Court, Crown Court and county courts, and 42 independent Magistrates Courts Committees. By creating one Unified Administration there is for the first time the ability to look at the court estate as a whole and to contemplate the creation of the very long-awaited integrated family justice system. In other words, for the first time there is the ability to introduce a Family Court.

9. Flexibility, however, within any family justice system is essential if a unified system is to perform effectively and efficiently (Vision para 45). The range of problems with which the courts are presented is vast (Response paras 3–5) and the system must be able to deal most appropriately with each one. There is no “one size fits all” solution. Neither is it appropriate necessarily to start from a belief that children should spend an equal amount of time with each parent (Response para 6) because of the myriad of school, work, home and childcare arrangements. The welfare of the child and not the needs and wishes of the parents must continue to be the paramount consideration; a child is not a commodity to be apportioned between its parents. Judges require a much wider range of powers than that which they presently possess both to enable solutions to be found in what at the moment are often seen as intractable stalemates between two parents wholly unable to communicate with, or understand, each other and to enable court orders, where necessary, to be enforced.
10. Nominated Care District Judges. One illustration of how increased flexibility could work is in the public law care area where, at the moment, final care or supervision orders may only be made either in the Family Proceedings Courts or by circuit judges sitting as care judges in the county courts. The district judges are not able to make final orders even though Nominated Care District Judges have a pivotal role in the case management of such cases. The number of care cases to be brought before the courts is predicted to increase significantly; that will impose strains on an already stretched system. A partial answer would be for some, but not necessarily all, NCDJs to be able to hear some of the simpler care cases by sitting in the Family Proceedings Courts for that purpose; this could be achieved by making NCDJs also Deputy District Judges (Magistrates Courts) (Vision paras 104–107).

11. Out-of-court settlement. It is a truism that any agreement reached by the parents is more likely to be successful than arrangements ordered by a judge with which at least one, and sometimes both, parent would not agree. Greater access to information and advice is therefore always to be encouraged (Response para 10), as is more out-of-court mediation (Vision para 43). Courts themselves often adjourn cases for mediation to be undertaken but it is not always the appropriate course, for instance in cases of domestic violence. Compulsory mediation in all cases would not be an effective remedy: for some families who see the breakdown of a relationship as an opportunity to rehearse past wrongs and resentments this will present a considerable challenge.

12. Reforms. Access to information, advice and assistance from the professions, the availability of mediation and conciliation schemes all have their place but it is becoming increasing recognised that they are in themselves inadequate. It is also a matter of concern that parents are increasingly unable either to find a legal aid solicitor, if they qualify for such assistance, or to afford to instruct a solicitor, if they do not. Parenting plans may well be a useful additional tool, requiring as they would both parents to discuss and agree the future arrangements for their children (Vision para 63). District Judges could be required to adopt a more active role in the settlement of disputes in relation to children prior to the finalisation of divorces (Vision paras 62 and 66); the parents themselves could be further encouraged to reach agreement before a decree nisi of divorce were pronounced (Vision para 64). And the Association await with interest the evaluation of the current Family Resolution Pilot Projects being undertaken in central London and elsewhere.

13. Framework for Private Law. The President announced, simultaneously with the launch of the Consultation Paper, a Private Law Programme that it is hoped will improve the resolution of residence and contact disputes. Every such case would be listed before a district judge for a first hearing within four to six weeks of the issue of the application.

14. Interventionist role. By virtue of being a tribunal of one, the judge is able to adopt an interventionist role, urging the parties, and with the support of a CAFCASS officer also in court, towards a settlement. This happens already in most courts; in-court conciliation is already routine (Response para 8, Vision para 75) although the detail of such schemes often differ. The district judge can almost invariably give an early and neutral indication of the level of contact which would be appropriate and encourage the parties to agree to a particular level of contact or a phased programme of contact which will either render further litigation unnecessary or at the very least ensure that progress is made (Vision para 76). The settlement rate on the day is often considerably in excess of 50%.

15. CAFCASS reports. At present reports from CAFCASS are ordered in many of the cases which remain unresolved despite the interventionist approach of the district judge. This is especially so if residence is in dispute or if there is an objection to any form of contact taking place. The reports themselves are often lengthy. The President’s proposals, which are wholeheartedly supported by the Association, envisage instead that the district judge will have identified in the order s/he makes the areas of disagreement between the parties; CAFCASS would then provide much shorter and more focussed reports. The hope is that they would also be provided more quickly which would enable the final hearing to take place within a shorter timeframe than is presently occurring.

16. A review by CAFCASS and by the courts. It is not unknown for contact arrangements to break down within a very short while of their being agreed or ordered. It has therefore been agreed between the President and CAFCASS that, once individual courts implement the new Private Law Programme, CAFCASS officer will be under an obligation to check soon after the relevant court hearing that the contact arrangements are working satisfactorily. If not, the CAFCASS officer will notify the court. The Association has agreed with the President that in such instances the contact application will be relisted for a review hearing within no more than two weeks of the court hearing from CAFCASS. At that hearing it would be intended to resolve whatever difficulties might have arisen.

17. Gatekeeper role. Whilst in some Family Proceedings Courts there are suitable and trained legal advisers who might be able to take on the interventionist role at a first hearing, the Association believes that the district judges should assume the gate-keeping role in the majority of cases and that therefore all private law residence and/or contact disputes should commence in the county court (Vision paras 53–58 and 74–76). Where an application does not settle at the first hearing, the district judge should consider whether it is suitable for transfer across to the Family Proceedings Court having regard to clearly defined criteria (Vision paras 85–91). There are in the family jurisdiction four levels of judiciary—High Court judges, circuit judges, district judges and the lay magistracy—and to ensure the maximum use of judicial resources and to achieve the speediest possible resolutions it is essential that the gatekeeper transfers across to the Family Proceedings
Court those cases which properly belong there. Ideally, all levels of judiciary would be under the one roof, as they now are in Birmingham, but this is not necessary; co-operation between courts and the sharing of diary information can overcome many of the deficiencies in the Court Service estate (Vision paras 120–123).

18. Local Plans. Since November 2002, with the introduction of the Protocol for the Case Management of Public Law cases, there have been local plans agreed between each county court care centre and the family proceedings courts within its area. The plans set out the arrangements for the disposal locally of the public law work. The Association believes that it would now be appropriate for a Private Law Protocol and Local Plans to be introduced in respect of section 8 residence/contact work, and would hope to play a full part in helping to draft such a Protocol and the Local Plans (Vision paras 83 and 92).

19. Judicial Continuity. This is absolutely essential to any successful system for conflict resolution in the family arena. Bracewell J in V v V [2004] EWHC 1215 (Fam) referred to the existence of 17 court orders made by 16 different judges. Her Ladyship echoed sentiments expressed by Munby J in Re D [2004] EWHC 727 (Fam). The Association believes that most, if not all, family cases, irrespective of their precise nature, benefit from judicial continuity and that such continuity has considerable resource benefits. The parties benefit from knowing that the facts of their case will be well known to the judge to whom the case is allocated. They should also benefit from consistency of approach. Since cases seldom consist of only one element that judge will be able to take a holistic view of the case and, where necessary ensure that all elements of the case are progressing together so that a final hearing of any financial dispute is not delayed by slow progress within the main suit or that where the future residence of any children is in dispute that dispute is resolved prior to any final financial hearing (Vision paras 46–50). Judicial continuity is likely to be more difficult, but not insuperable, to achieve in the Family Proceedings Courts where, by their very nature, lay magistrates are not members of the permanent judiciary and do not sit alone.

20. Contact centres have a crucial role to play in cases where contact, for whatever reason, needs either to be “supported” for a short while, or “supervised” for perhaps longer. However, pressures on their resources often mean that the most contact they are able to offer is for a limited period of two hours once every two week. This is often considered unsatisfactory. Their number, and level of support offered, need to be increased (Response para 16) by central planning and by the allocation of resources.

21. Family Assistance Orders. The Association welcomes the proposed extension of Family Assistance Orders as set out in paragraph 81 of the consultation paper “Parental Separation”. Many FAOs could—but are not—ordered by judges at the moment because of their limited time span and the delays in the allocation of such orders by CAFCASS or by local authorities. Instead, a very similar e

22. Enforcement. Unfortunately, however, some cases defy all attempts at resolution; court orders presently go unenforced. The frustrations of those not able to enjoy contact with their children are understood. As Bracewell J said in V v V, there are only four options at the moment and all can be unsatisfactory: imprisonment (suspended or otherwise), the imposition of a fine, the transfer of residence to the other parent and “to give up”. Legislation is required to introduce, in appropriate cases, the ability for the judge to refer parents to mediation. Family assistance orders merit reform. Judges should be able to refer a defaulting party to information meetings or parenting classes (V v V para 12), or even if appropriate to a psychiatrist or psychologist; one or both parents might benefit from an anger management course. Either parent might need to be subjected to a community punishment order, or even ordered to pay compensation when his/her actions have caused the other parent to suffer a financial loss (V v V and also Vision 95–98). Such interventions will, however, have cost and other resource implications (Response para 17), and may not always be appropriate.

23. In conclusion, the Association has welcomed the opportunity to participate in the inquiry being conducted by the Constitutional Affairs Committee. The district bench is proud of its role in the family justice system but equally is all too well aware of the present problems which HM Government’s consultation paper seeks to address.

District Judge Michael J Walker
Hon Secretary
Association of District Judges

October 2004

Evidence submitted by the Greater London Family Panel

INTRODUCTION

1. (a) The Greater London Family Panel (GLFP) welcomes the opportunity to submit a paper to the Constitutional Affairs Select Committee Inquiry into the way in which Courts deal with family cases. This is in addition to a response to “Parental Separation: Children’s Needs and Parents’ Responsibilities” made on behalf of the Panel by the Legal Committee.
(b) The GLFP comprising some 650 Magistrates commenced in January 2004 and is an amalgamation of the Inner London Family Proceedings Panel sitting at Wells Street, and the 20 Outer London Family Proceedings Courts Panels sitting in 20 different Court Houses throughout London. We are therefore uniquely placed to make representations on the positive contribution of the Family Proceedings Courts to the Family Justice System based on our experiences from both a dedicated family court and from Family Proceedings Courts located in busy multi-jurisdictional Magistrates Courts.

(c) One of the purposes of setting up the GLFP is to support the establishment of regional specialist family centres throughout Greater London with a dedicated staff able to provide court users with daily access and advice. The proposal is for these courts to combine the work of different tiers of court in one location allowing for the listing of work at the appropriate level and for the transfer of work between the tiers as necessary. Responsibility for these proposals has passed from the Greater London Magistrates Courts Authority to Her Majesty’s Court Service and timetabling is currently uncertain. In the meantime, we are concerned to improve service delivery, improve outcomes for children and to reduce delay.

(d) The resident District Judge at the Inner London Family Proceedings Court has submitted a paper which we have had sight of.

(e) As stated in our response to the consultation we agree with the legal position described and look to Government to confirm their commitment by legislation and the provision of resources. We therefore confine our submission to case management, court procedures and listing arrangements for private law work. In addition we are mindful of the change in courts administration to HMCS in general and to the aims and objectives for the London panel in particular.

Specialisation

2. (a) Since the introduction of Family Proceedings Courts on the implementation of the Children Act 1989. Magistrates have undertaken multi-agency training and developed knowledge of children’s development and needs. The formation of the dedicated court at Wells Street in Inner London in 1997 has enabled expertise to further develop and the workload to increase, with the result that service delivery has improved, delay reduced and there has been a reduction in unit costs. With this in mind the GLFP was set up in order to extend these benefits across London and promote consistency.

(b) Currently throughout the Outer London area, family proceedings work is carried out against a backdrop of busy local Magistrates Courts under pressure from heavy workloads in the Adult Crime Courts and the Youth Courts and where there is a shortage of Legal Advisers and Administrative staff.

(c) We would therefore support initiatives outlined by the DCA to increase specialisation in Family Proceedings Courts and would like to see them put into practice at local court level.

Delay in private law proceedings

3. (a) The GLFP is concerned about delays in proceedings in both the County Courts and the PRFD. This varies in different courts. We understand that this is due partly to volume of work and partly due to the delay in the writing of welfare reports by CAFCASS Officers.

(b) Currently, Private Law work can commence either at the FPC level or in the County Court. Due to a preferential fee structure favouring the County Court a high percentage of work commences at that level.

(c) In the longer term, we would propose that all private Law cases should commence in the family proceedings court and be transferred to the county court according to prescribed criteria as is the practice in public law cases. Meanwhile, we propose transfer of appropriate work down to make use of spare capacity in the FPC’s. Work is transferred from the PRFD to Wells Street where the flexibility of a large dedicated courthouse enables a high volume of work to be carried out but levels vary in the Outer London Courts where in some areas little or no work is transferred to the family proceedings court. Transfer of work to the family proceedings court would not only make use of spare capacity in the FPC’s would free county court Judges to deal with more complex matters.

Powers of the courts

4. We refer to Page 2 of our response to the Green Paper on Enforcement which emphasises the differences between the powers available to the FPC and the county court. On occasion a case is transferred to the county court purely to enable that court to make use of its greater powers. This can cause delay. We would suggest that as all courts dealing with Children Act and Family Law Act matters are applying the same legislation, the same methods of enforcement should be available to them.

In conclusion we quote The Hon Mr Justice Munby when giving judgment in Re D (Intractable Contact Dispute: Publicity) 2004 “...In dealing with fast-track cases, even if they have entered the system in the county court, greater use should be made of the skill and expertise of the lay justices and district judges (magistrates) who sit in the family proceedings courts [which] are an invaluable and, at least in private law cases, a seriously under-used resource...”  (ref. Family Law P 320 May 2004.)
The lay Magistrates on the Greater London Family Panel are committed to providing the best outcomes for the children and families subject to proceedings in the family courts. If required we would be happy to attend and appear before the Select Committee.

Margaret Wilson
Chairman
Greater London Family Panel
1 November 2004

Evidence submitted by The Magistrates’ Association—Family Proceedings Committee

The Magistrates’ Association welcomes the opportunity of submitting this paper, which supports our response to the consultation document Parental Separation: Children’s Needs and Parents’ Responsibilities, and is focussed mostly on private law proceedings under the Children Act 1989 as we understand this to be the principle concern of the Committee’s inquiry. We have made observations about family proceedings courts’ (FPCs) public law jurisdiction under the Children Act 1989 where we believe them to be vital to understanding their overall workload. It is made with the support and concurrence of the Justices’ Clerks Society.

In summary, FPCs are made up of experienced, knowledgeable, enthusiastic magistrates who have the capacity to deal with significantly more work thus reducing delay in the family justice system whilst giving a better return on public resources.

Is the family court system being run effectively?

There is significant capacity in FPCs to do more work. Historically, FPCs completed two thirds of all public law Children Act cases, and one third of all private law work. A variety of pressures has caused these proportions to fall. Less than half, and still falling, of public law now stays in FPCs; only 15% of private law applications are made in FPCs. We believe that the introduction of the public law protocol has caused more cases to be transferred to care centres. There is no evidence that cases in general have suddenly become more complex because of the introduction of the protocol and we believe that many of the transferred cases could be successfully completed more swiftly by remaining in FPCs.

Two principal factors appear to be causing the downturn in private law work:

— Cases start in either the FPC or county court at the preference of the applicant. The Framework for Private Law, launched last summer, provides for increasing in-court mediation services in county courts—without any concomitant increase in FPCs. This will only increase the trend for more work to be handled in county courts even though cases can generally be heard much more rapidly in FPCs.

— Fees for publicly funded applicants are higher in county courts than in FPCs. We understand that this was designed to reflect the greater complexity of cases being heard in the former. As the applicant chooses the venue, the Legal Services Commission rarely challenges it, and almost no judge transfers to the FPC matters that have started in the county court, we find it difficult to understand the continuation of this differential. It does not appear to contribute to either the economy or effectiveness of justice.

The Association believes that all private law matters should be started in the FPC (save only where there are pressing reasons such as a live divorce case) as public law ones do now, with allocation criteria for transfer. There is absolutely no credible evidence of concern about the justice being delivered by the lay magistracy in family proceedings; contact and residence applications should be treated in the same way as care proceedings.

Members of the government and the senior judiciary make many positive and complimentary comments about the role of the lay judiciary in family justice. Those comments must be supported by immediate action to shore up FPCs so that they can make a full contribution to the effectiveness of the family courts. There is no need to consider alternative and almost certainly more expensive approaches to tackle delay until action has been taken, and demonstrably failed, to utilise the full capacity of FPCs. Failure to address what is happening will cause further erosion in workload, confidence, and then willingness of magistrates to continue to do the work.

Do family court judges have sufficient powers?

FPCs should be given the same enforcement powers as county courts; it is illogical for it to be otherwise. This lack provides one more justification for parties to use county courts when in all other regards FPCs could do the job.
Family magistrates do, however, have extensive powers, backed by significant experience, expertise and training but they are underutilised. For instance, magistrates were given powers to make non-molestation orders and received expensive and time-consuming training, but then the work went elsewhere. This is ineffective use of resources.

What issues are there about delays caused by the current system?

The paucity of reliable data ahead of the introduction of the public law protocol makes it impossible to draw objective conclusions about its impact on delay. Six major obstacles were identified by the advisory committee in its report; all remain and each is the source of significant ongoing delay. However, what is abundantly clear is that there is significant underutilised capacity in FPCs which could and should be used to address the delays being encountered in private and public law work in both county courts and care centres. It is ironic that at this time there is an increasing drift of work out of FPCs.

The Association is concerned that the increasing focus on public law is causing private law timescales to lose attention. There will no longer be a PSA target in the private law arena. Much is said, and rightly so, about the need to get contact cases into court (where that is the appropriate venue) quickly. When one or both parties are publicly funded delay has obvious consequences for the public purse. In all cases it has an effect on children and their relationships with their parents. More use of FPCs could have a positive impact on resolution timetables.

In order for any reversal of the current drift of work to county courts to be effective, the expertise, enthusiasm and commitment of highly trained—and available—lay magistrates which already exists must be backed by competent legal advice. The work of the FPC creates a unique relationship between magistrates and legal advisor. Just as magistrates need to be willing and interested in family work—and be allowed sufficient time to develop and maintain expertise—so must legal advisors.

Are people using the family courts getting the service they deserve?

There is a real opportunity, with the arrival of HMCS, to create an integrated family court. For this to become a reality there needs to be clear evidence that all of the elements are joined up and with the mandate to be a service based on demonstrable expertise: administrative staff, IT, hearing centres and judiciary (part-time, full-time and legal advisors).

It is not clear that there is a common understanding of what users deserve from family courts. Indeed, as current events demonstrate, there is a real need for a public debate about the purpose of the family justice system. As our response to the government’s consultation makes clear, we are supportive of programmes to divert people away from the courts where possible. We therefore take the Committee’s last question as referring to situations where, for whatever reason, court is where they have finally ended up.

We would say that, as an irreducible core, users deserve affordable local access to a fair, impartial determination of their case from an experienced judiciary in a timescale that meets their needs and those of their family. That determination should be informed by timely expert advice (focussed on locally available interventions) whenever required, and the judgement communicated in a way that all the users understand. Any orders should be underpinned by resources to ensure their implementation. All this should continue to be built on the principle of the paramountcy of the best interests of the children.

Against that background we believe that the principal challenges lie in the:

— Accessibility of the service (local hearing centres).
— Timeliness (access to hearings, availability of welfare reports).
— Universal provision of support services either before an order is made or to support one (mediation, contact centres, family assistance orders for example).
— Fully-funded enforcement provisions (CAFCASS follow-up, parenting programmes, behaviour modification programmes, community-based orders).

Family proceedings courts have the potential to be a vital part of the resolution of these challenges—but only if urgent action is taken to reverse the downturn in their workload.

The Magistrates’ Association
Family Proceedings Committee

November 2004
Evidence submitted by CAFCASS

1. **Introduction**

1.1 CAFCASS was set up from 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 in family law proceedings. We bring 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.

1.2 In January 2004 CAFCASS transferred from DCA to DfES.

2. **The strategic framework in which CAFCASS operates**

2.1 We now work within the strategic priorities set by DfES and contribute to the wider government objectives relating to children. In this context we will have a role to play in taking forward the proposals set out in the Children Bill currently before Parliament and other non legislative measures set out in the Green Paper Every Child Matters.

2.2 We have contributed to the proposals outlined in the Green Paper Parental Separation: Children’s Needs and Parents’ Responsibilities and we attach at Appendix 1 (not printed) our response to that consultation.

3. **The work of CAFCASS**

3.1 CAFCASS exists to ensure children and young people are put first in family proceedings, that their voices are properly heard, that the decisions made about them by courts are in their best interests, and that they and their families are supported throughout the process.

3.2 We operate within the law set by Parliament and under the rules and directions of the family courts. Our role, as set out in legislation in respect of family proceedings in which the welfare of children is or may be in question, is to:

- safeguard and promote the welfare of the children;
- give advice to the family court about matters before it;
- make provision for children to be represented; and
- provide information, advice and support for children and their families.

3.3 During 2003–04 we responded to:

- 33,803 private law cases (that is applications for parental responsibility, residence and contact, where parents have been unable to reach agreement on these matters);
- 13,470 public law cases (that is applications for local authority care and supervision orders and applications for adoption);
- Overall these 47,273 applications involved 73,937 children and young people. Further information about our workload and demand is given later in the Annex.

3.4 In addition CAFCASS practitioners participated in over 350 alternative dispute resolution schemes. The MCSI Thematic Inspection Seeking Agreement, which looked at this element of our work, found that these could be grouped into seven different types of schemes. As part of our contribution to the implementation of the Green Paper we intend to work with others in the Family Court System to identify common agreed criteria so that schemes such as the Essex scheme, mentioned in the Paper can be rolled out more widely and assist families to resolve more issues at an earlier stage.

We are also a major contributor to the Family Resolutions Pilot Project and have worked with commitment and enthusiasm in the development and roll out of the pilots. We would be very happy to provide more information about our alternative dispute resolution role.

3.5 At the other end of the spectrum CAFCASS practitioners supervised 607 new Family Assistance Orders in 2003–04. These orders provide additional advice and support to families after the final orders are made by the court. Current legislation restricts their use to exceptional circumstances only. We are currently undertaking some internal research on their use and effectiveness so that we can contribute authoritatively to the current proposals to review them.

4. **About CAFCASS**

4.1 We employ over 2,000 staff, including more than 1,300 practitioners and we also contracted with over 350 self employed guardians last year. We have continued to recruit additional self employed guardians to meet our objective of having a flexible workforce which can respond to fluctuations in demand. We are the largest employer and contractor of qualified social workers in the United Kingdom and on average our practitioners are more experienced than in any other social work organisation. When CAFCASS started
our practitioners undertook exclusively private law work or exclusively public law work. New practitioners joining CAFCASS are trained to undertake both types of work and over time we plan to train and develop all practitioners who have the necessary skills and experience—and who wish to—to undertake the full range of work. We call this process convergence and believe that it will provide us with a more flexible workforce and create the unified service envisaged when CAFCASS was created.

Our 2004–05 operating budget is £107,830,000.

We work from 125 buildings across England and Wales (with a further 13 properties where we have interview facilities only). We also support 260 home workers who we provide with the same computer facilities as our office-based staff.

Our service delivery is structured through nine English regions, Wales and CAFCASS Legal. We have a small Headquarters, providing overall management of our operations and corporate support on finance, human resources and communications.

Following the Select Committee report on CAFCASS published in July 2003, the entire Board of CAFCASS was invited to resign. They were replaced by an Interim Board in January 2004 and a new board was appointed in the Spring of 2004.

The new members are:

Baroness Pitkeathley (Chair); Baroness Howarth of Breckland OBE; Gillian Baranski; Harry Marsh; Jennifer Bernard; Richard Sax; Margo Boye-Anawoma; Judith Timms OBE; Erica De’Ath OBE; Professor Jane Tunstall; Mark Eldridge; Nicholas Stuart (Co-opted member)

The new Board is rich in experience and expertise as well as strongly committed to CAFCASS’ aims.

A new Chief Executive, Anthony Douglas, took up his post in September 2004.

The Director of Operations and the Director of Human Resources left CAFCASS in August and October 2004, respectively. As a consequence, the new Chief Executive is taking the opportunity to review the senior management functions at Headquarters and has made the decision to reduce the tiers of management between himself and front line staff.

Both the new Chief Executive and the Board have made service delivery the top priority for CAFCASS. Action to achieve this includes:

— putting more resources into the operational teams and regions;
— putting a hold on non-frontline developments to create additional resources to fund frontline services and reduce delays;
— putting in place plans in each team and region to reduce delays in allocating cases;
— reducing the size and functions undertaken at Headquarters and devolving many functions closer to the front line;
— making decisions more open and inclusive; and
— involving all staff and self employed practitioners in developments and decisions within CAFCASS.

In his first two months in post Anthony Douglas the new Chief Executive has:

— visited 32 teams around the country, met with over 600 staff and all key stakeholders, and initiated programmes to transform the internal culture of CAFCASS, now set out in a detailed consultation paper;
— changed the decision-making process so that decisions are made quickly and are widely publicised;
— provided free access to the CAFCASS Intranet for all self-employed practitioners, and removed restrictions on the CAFCASS Smart Group as part of making the organisation more transparent and open;
— contributed to numerous press articles;
— spoken at a number of conferences and events to promote CAFCASS work;
— begun discussions with key agencies in the family justice system about working more effectively together, including the potential development of joint dispute resolution teams; and
— changed the Human Resources functions and policies into a new Staff Support and Development Service.

5. First year issues

5.1 Detailed information on the difficulties associated with the set up and start up were provided to an earlier inquiry of this committee, which reported on the work of CAFCASS. We do not intend to repeat the evidence given but this is available if required. Following the publication of the report CAFCASS prepared a detailed Action Plan to address the Committee’s recommendations and findings.
We had already commenced work on many of the areas identified by the committee and found the committee report positive in reinforcing many of the actions taken. The Action Plan and progress against it can be made available to the Committee on request.

5.2 More information about our performance in our first three years is given in our 2001–02, 2002–03 and 2003–04 Annual Reports.

6. Progress in the last year

6.1 Over the last year we have substantially reduced delays in the allocation of public law cases, which were a matter of concern at the time of the previous Select Committee.

6.2 We understand that this Committee is focusing on Private Law proceedings. We accept that there is still more work to do to achieve consistent speedy allocation of private law cases in many parts of the country. The causes of delay are complex and include a growth in workload demand, staff sickness, delays and in some places inability to recruit significant numbers of practitioners.

The measures that we have so far taken to reduce delay include: developing a staff bank scheme, extending the self-employed contract to take on private law cases, and giving new staff a mixed caseload.

The most recent performance reports to the Board and our sponsorship Department demonstrate the progress that has been made. Progress on Regions not meeting required performance levels is reported to the Board monthly.

6.5 CAFCASS is set Key Performance Indicators (KPI) by its sponsoring department. The most relevant in the context of Private Law cases is our KPI 2, which relates to keeping unallocated cases to the minimum.

KPI 2—The number of reports unallocated less than 10 weeks before Court filing date for the month should be no more than the target of 4% of the workload.

This KPI along with the others is monitored on a monthly and quarterly basis. The graph below shows the cumulative second quarter figure of 4.0%:

Performance (target met): Six regions and Wales met the target for the quarter: East Midlands (0.4%), Eastern (0%), North East (3.9%), North West (1.2%), South East (3.3%), Wales (0.5%) and Yorkshire & Humberside (3.2%)

Performance (target not met): Three regions did not meet the target for the quarter: Greater London (8.1%), South West (10.6%) and West Midlands (6.4%). While these regions have a quarterly percentage that did not meet the target, all show a substantial downward trend from July to September. Greater London dropped from 14.7% in July to 2.0% in September. South West dropped from 11.4% in July to 8.8% in September. West Midlands dropped from 9.7% in July to 2.8% in September.

We also monitor whether regions and teams are able to meet the filing dates of the courts. In this we continue to aspire to the target that Private Law reports should be prepared within 10–12 weeks of the filing date. Teams who are unable to meet this requirement may make arrangements with their Courts to extend the timetable for preparing reports. These teams with extended agreed times will still continue to be counted as unallocated less than 10 weeks before filing date. Wales is the only region whose teams have not made these arrangements with their Courts and work to the agreed timetable. Of the other teams within CAFCASS,
2.5% (two teams) may extend times with the Courts on a case-by-case basis, 50.6% (41 teams) meet the 10–12 week requirement, 19.7% (16 teams) have agreed times of 13–14 weeks, 21% (17 teams) have agreed times of 15–16 weeks and 6.2% (five teams) have agreed times over 17 weeks.

7. THE WIDER FAMILY SYSTEM

7.1 We do however believe that some of the issues contributing to the delays lie beyond the sole control of CAFCASS. The Magistrates Courts Service Inspectorate, which undertakes the inspection functions of CAFCASS for DfES, conducted an inspection into delays. They found that while CAFCASS was focusing on clearing backlogs of unallocated work there was much more that could be done with the courts and others in the family justice system to reduce delays throughout the system, agree alternative dispute and case management processes as well as agreeing appropriate thresholds for requesting reports.

7.2 This year the sponsoring Departmental minister commissioned a report from a consultant, Ernie Finch, into public law delays in the court system and process. Mr Finch has come up with a range of findings and recommendations that point to the need for all agencies in the family justice system to work together to reduce delays and improve services to families and children. Most of his recommendations have been incorporated into the Programme Board on Reducing Delays along with the implementation of the Judicial Protocol.

This work is led at ministerial level by a group with representatives from all the key agencies, including the President of the Family Division. CAFCASS believes that many of the issues identified in the Finch report on public law also pertain to private law and recommends that a similar approach is taken and a protocol developed for private law cases.

8. OUR WORK WITH FAMILIES

8.1 As stated already CAFCASS has contributed to the work leading up to the Green Paper and the President’s Private Law framework. We are committed and enthusiastic about taking the proposed development forward and believe that CAFCASS is now ready to realise the promise made when it was created to see in place a far greater range of support services to families and courts.

8.2 Below are examples of our work, some of which will be familiar. It is worth remembering, however, that behind every high profile and heart-rending story that hits the headlines there is a CAFCASS practitioner working discreetly with the family to ensure that the interests of the child are put first. Not always, or even often, an easy role in private law work.

Case Study 1: Allegations of Violence

A father applied for contact of three children aged 10, five and two. The mother opposed the application, saying the father is extremely violent and has never shown an interest in the children. She claimed his application was motivated by a desire to control her and disrupt her new relationship. This is a reasonably familiar scenario to us in CAFCASS. Police checks revealed 20 “domestic” incidents when the couple lived together. Of these 60% were when help was summoned by the mother, and 40% when help was summoned by the father. No charges were ever brought. Since the couple separated 15 months previously, contact had been sporadic and at times violence apparently broke out between the parents. The mother is a white UK citizen and has a history of depression. The father is a second generation British citizen, his family being from the Indian sub-continent. Cultural issues added to the complexity of the case.

A great deal of work was done with the family and three reports for the Court were prepared. A number of supervised contact sessions were arranged by the CAFCASS Family Court Adviser, who also advised the Court that a Family Assistance Order would be useful. The CAFCASS practitioner conducted a number of joint interviews with both parents, whose attitude softened considerably over a period of time. The parents began to prioritise the needs of their children and satisfactory contact arrangements are now in place.

This case illustrates how most of our work is not in the report writing, but report writing plus direct work with children and parents to move a situation on. Many situations we resolve are initially as intractable as this one. Only a very small proportion require a court hearing, and even when Orders are made, this is usually with consent, the parties having agreed a way forward.

Case Study 2: Complex special needs

D is a seven year old girl with special needs who has not had contact with her birth father for four years, apart from letters which may or may not have been received or opened. He has applied for direct contact. D’s mother, with whom she lives, has two other children, also with special needs. D’s father has a learning disability. In order to be able to make a clear recommendation to court, the CAFCASS Family Court Adviser spoke with all the suitable relatives, a number of local professionals who are working with the family including a child mental health professional, and another professional dealing with specific aspects of the child’s learning difficulties. The CAFCASS practitioner also gathered all known information from local agencies. Direct communication with D through the use of play and materials showed her to be apprehensive about her father. The mother opposed direct contact, even if supervised. The CAFCASS practitioner concluded that D would benefit from continuing indirect contact with her father, through
letters, postcards and exchanges of photographs. She recommended work be done with D’s father so he could understand her views, needs and wishes, and direct work with D’s mother, so she could see the potential benefits of some structured supervised contact in the future.

The case illustrates how many children referred in private law cases are children in need, and how a full assessment and focused follow-up work is often required.

**Case Study 3: intractable contact issues**

Mr Justice Wall (as he then was) gave judgment in an intractable contact case in January 2003. He followed the recommendation of the CAFCASS Legal practitioner and transferred residence of the two children from the mother who he found had been undermining contact to the father who was unimpeachable.

This is a relatively unusual but by no means unique outcome. The judge praised the work of our practitioner who had disagreed in her report with the opinion of a consultant child psychiatrist whom she had commissioned to provide expert medical evidence in what was a very complex case.

**Case Study 4: Medical treatment—representation of a very young baby**

The tragic case of baby Luke Winston-Jones was heard in open court by the President on 22 October 2004. Luke is a baby boy who is approximately nine months old. He suffers from Edward’s Syndrome. Doctor’s treating Luke concluded that cardiac massage and ventilation were not appropriate for Luke in his condition, and so sought a treatment limiting order from the Court. His mother, Ruth Winston-Jones, wished for treatment to be given contrary to the Doctor’s clinical judgment. A CAFCASS Legal practitioner was appointed as guardian ad litem to protect Luke’s best interests. She visited the mother and Luke in hospital, instructed an independent medical expert and attended meetings to try to narrow the issues in the case. It is likely that in the short term there will be more such cases that are emotionally demanding as well as requiring intensive work from social work practitioners and lawyers in CAFCASS Legal over a very short period of time.

The above cases give a mere glimpse at the complexity and distress that our practitioners worked with in the nearly 39,000 cases that were referred to us last year.

9. **Conclusion**

9.1 Since the inception of CAFCASS much has been said about putting the additional “S”, the support “S” in CAFCASS into place. The above case studies demonstrate that some of that is already happening, but as we have stated in our Green Paper response we believe that much more can be achieved.

9.2 We firmly believe that as an organisation we are now ready to put a sharper focus on our role in private law work. We are keen to work with other agencies and the independent and voluntary sector to achieve the changes proposed in the Green Paper and we believe that if our resources can be focussed on the more complex cases much earlier on in the process that we will be able to make a real difference.

9.3 We are committed to work with others to achieve real changes both within CAFCASS and within the wider Family Courts System so that children can continue to enjoy safe and meaningful relationships with both parents and wider family members following separation and divorce. We believe that this is achievable and in the best interests of most children if they are to grow up and develop mature adult relationships and ultimately become parents themselves.

Children and Family Court Advisory and Support Service

*1 November 2004*

### Annex

**CAFCASS workloads and resources**

1. **Workloads**

<table>
<thead>
<tr>
<th>Type of work</th>
<th>2001–02 actual</th>
<th>2002–03 actual</th>
<th>2003–04 actual</th>
</tr>
</thead>
<tbody>
<tr>
<td>Private law requests</td>
<td>34,704</td>
<td>34,761</td>
<td>33,803</td>
</tr>
<tr>
<td>Public law requests</td>
<td>13,462</td>
<td>13,815</td>
<td>13,470</td>
</tr>
<tr>
<td>Total requests</td>
<td>48,166</td>
<td>48,576</td>
<td>47,273</td>
</tr>
<tr>
<td>Family assistance orders</td>
<td>436</td>
<td>582</td>
<td>607</td>
</tr>
<tr>
<td>Privileged mediation</td>
<td>4,346</td>
<td>4,650</td>
<td>3,632</td>
</tr>
<tr>
<td>Directions Hearings</td>
<td>N/A</td>
<td>N/A</td>
<td>38,750*</td>
</tr>
</tbody>
</table>

* Directions hearings involving CAFCASS practitioners undertaking alternative dispute resolution have resulted in a reduction in the number of privileged mediations during the last year. This information was not consistently collated from all teams in the past.

**Note:** 2001–02 figures based on six months actual data. Our workload is determined by the number of applications to the family courts and is not within our direct control.
2. **People**

<table>
<thead>
<tr>
<th>Region</th>
<th>Self employed (headcount)</th>
<th>Employed staff in Post (headcount)</th>
<th>In Post (WTE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eastern</td>
<td>40</td>
<td>126</td>
<td>105.89</td>
</tr>
<tr>
<td>East Midlands</td>
<td>15</td>
<td>142</td>
<td>125.89</td>
</tr>
<tr>
<td>Headquarters</td>
<td>0</td>
<td>87</td>
<td>80.6</td>
</tr>
<tr>
<td>Legal Services</td>
<td>0</td>
<td>28</td>
<td>28</td>
</tr>
<tr>
<td>London</td>
<td>94</td>
<td>212</td>
<td>187.4</td>
</tr>
<tr>
<td>North East</td>
<td>11</td>
<td>132</td>
<td>117.38</td>
</tr>
<tr>
<td>North West</td>
<td>23</td>
<td>307</td>
<td>276.05</td>
</tr>
<tr>
<td>South East</td>
<td>90</td>
<td>188</td>
<td>151.59</td>
</tr>
<tr>
<td>South West</td>
<td>30</td>
<td>167</td>
<td>139.3</td>
</tr>
<tr>
<td>Wales</td>
<td>15</td>
<td>148</td>
<td>127.8</td>
</tr>
<tr>
<td>West Midlands</td>
<td>59</td>
<td>212</td>
<td>182.93</td>
</tr>
<tr>
<td>Yorkshire &amp; Humberside</td>
<td>11</td>
<td>274</td>
<td>242.86</td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>388</td>
<td>2,023</td>
<td>1,765.69</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Staff Group (employed)</th>
<th>In Post (headcount)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family Court Advisors</td>
<td>1,307</td>
</tr>
<tr>
<td>Service Managers</td>
<td>126</td>
</tr>
<tr>
<td>Directors (inc. Chief Executive)</td>
<td>5</td>
</tr>
<tr>
<td>Board Members</td>
<td>12</td>
</tr>
<tr>
<td>Senior Managers (Divisional Directors, Assistant Directors, Regional, Managers and Business Managers)</td>
<td>34</td>
</tr>
<tr>
<td>Specialists (Lawyers and HR Advisors)</td>
<td>41</td>
</tr>
<tr>
<td>Administrative Staff (Regional and Headquarters support functions)</td>
<td>420</td>
</tr>
<tr>
<td>Assistant FCA</td>
<td>6</td>
</tr>
<tr>
<td>Ancillary Staff</td>
<td>20</td>
</tr>
<tr>
<td>Support Worker</td>
<td>3</td>
</tr>
<tr>
<td>Sessional and Bank Scheme</td>
<td>53</td>
</tr>
</tbody>
</table>

Note: based on data at 30 September 2004.

3. **Financial Resources 2004-05**

<table>
<thead>
<tr>
<th>Budget type</th>
<th>Annual operating budget £000's</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Staff</td>
<td>66,153</td>
<td>62</td>
</tr>
<tr>
<td>Contract (self employed guardians) and agency</td>
<td>12,399</td>
<td>11</td>
</tr>
<tr>
<td>Total staff</td>
<td>78,552</td>
<td>73</td>
</tr>
<tr>
<td>Running costs</td>
<td>23,283</td>
<td>22</td>
</tr>
<tr>
<td>Accommodation</td>
<td>4,711</td>
<td>4</td>
</tr>
<tr>
<td>Partnerships</td>
<td>1,284</td>
<td>1</td>
</tr>
<tr>
<td>Capital</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total non staff</td>
<td>29,278</td>
<td>27</td>
</tr>
<tr>
<td><strong>Overall total</strong></td>
<td><strong>107,830</strong></td>
<td></td>
</tr>
</tbody>
</table>
Evidence submitted by HM Magistrates’ Court Service Inspectorate (MCSI)

Statutory remit of MCSI

1. MCSI welcomes the decision of the Constitutional Affairs Committee to examine family justice and the family courts.

2. Under the terms of the Justices’ of the Peace Act 1997, HM Magistrates’ Courts Service Inspectorate (MCSI) is required to inspect and report to the Lord Chancellor on the organisation and administration of magistrates’ courts for each magistrates’ courts committee (MCC) area. MCSI’s powers to inspect CAFCASS are set out at section 17 of the Criminal Justice and Court Services Act 2000. The same Act also established CAFCASS.

3. Under the Courts Act 2003, from April 2005 MCSI will cease to operate and will migrate to become HM Inspectorate for Court Administration (HMICA) with responsibilities for inspecting the system that supports the carrying out of the business of the courts (HM Courts Service). Its responsibilities for inspecting CAFCASS will continue in England. In Wales, where under provisions in the Children Bill currently before Parliament CAFCASS will be devolved to the Wales Assembly, HMICA will inspect the service.

Background

4. MCSI has not routinely focused its inspection of MCCs on family proceedings. However, in May 2001 it published “A Review of Case Administration in Family Proceedings Courts”. Since April 2001, MCSI has built up a systematic body of inspection evidence and has published 20 reports of the inspection of CAFCASS. These include Seeking Agreement (December 2003), the report of a Thematic Review of dispute resolution schemes involving CAFCASS at an early stage of private law proceedings. This report is specifically relevant to proposals that are set out in the Green Paper Parental Separation: Children’s needs and parents’ responsibilities (July 2004) and MCSI’s headline response to the consultation is set out below at paragraphs 18–24.

5. MCSI gave oral evidence to the Select Committee of Inquiry into CAFCASS in April 2003 and submitted its inspection reports as advance information.

6. MCSI’s relevant recent sources of information for the current Inquiry include, in particular, its inspection reports:

   - **Thematic Review**—Seeking Agreement (December 2003).
   - **Overview report**—Towards Year Three (April 2004).
   - **Tackling Delay** (July 2004).
   - **Training and Quality Assurance for Service Delivery** (July 2004).
   - **Managing CAFCASS** (August 2004).
   - **South West Region** (October 2004).

7. All the above reports are available on MCSI’s website at: [www.MCSI.gov.uk](http://www.MCSI.gov.uk)

The Family Justice System—recognition and developments

8. There is widespread recognition that although there are courts that are not explicitly called “family courts”, there is a well-established set of arrangements across England and Wales. Government departments and a wide range of professionals know these as “the family justice system”. There have been many initiatives to continue to develop and improve the effectiveness of the family justice system. For example, there have been the President’s Inter-disciplinary Committee, the interdisciplinary conferences held every two years (with published papers), publications such as Working in the Family Justice System (1998), the outputs from The Advisory Committee on Family Law and the Protocol for Judicial Case Management in Public Law Children Act Cases (2003). This year has seen the establishment of the Family Justice Council. MCSI believes that setting up HM Courts Service will also help further align practice, procedure and efficient deployment of resources in family proceedings.

The Family Justice System and its lack of overall aims

9. However, MCSI also notes the absence of clear and agreed aims for the family justice system. Instead, there is a range of arrangements such as departmental objectives and public service agreements. Some of these, such as increasing the level of contact between children and their separated/divorced parents, approach what might be considered as an example of a family justice objective. Delivering due process and justice might be considered as another. But, in family matters, justice for a parent may conflict with the need to ensure justice and welfare for the child.
10. Clear aims for the family justice system would in turn facilitate the development of objectives, performance indicators and targets. These would help assess the performance of the family justice, identify where it needs to improve, and make better use of the considerable resources that it utilises. These developments should encourage the specification of the next generation of judicial statistics that need to be generated.

OUTCOMES FOR CHILDREN

11. Among the key aspirations underpinning Every Child Matters and the children bill currently before Parliament is defining what is meant by better outcomes for children. To support this ambition, the process has begun of setting out measurable indicators. These should provide more reliable evidence as to whether, over time, such outcomes are being achieved. Clear links will be needed to join up these kinds of developments with the family justice system in order to assess its contribution to the delivery of better outcomes for children.

12. Joint Area Reviews are one of the children bill provisions that aim to link the contribution made by a wide range of services in some 150 areas across England to achieving improved outcomes for children. There is an opportunity to link such outcome measures related to services for children with court generated evidence about those children who are the subjects of decision-making in family proceedings.

EXPECTATIONS OF PROFESSIONALS AND THE PUBLIC ABOUT THE AIMS OF FAMILY JUSTICE

13. MCSI’s inspections of CAFCASS show that once one moves beyond protecting and safeguarding children who are, or may become, the subject of family proceedings, there are wide differences of professional view about the purpose of family justice related work, as well as the best ways of achieving improved results. Similarly, it is increasing apparent to MCSI that the parents and children as service users whose views inspectors elicit have very different opinions. These cover what they want and expect, as well as what they feel entitled to and need from their dealings with the family justice system.

14. There are also different expectations by the public at large, and some professionals about what are, or should be, the aims for care proceedings initiated by local authorities on behalf of the State (Children Act 1989 section 31), as well as how in practice they are delivered. The position is sometimes characterised by the criticisms that either the authorities have acted precipitously early or far too late. Whilst there may well be more agreement about the need to ensure the best welfare outcomes for the child, there are differences of view about the optimum ways of achieving these.

15. Some of the high profile views of groups representing parents of both genders about disputed residence and contact (Children Act 1989 section 8) also reveal a wide range of opinions. Here, there seems to be a lack of consensus about whether the current arrangements for making decisions about children in private law family proceedings are satisfactory. Again, as with public law, there are differing views and expectations about how child welfare is best assured in the context of the rights of both the children and their parents.

PROTOCOL FOR JUDICIAL CASE MANAGEMENT IN PUBLIC LAW CHILDREN ACT CASES (2003)

16. The ambitions of the courts led Protocol (to enable the court to deal with every care case justly, expeditiously, fairly and with the minimum of delay) are wholly commendable. MCSI visits to CAFCASS and courts suggest that significant progress is being made in achieving the Protocol targets. However, the Protocol requires a great deal of interagency co-operation and commitment, particularly from local authorities and CAFCASS, to feed into the courts. In many areas of the country, CAFCASS is able to play its full part. But in many other areas, it continues to have difficulties in appointing children’s guardians promptly. This apparent lack of capacity is perceived by courts as significantly undermining their ability to meet Protocol targets. It also puts children at risk in the proceedings if their voice and needs are not properly heard through the children’s solicitor and children’s guardian (known as the “tandem model”). As MCSI has stated in its recent reports, it means that in some areas and for some children, CAFCASS is failing in its statutory duty to safeguard and promote the welfare of children in family proceedings, as set out in section 12(1) of the Criminal Justice and Court Services Act 2000, although it is not possible to put an exact figure on this.

PRIVATE LAW APPLICATIONS—DELAY

17. The effectiveness of family proceedings dealing with contested applications around contact and residence under section 8 of the Children Act 1989 is also dependent to some degree on how well courts and CAFCASS work together. Again, MCSI regrets having to report that delay in CAFCASS filing welfare reports in private law in a few parts of the country is up to 26 weeks. In MCSI’s view, this is chronic and unacceptable. CAFCASS continues to address these matters nationally. In MCSI’s view, there needs to be much greater flexibility in private law reporting by CAFCASS, particularly where a shorter and speedier report is needed about a single issue. This in turn would help, to some extent, to free up capacity to deal with some of the most complex cases, including where in the higher courts the child is made a party under
the provisions of rule 9.5. In its reports, MCSI has also urged CAFCASS and courts to agree protocols for the ordering of section 7 welfare reports. MCSI has undertaken extensive reading of CAFCASS private law reports. As such, it has some doubts whether the repetition of much background material from the applicants’ and respondents’ statements and other supporting documents about the history of the relationship and its breakdown adds sufficient value for the courts to aid them adjudicate issues, such as the child’s contact and residence. The proposals in the Government’s Green Paper discussed below offer CAFCASS a chance to re-align its resources and focus in private law matters.

SUMMARY MCSI RESPONSE TO THE GOVERNMENT’S GREEN PAPER Parental Separation: Children’s Needs and Parent’s Responsibilities (July 2004)

18. MCSI welcomes the Government proposals set out in The Paper. The proposals are far reaching. Current arrangements demonstrate a need for a “social” rather than “legal” gateway into the system of Family Justice. MCSI is of the view that the full implication of the proposals is the recognition of the need for a social work service for those families facing relationship breakdown.

19. CAFCASS is given a high profile throughout most of The Paper and is well placed to take on and develop the social work tasks set out in the Government’s proposals. MCSI anticipates that this would entail a reconfiguring of CAFCASS activity with consequent training implications.

20. The Paper provides a framework for a flexible, responsive, customer focused system for family justice. The proposed system opens up opportunities to provide support (care) alongside the enforcement of court decisions if necessary (control). Social work is at root the balance of care and control. However, MCSI considers that service users do not see CAFCASS as a support service and it would need to be marketed as such.

21. Until recently, Family Justice has not been subjected to systematic research or rigorous inspection. Consequently, views about it, whether supportive or critical, tend to be based on anecdotal rather than systematic evidence. In particular, there is little if any evidence about outcomes of the Family Justice System.

22. In MCSI’s experience, there is little systematic evidence to support the claim made about in-court conciliation in The Paper that “such an approach is known to work where it is currently used”. MCSI urges caution before steps are taken to implement the proposal to extend in-court conciliation systems nationwide. Ideally, much more research evidence is needed to underpin the future direction of Government policy.

23. The Paper notes the extent and range of emotions bound up in adult separation and separation from their children. Based on meetings with service users and observations of practice, MCSI concludes that answers to almost all of the consultative questions need to be set in the context of such emotional responses. As such, in order to provide the right service for parents at the optimal time, intelligent, sensitive, child focused and systematic assessment skills will need to be brought to bear.

24. Implementation of many of the Green Paper’s proposals is contingent in each case on the early assessment of risk to children, adults and the public. Currently, there is no tool for systematic risk assessment in use by CAFCASS or the courts.

MCSI’S CONCLUDING COMMENTS TO THE COMMITTEE

25. MCSI concludes that there is a need to try and reach agreement on a set of aims and key objectives for the family justice system, as currently constituted. All other developments, such as more effective interagency working by all the main constituents of the family justice system, need to contribute towards such aims and objectives. In MCSI’s view, an agreed set of aims and objectives would help to:

— clarify the roles of all key stakeholder organisations and their work;

— provide a framework within which to locate further developments across the family justice system;

— help to reduce some of the public and professional confusion about achieving child welfare within family proceedings; and

— encourage explicit links between the children bill provisions and the family justice system aimed at achieving assessed better outcomes for children involved in family proceedings.

Arran Poyser
Director
Inspection of CAFCASS

1 November 2004
Evidence submitted by Napo

A. INTRODUCTION
Napo welcomes the opportunity to submit written evidence to the second inquiry into the functioning of the Family Courts since 2003.
Napo is the Trade Union and Professional Association for Family Court and Probation Staff. Napo currently has just over 620 members in CAFCASS, the majority of whom are practitioners and managers working within the private law arena, but Napo also represents an increasing number of public law and newly appointed staff undertaking both public and private law work. Collectively Napo’s members have a substantial number of years’ experience of assisting the courts to resolve family disputes, following separation or divorce, in the best interests of children. Napo has overseen many changes in emphasis of the tasks over the last 20 years and therefore feels well placed to comment on the issues that the Committee is currently investigating.

B. INITIAL INQUIRY
Napo gave both written and oral evidence to the first inquiry into the functioning of CAFCASS, the Children and Family Court Advisory and Support Service. In that evidence in March 2003 Napo concluded:
Napo gave both written and oral evidence to the first inquiry into the functioning of CAFCASS, the period has been characterised by sound management intentions, which have not always been implemented in the workplace. For the future, CAFCASS urgently needs to develop a training strategy for existing staff and new recruits. It needs to examine the feasibility of a trainee or apprenticeship programme. CAFCASS needs to develop, in conjunction with staff, an IT database for case management. CAFCASS needs to take urgent steps to reduce unallocated cases. The organisation needs to develop a workload measure for practitioners and managers. CAFCASS needs to develop its Human Resources policies in order to retain and attract qualified workers. CAFCASS needs to implement family-friendly policies, which would have the effect of encouraging a diverse workplace”.
Napo acknowledges that improvements have and are being made in the management of CAFCASS. However, Napo believes that that there are still a number of areas that require significant attention, including the long-term training strategy and the proposals for a case recording system. Napo welcomes the reduction in unallocated cases in some geographical regions, but still believes that the time taken to complete cases because of staff shortages and workloads is unacceptable. There is still need for human resources policies to be developed in order to attract and retain qualified workers, and CAFCASS would benefit from family-friendly policies to encourage a diverse workforce.

C. GREEN PAPER—PARENTAL SEPARATION: CHILDREN’S NEEDS AND PARENTS’ RESPONSIBILITIES
Napo has submitted evidence on the Government’s Green Paper on Parental Separation. Copies of this will be made available to the Committee if required. In its evidence Napo gave cautious support to the Green Paper and its emphasis in supporting parents to “problem solve”and focus on their children’s needs in an early stage of the dispute. In addition, Napo concurred with the view that there should be improved information and support made available to separating parents, with a view to avoiding unnecessary adversarial court disputes. This information needs to be a mix of legal advice and information that enables parents to better understand their children’s needs and responses to the separation, and what will help them manage this in the least problematic way. Napo also recognises that the management of parental separation is an ongoing process and not a single event and that there needs to be a broad range of information and support services available to parents and children at different stages of the process.

D. KEY AREAS
1. Is the Family Court System being run effectively?
Napo is concerned that any analysis of whether the Family Court System is being run effectively should be based on the underlying principles of the Childrens Act and the focus should be on the welfare of children. Recent activities of some pressure groups and the media attention they have achieved, should not obscure the intention of the Family Court System which is fundamentally to meet the welfare needs of children. The definition of “effective” is therefore crucial.
Napo supports the principles enshrined in the Green Paper of early support and intervention with the small proportion of families that are accessing the Family Court System. There are already many examples of good practice in which as a result of collaborative working between families, the judiciary, CAFCASS staff and other professionals, effective resolutions are reached. Napo would be supportive of continuing development of this work.
Napo is, however, of the view that considerable caution needs to be exercised in understanding the underlying problems that the Family Court System may appear to present. The Family Court System cannot resolve all family disputes to the satisfaction of all involved, nor did it create them in the first place. The majority of cases coming before the courts are extremely complex and time consuming and courts are often faced with managing contradictory needs and unrealistic expectations.

It is Napo’s view that the effectiveness of the courts is significantly impaired by delay, lack of court time, the over adversarial approach adopted by some of the players, lack of access to specialist resources and in some areas poor court buildings and infrastructure. These issues will be referred to again.

Napo would make a number of specific points about the running of the Family Court System:

(a) Pressure to reach agreement

Napo fully supports the principle currently underlying much Family Court work which encourages parental agreement and the resultant reduction of conflict at as early a stage as possible. However, Napo is also concerned that pressure on parents to resolve matters early may lead to a greater disregard of their children’s wishes and feelings and in some situations their safety. Specifically, where professionals have been involved in assisting the parents to reach agreement, then ensuring that the needs of the children remain central to any decision making becomes a joint responsibility with the parents. The experience of Napo members would suggest that at times of heightened distress following separation, there are occasions where one or both parents struggles to recognise how their children are feeling and to listen to them adequately.

(b) Reports

Napo believes, based on its members’ experience, that the majority of reports that they prepare are on families with difficult and complex problems and as such represent an appropriate use of resources. In recent years, families with less intense problems have been diverted into the Mediation Service and therefore CAFCASS input with parents and initial liaison at First Directions Hearings have significantly reduced inappropriate referrals for reports. Napo believes, therefore, that even if the proposals in the Green Paper are adopted, the potential for reduction in the number of requests for CAFCASS reports may be limited. This in turn leads to questions of resources as many of the proposals contained in the Green Paper, for example rolling out of initiatives such as the Family Resolutions Pilot, suggests that CAFCASS would be involved in additional work.

Napo believes, therefore, that there has to be a full cost analysis undertaken of the additional resources needed to implement any proposals that would lead to greater efficiency. Napo believes that work with hostile separated parents is difficult and demanding and requires great emotional and mental energy from practitioners. In Napo’s experience overworked and exhausted practitioners are unlikely to be as effective in their work.

(c) Safety from harm

Allegations of domestic violence and issues of the safety of children are a significant feature in family proceedings. Napo is concerned that the current focus on parental rights and ill-informed views from some commentators, should not lead to a change in culture, in which the safety of both parents and children is considered a high priority.

Current systems for managing these issues would benefit from further research and consideration. For example, Napo members report that parents do experience pressure from the judiciary and legal representatives to avoid Finding of Fact Hearings and on some occasions may agree to a Schedule of Admissions. Such admissions can sometimes represent only a small part of any alleged violence and in Napo’s view do not then assist any assessment of risk. Napo also believes that many court facilities are unsatisfactory in that separate waiting areas are not provided and that victims of alleged violence often do not have access to the resources offered to vulnerable witnesses in the criminal courts, such as evidence by video link.

A strategy paper in relation to Napo’s approach to domestic violence is available at www.napo.org.uk/cafcass/

(d) Mediation

Napo welcomes the Green Paper’s commitment to continue to promote mediation as a means of supporting parents to resolve disputes without recourse to court. This can only result in greater efficiency and effectiveness. However, there are occasions where mediation may not be appropriate, particularly where child protection or violence issues are live. In this context Napo members have expressed concern about the current requirements for parents to explore mediation prior to taking matters to court if they wish to access
public funding. This can also be problematic where contact has completely broken down, can add to delay in the restoration of contact where appropriate and can potentially, therefore, damage the relationship between the child and non-residential parent.

(e) Role of CAFCASS practitioners
Within many courts, CAFCASS practitioners are actively involved in problem solving and dispute resolution. Good relationships often exist with local judiciary and legal representatives and significant efforts are made to resolve disputes at an early stage to avoid costly court hearings. Napo recognises that a more consistent approach could be developed nationwide and therefore welcomes many of the suggestions in the Green Paper. However, Napo does not believe that the proposals contained in the Green Paper which are aimed at greater efficiency in the Family Courts necessarily represent a significant shift for CAFCASS practitioners. Underpinning the work of private law practitioners is an understanding that parents in dispute continue to hold responsibility for their children and continue to do so long after the court is involved in their family life. Napo believes that a problem solving approach that encourages all parties to respond to the feelings and needs of the children lies at the heart of enquiries and reports and informs all intentions in court.

(f) Best practice
Napo recognises that there needs to be dissemination of what is currently considered to be best practice in respect of in-court conciliation and that is likely to need additional resources. Napo also believes that there needs to be monitoring in the interests of effectiveness and accountability in respect of ensuring that safety and diversity issues are fully addressed in the process. Napo believes that in most areas systems are already in place to ensure that reports are only ordered when necessary and that it is unlikely that the number of reports will be reduced significantly as the Green Paper emphasises. Napo reinforces its view that the high levels of hostility, domestic violence, substance misuse and mental illness are significant features in many of CAFCASS reports, and it may therefore be unwise for decisions to be made at an earlier stage in court without an informed assessment of the impact of parental behaviour on children concerned.

2. Do Family Court Judges have sufficient powers?
Napo is not convinced that the arguments have been made to support a significant increase in judicial powers. Napo is more concerned that the lack both of in-court resources and more specialist resources within wider society effectively limit the options available to the judiciary.
Napo believes that a more punitive approach to parents is likely to be unhelpful and that the suggestions made in the Green Paper that judges need additional powers to jail parents in certain disputes would be counter productive. This would cause considerable hurt to children, would demonise one parent, and could lead to admission to local authority care. If the parties are deeply entrenched and the courts need a punitive model then one should be developed that does not impact adversely on children. Consideration should be given to therapeutic intervention or the use of the fine. It is difficult to envisage circumstances where children would want to see their father send their mother to jail, or vice versa. Napo has a number of other comments related to the powers of the courts which have also been referred to in the response to the Green Paper.
Napo, whilst concerned about a punitive model towards parents, would however support a model which holds parents to account on behalf of the court.

(a) Safety
Napo reiterates its earlier comments on the need for judges to focus on the importance of parental and child safety and to follow the President’s Direction in relation to domestic violence. The experience of Napo members is that implementation of these guidelines are inconsistent across the country. We would welcome any emphasis on the need to ensure that contact is safe for both the child and the main carer. It is now well accepted that where there is abuse or neglect, exposure to domestic violence, or severe parental conflict the effect on children can be extremely damaging.

(b) Shared residence
Napo does not support proposals by some that residence of children should be automatically split between the parents. Napo members have daily contact with children who are suffering as a result of their parents’ inability to focus on their welfare rather than the parental argument. Experience suggests that court arguments over shared residence are not infrequently a means by which parents play out their disagreements and power struggles rather than a response to the child’s needs. Napo would not favour any change in legislation that altered the primary focus of the court from the welfare of the child.
Children’s needs must continue to be considered on an individual basis. The families Napo members encounter come from a wide variety of backgrounds and the adults within these families consequently adopt different parenting roles. This could be influenced by many factors including culture, gender, employment, finances, class, health and disability. The gender of a child may also be a factor that affects how parents relate and interact with them. The way in which parents carry out their responsibilities may change over time according to the age and gender of the child. Siblings may have a different quality of relationship with one parent than the other. All these factors Napo believes need to be taken into account when determining the right arrangements for the child following separation. An automatic “one size fits all” may meet the needs of the parents but in all probability will not meet the needs of the child. Overall Napo does support the position that for most children it is in their best interests to have a meaningful relationship with both parents where it is clearly safe to do so.

(c) Parental accountability

Courts, and generally non resident parents, are rightly frustrated in a small proportion of cases where the resident parent refuses to co-operate with court proceedings or court orders. Napo agrees that this is a genuine problem, but does not consider there to be an easy resolution which maintains a focus on the child’s welfare. Napo is well aware of situations where the conscious or unconscious behaviour of the resident parent effectively damages a child’s relationship with the other parent, or other family members.

It has been suggested in the Green Paper that CAFCASS should routinely contact parents following the making of an order. Whilst in sympathy with the intentions behind this proposal, Napo believes that this would be against the principle that the proceedings are private and that once they are concluded the parents have a responsibility to carry on without any undue interference from the state, and should be encouraged to do so. Napo believes that the process of contacting a parent after proceedings may cause them to identify problems that they may otherwise have resolved themselves. It could create a situation of making them dependent on outside agencies that was unnecessary.

However, Napo members do report concern that, after an order is breached following a final hearing, it can often take a considerable amount of time for the matter to be heard again by the court, during which time the parent/child relationship can be again disrupted. There may therefore be merit in exploring the possibility of a rapid response system which would be a form of regionalised breach court whereby matters could be heard quickly with the assistance of a CAFCASS officer, as at first direction hearings, and the problem resolved and contact restored where appropriate. Care would need to be taken to ensure that parents did not abuse this process in order to have their case in effect reheard.

(d) Support for families in proceedings

Napo is concerned at the lack of an adequate range of support for families whose problems are deeply entrenched and believes this is a significant issue for both Family Court Advisors and the judiciary. Most areas report a lack of access to counselling and therapeutic services, for example within the NHS. Where services do exist they are generally overstretched and waiting lists can effectively make referral meaningless from a court perspective. This concern is also reflected in the inability of many social services departments to offer services to families where children are not within the child protection system. Napo members are concerned at the number of children who are emotionally damaged by these proceedings, but whose needs local authorities are unable to prioritise.

Napo can see possible benefits in some increase in the number of Family Assistance Orders in order to provide a short-term level of support following the making of a final order. This would be appropriate in situations where there was a clear focus and tasks to carry out and informed consent had been obtained from all parties and the children. Napo believes that it is not really effective when the judiciary make Family Assistance Orders without the involvement of CAFCASS staff, primarily because in such cases there is generally a lack of clarity about the purpose of such orders, lack of considered agreement and often an expectation that CAFCASS staff have at their disposal “miracle” cures to intractable problems.

Families with complex problems are often in need of more long term intervention than the Family Assistance Order can provide. However, Napo believes that if an increase in the number of Family Assistance Orders occurs there would need to be specific resources set aside to ensure this work is carried out effectively and that it is not marginalised by the pressure of more immediate work for the courts. Napo would also welcome additional resources to allow those parents who are particularly intransigent to have access to intensive therapy and support for change and the increased availability of creative programmes.

(e) Enforcement

Napo believes that an approach which focuses on ensuring parental co-operation could be seen as more advantageous for the children concerned than punitive orders for non-compliant parents that are likely to harden attitudes further. Napo therefore reinforces the need to focus on parental accountability rather than punishment.
3. Issues surrounding delay in the system

Delay is a significant issue within some courts and can result in long term damage to children and limit the courts’ ability to intervene effectively. Napo members frequently report serious delays as a result of lack of judicial time and this problem is often exacerbated in the higher courts. Napo members report cases which, despite being listed for several months do not go ahead on the day due to double or multiple booking in the judge’s list. It can then lead to a further adjournment of two or three months or longer before a new date can be agreed. In situations where there is currently no contact taking place this is particularly damaging. It is a common experience for public law cases to take priority in a judge’s list, which in Napo’s view reflects a lack of understanding of the emotional harm experienced by children during parental separation and conflict. It is also the case that such delays are extremely expensive in relation to professional time and the cost of public funding.

Delay is also a significant feature in accessing expert opinion. In many areas there are very limited numbers of child and adult psychologists and psychiatrists available for court work. It is therefore not uncommon for there to be an adjournment of several months simply waiting for an appointment to see a specialist.

It is also the case that Napo members report frustrating delays as a result of parties meeting counsel on the morning of a full hearing. It is commonplace for CAFCASS officers to spend several hours waiting while barristers introduce themselves to clients, familiarise themselves with the case and then become involved in advice giving and potential problem solving. It is also not uncommon for this to lead to a further adjournment as time allocated for a judge to hear the case has then been lost. Napo would support a system which ensured that counsel were fully briefed prior to any final hearings and options for resolution had been explored fully before the date of the hearing itself.

Delay in allocating and processing S7 reports has been an issue since the creation of CAFCASS in April 2001. The causes of the delay have included a lack of court time and space, insufficient administration, increasing demand in some areas, too few CAFCASS staff and a lack of judges.

However, by the Autumn of 2004, it is clear that in many places backlogs are not as severe as they have been in the past. Napo is nevertheless concerned that the regular quarterly figures which detail time taken to allocate reports no longer seem to be available.

Case management

Napo welcomes and supports the principle of good case management to minimise delay and to ensure continuity, as being in the best interest of children, where this is practically possible. Napo does not believe that all delay is necessarily negative. A reasonable amount of time for report preparation allows the writer to work with a family, to observe contact, to allow parents space to reflect on discussions, and importantly to allow for the children to be consulted. Napo believes it is commonplace for Children and Family Reporters, with parental consent, to trial arrangements that can then be reviewed at a later stage. Such delay can be constructive in assisting parents to reach a final informed agreement and has the benefit of being more successful than a hastily imposed Court Order.

Napo would emphasise that the most significant and problematic delays are usually with the court process itself, significant waiting times for hearings and over-listing for contested hearings, which means that many parties do not get heard on the day which is initially appointed.

4. Whether people using Family Courts are getting the service they deserve

Napo finds it difficult to define the concept of “the service they deserve”. The Family Court System should be run efficiently and paramount should be the best interests of children. A number of assertions have been made recently about bias in the Family Court System particularly against fathers. However, Napo’s own research in this area refutes these suggestions and demonstrates that there is a significant increase in contact between child and non resident parent (often the father) as a result of the work of CAFCASS officers.

During the summer of 2002 Napo undertook a survey of the work of the Children and Family Court Advisory and Support Service in contested residence and contact cases. In all 300 families were detailed in the survey. The survey found that, at the commencement of proceedings in 156 cases children were having direct contact with the parent with whom they were not resident. In 126 cases there was no contact at all.

By the end of the proceedings, which often took many months, in only 18 cases was there no contact with the father, and in seven of those domestic violence was established as a fact. No contact had therefore fallen from 42% to 6% of cases.

Napo would refer to the work of Carol Smart and others in respect of the difficulties encountered by children who are subject to shared care arrangements. Napo also refers to evidence which suggests that some children do not see their parents as often as they or their resident parent would wish, and that split home arrangements can be highly disruptive. The Women’s Aid movement has complained vociferously in the past that often children are forced to see dangerous fathers. Napo would wish to see independent research funded to investigate this concern further.
(a) Problem solving versus adversarial approaches

Napo endorses the view that separating parents should be given high levels of support to enable their difficulties to be resolved without recourse to adversarial court proceedings. However, once court proceedings have commenced, this should not mean that a problem solving process inevitably stops. Napo believes there has been misunderstanding in the Government Green Paper about the routine work of CAFCASS staff. Napo believes that the Government Green Paper fails to recognise that most Children and Family Reporters, through the process of preparing a report, work with families with a view to supporting the adults concerned in order to reach agreement in the best interests of the children. In reality most Children and Family Reporters do not just comment or commentate on proceedings but are actively engaged in a problem solving process with the family, in the way the Green Paper actually recommends. It is as a consequence of this approach that contested hearings are often avoided and that parents do receive an efficient service.

Napo also recognises, however, that there is a value in some situations in cases being fully heard by a judge. Many parents are unable to reach agreement, a not uncommon reason for this being a belief that this would imply that they had given up on their child. A judicial decision, is for some parents the only way that proceedings can be concluded. Hearings also allow judicial comment on the arrangements or the behaviour of parents, which at times can be very powerful.

(b) Domestic violence

Napo reiterates its concern at the impact of domestic violence within families. It is Napo’s belief that the Green Paper survey of court files, which identifies domestic violence as a feature of 35% of cases coming from the courts is probably an underestimate. Napo members report that often domestic violence is not referred to in initial court documents but that allegations become more apparent either at first directions hearings or in the course of report preparation. In Napo’s own survey domestic violence was a feature in 77% of reports on which Napo members were working. Napo believes that once the new application and response forms are introduced, directly asking the question about domestic violence, the figure of 35% will significantly rise.

Napo believes that it is generally in most children’s interests that they continue to have contact post-separation with a parent with whom they have established a relationship and even where this has not been the case most children are assisted by knowledge of and contact with their non-residential parent. Effective court decisions balance this with the need for child and parental safety.

(c) Court premises

Napo believes that many court premises currently employed are unsuitable for Family Hearings and have insufficient private and comfortable interviewing space. Napo believes that families involved in proceedings deserve a better service than this.

Napo is also concerned that problem solving can be equated by some in the legal process to agreement seeking and attempts to achieve this in court create difficulties. Napo believes that within the pressurised environment of a court building, and with limited time available, the parents can be persuaded to reach agreements that do not take into account the children’s wishes or address fully any safety factors. Napo believes that the professionals involved in assisting parents, including the judiciary, legal representatives and CAFCASS officers, need to take this into account and be fully informed of any risks involved. Where a problem solving approach is being taken, there needs to be adequate, safe, private, comfortable facilities and this is often not the case. Napo believes that it can often be beneficial for a short adjournment, away from court buildings, to take place to allow for more consideration.

(d) Additional child-centred facilities

In the Napo survey conducted in 2002, two-thirds of questionnaire respondents believed that additional child centred facilities would have assisted their work. A range of facilities for interventions would have been of considerable assistance in a quarter of the individual cases. In the survey 10% of the cases studied would have benefited from the provision of supervised contact facilities. Several staff reported that facilities were unavailable for older children and the need for supervision contact was a critical issue. Others felt that therapy and parenting classes would have assisted their work. Others felt that the service from Family Courts would be improved by a much wider range of resources ranging from the provision of extra support workers for children, anger management classes, and specialist Muslim support workers and interpreter facilities.
(e) Accessing data from other agencies

The survey also found that the vast majority of respondents were able to access data from other agencies quickly and easily. However, in a quarter of cases there were difficulties experienced with one or more key agencies. Improvements in inter-agency liaison would therefore increase the quality of service that people who use the courts received.

The main problems were: lack of access to criminal records; problems with police domestic violence units; difficulties in accessing information from probation, health and social services; and specifically issues with confidentiality and data protection with mental health agencies.

E. CONCLUSION

Napo recognises that the Family Court System is often not the best place to resolve complex family disputes and welcomes any thoughtful attempts to improve its functioning. However, it is important to recognise that the court system is responding on society’s behalf, to what are often intractable problems that parents cannot solve themselves, and which do not lend themselves to easy resolution. Napo urges the Committee to be cautious about simplistic solutions in which the needs of the children may become secondary to the “rights” of the parents.

Napo does not believe there is any systematic bias in the Family Court System and notes that no independent evidence has yet been produced to demonstrate that there is. Napo members do report individual experiences where assumptions about gender roles are a cause of concern, for example where the father’s role in a child’s life is given inadequate acknowledgment, and Napo would not support sexist attitudes of this sort. However, we do not believe that this is systemic and would further note that such attitudes impact on both men and women. Research also indicates that a significant feature in maintaining gender based stereotypes in relation to parenting come from parents themselves. Experience and evidence would show that most fathers do not seek residence, even when they are raising criticism of the mother’s abilities. Many resident parents, often mothers, are distressed at the failure of the non resident parent to spend more time with their children and Napo members are commonly asked if there is a way to force a father to have contact, something which the law has no ability to do.

There is, however, a case for improving inter-agency communication, for more child contact centres, for a reduction in delay, for greater access to resources within the health and social services and for additional resources for early resolution and intervention.

Napo supports the thrust of the Government’s Green Paper in its focus on early resolution. Napo believes that many of the suggestions, particularly the emphasis on supporting parents to problem solve and early intervention, are already an integral part of the work of Children and Family Court Reporters and would seek the Committee’s support in supporting and developing the work of CAFCASS as a key player in the Family Court System.

Harry Fletcher
Assistant General Secretary

Sian Griffiths
National Vice-Chair

Liz Moxham
Chair Family Court Committee

2 November 2004

Evidence submitted by The Family Law Bar Association

1. It is now well over 2½ years since Wall J (as he then was), the Chairman of the Children Act Sub-Committee of the Lord Chancellor’s Advisory Group on Family Law, produced a report called “Making Contact Work”. The report received a warm welcome from practitioners, the judiciary and, notably, parents deprived of contact with their children for no good reason.

2. The Government, through the then Minister with responsibility for family law, Rosie Winterton MP, promised that the recommendations, few of which attracted any real controversy, would be “carefully considered”. The Government was, she said, committed to increasing contact between children and non-resident parents where it was safe to do so. From April 2003 we were told that this was to be a “strategic objective” of the Lord Chancellor’s Department.

3. Not until 21 July 2004 did the Government finally publish the Green Paper “Parental Separation: Children’s Needs and Parents’ Responsibilities” (Cm 6273). It is no secret that in the intervening period some members of the Children Act Sub-Committee were disappointed, if not inwardly seething, that the urgent need for change identified in the report had, seemingly, been over-looked.
4. The members of this Association welcome the proposals for change outlined in the Green Paper. We have said so in a written response to the Government and we have conveyed those views orally to the Minister, Baroness Ashton, on several occasions.

5. **Where things have gone wrong**

Court orders for contact are made in the expectation that they will be obeyed. All members of this Association who practise in this field can call to mind cases where the parent with care (invariably the mother) determines that he/she knows best and treats the order with impunity (or lip service, which is equally bad), seemingly secure in the knowledge that there is perhaps little that the court can do about it.

The reluctance on the part of the other parent (invariably the father) to pursue applications for penal notices or for committal for contempt is entirely understandable, given the fear that the child may be told “you will not believe what your father is trying to do to us now”. An application for a change of residence is no solution for a father who cannot provide full-time care for the child and wants no more than that the contact order be obeyed: a perfectly respectable position.

It is remarkable that, as the law presently stands, the court should possess so many weapons to enforce residence orders, and yet so few when it comes to the enforcement of contact orders. Both, after all, regulate the amount of time that the child is to spend with each of his parents.

6. **Section 14 of the Children Act 1989 is in these terms**

1. Where:
   (a) a residence order is in force with respect to a child in favour of any person; and
   (b) any other person . . . is in breach of the arrangements settled by that order,

   the person mentioned in paragraph (a) may, as soon as the requirement in subsection (2) is complied with, enforce the order under Section 63(3) of the Magistrates’ Courts Act 1980 as if it were an order requiring the other person to produce the child to him.

2. The requirement is that a copy of the residence order has been served on the other person.

3. Subsection (1) is without prejudice to any other remedy open to the person in whose favour the residence order is in force.

   The penalty here facing the father who wrongfully retains the child at the conclusion of a period of contact is a finding of contempt, coupled with a fine of up to £5,000 or committal to prison for a period of up to two months.

Relevant parts of Section 34 of the Family Law Act 1986 (applicable to proceedings in courts at all levels) are as follows:

1. Where:
   (a) a person is required by a Part I order, or an order for the enforcement of a Part I order, to give up a child to another person (“the person concerned”), and
   (b) the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order:

   the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned.

2. The authority conferred by subsection (1) above includes authority:

   (a) to enter and search any premises where the person acting in pursuance of the order has reason to believe the child may be found, and

   (b) to use such force as may be necessary to give effect to the purpose of the order.

Whilst this legislation is apt to enforce the recovery of a child who is wrongfully retained at the conclusion of a period of contact, in terms of the enforcement of a contact order the moment will almost invariably have been missed. The court will need to be satisfied that the child has not been given up in accordance with the order. All too often the court only learns of the default after the event where, for example, weekend staying contact has not taken place. It may be more apposite to enforce a longer period of holiday contact, provided, that is, that it is possible to obtain fresh travel documents and, if needs be, fresh accommodation.

Sections 29 and 50 of the Children Act 1989 provide a composite code for the speedy recovery of children in care and for the prosecution of those who, for example, retain them at the conclusion of a period of contact. That kind of behaviour is not tolerated.
7. **So what is the parent to do?**

As Bracewell J said in the case of *V-v-V* [2004] EWHC 1215 (Fam) at para 10:

> Currently, there are only four options available to the court and each is unsatisfactory: one, send the parent who refuses or frustrates contact to prison or make a suspended order of imprisonment. This option may well not achieve the object of re-instating contact. The child may blame the parent who applied to commit the carer to prison. The child’s life may be disrupted if there is no one capable of or willing to care for the child when the parent is in prison. It cannot be anything other than emotionally damaging for a child to be suddenly removed into foster care by social services from a parent, usually a mother, who in all respects except contact is a good parent. Two, impose a fine on the parent. This option is rarely possible because it is not consistent with the welfare of a child to deprive a parent on a limited budget. Three, transfer residence. This option is not necessarily available to the court, because the other parent may not have the facilities or capacity to care for the child full-time, and may not even know the child. The current case is one in which this is a real option. Four, give up. Make either an order for indirect contact or no order at all. This is the worst option of all and sometimes the only one available. This is the option that gives rise to the public blaming the judges for refusing to deal with recalcitrant parents. This option results in a perception fostered by the press that family courts are failing in private law cases and that family judges are anti-father. The truth, however, is that without the weapons to use against what is in essence a small group of obdurate mothers, the ability of judges to do better for fathers is strictly limited. It is not commonly recognised by the public that, in order to have enforcement procedures which are effective, legislation by Parliament is necessary. [Emphasis supplied]

Bracewell J spelled out very clearly in her judgment the perceived need for legislative reform in three areas:

**Mediation**

Judges and magistrates should have the power to refer parties to mediation at any stage of the proceedings.

**The Family Assistance Order**

Orders should henceforth be directed to CAFCASS and not to local authorities. The time limit of six months should be removed. The requirement for the circumstance of the case to be “exceptional” should go and the parties should not have the option of refusing to be named in such an order. There must, she said, be a commitment on the part of the Government to proper funding.

**Additional Enforcement Powers**

She identified the need for a clear commitment to legislate to provide the court with the following additional powers:

- the referral of a defaulting parent to information meetings, meetings with a counsellor, parenting programmes and classes designed to deal with contact disputed;
- the referral of a parent to a psychiatrist or a psychologist;
- the referral of a “non-resident” parent who is violent or in breach of an order to an education for perpetrators programme;
- a probation order with a condition of treatment or attendance at a given class or programme;
- a community service order with programmes specially designed to address the default in contact; and
- financial compensation, for example where the cost of a holiday has been lost.

These proposals have, in large measure, been taken up by the Government in the Green Paper. They receive the full support of members of this Association.

8. **Delay**

Delay has been described as the scourge of the family justice system. It is inimical to the welfare of children and should be avoided in almost all the cases that come before the courts. Planned and purposeful delay is a different matter altogether.

Munby J in the case of *Re D* (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam) identified five areas of concern, common hallmarks of intractable opposition cases, and all features of a system that was failing parents and children alike:

- the appalling delays of the court system, exacerbated by the absence of any meaningful judicial continuity, seemingly endless directions hearing, the lack of an overall timetable, and the failure of the court to adhere to such timetable as has been set;
- the court’s failure to get to grips with the mother’s (groundless) allegations;
— the court’s failure to get to grips with the mother’s defiance of its orders and the court’s failure to enforce its own orders;
— the all too frequent response to any significant problem with contact: list the matter for further directions; reduce contact in the meantime; obtain experts reports; direct the filing of further evidence—all of which produces only further delay which, in turn, exacerbates the difficulties and leads eventually to a situation which may be irretrievable; and
— the fact that too often in such cases we only wake up to the fact that the case is intractable when it is too late for any effective intervention.

As he observed at paragraph 36 of his judgment:

...the two great vices of our present system are:

(i) that the system is, for all practical purposes, still almost exclusively court based; and
(ii) that the court’s procedures are not working, and not working as speedily and efficiently as they could be and, therefore, as they should be.

In terms of improving the present system he advocated the adoption of a protocol (not dissimilar to the existing protocol in public law children cases) to address the key principles of judicial continuity, case management and, crucially, time-tabling. Bracewell J in the case of V-v-V (above) associated herself with these observations in terms of improving the system. On the importance of judicial continuity she had this to say (paragraph 8):

Judicial continuity is essential. For a succession of judges to have to read a case for the first time, often consisting of many bundles, is not only wasteful of judicial time, but risks inconsistency of approach and adds to delay and dissatisfaction of the parties.

There are undoubtedly difficulties in achieving continuity, particularly in the county courts and the family proceedings courts. In the former jurisdiction full-time judges have other duties in criminal and civil courts which may removed them from family work for months at a time; and part-time recorders, by definition, sit for limited periods in the year. In the family proceedings courts it is by no means easy to convene the same bench of magistrates at short notice. However, these problems are capable of solution and must be addressed by the Court Service.

The President’s new Framework for the conduct of private law disputes before the courts should go a considerable way towards overcoming avoidable delay in terms of active case management and timetabling. The members of this Association support this important new initiative.

It is no exaggeration to say that the current system is currently creaking under the burden of cases waiting to take their turn to be heard in lists which are jammed to capacity. We do not have sufficient judges allocated to hear these cases nor are sufficient courtrooms made available to enable them to be heard. This is frustrating for all and detrimental to the children who are the subject matter of these disputes.

Part of the solution must lie in deflecting as many cases away from the courtroom to other means of dispute resolution. That said, family courts are still seriously under-manned and this, too, needs to be addressed.

The members of this Association support the initiatives contained in the Green Paper. We look forward to their speedy implementation and hope that sufficient by way of resources will be made available for them to achieve their stated aims. We have long advocated the speedy resolution of all family disputes by means other than a lengthy, fully-contested hearing. Members of this Association were the architects of a “pilot scheme” for the swift determination of cases involving the division of assets on divorce or separation. That scheme (which was to become law under the Family Proceedings Rules 1991) has been in operation nationwide for many years now. Members were likewise the principal architects of the public law protocol in children cases, designed to reduce delay by a greater concentration of the issues in the case and active case management. We were likewise consulted with regard to the President’s new Framework in private law cases and we will continue to offer her every assistance as structures are gradually put in place.

We hope that these outline submissions will assist members of the Committee.

The Family Law Bar Council

November 2004

Evidence submitted by The Law Society

In 1969 the Law Commission defined the purpose of family law as “to dispose of dead marriages in a manner that encourages and affords spouses the best possible opportunity to make rationalised and conciliatory arrangements for their own and their children’s future”. We consider that this still holds true, not just for divorce but in all family cases where parties are separating. Achieving that should be the purpose of any changes to the system.
Judicial systems cannot force members of a family to display appropriate conduct towards one another. However, the methods used by the courts to recognise the termination of relationships can help educate and encouraged the parties to consider the results of their actions and to take responsibility for organising their own affairs. The legal system and the parties' representatives can assist the parties to work towards this by offering mediation and other forms of ADR, collaborative law, in-court conciliation and other court and non-court based interventions. Many cases settle through these methods and we think that initiatives to extend their use will be helpful in family justice systems.

There are, however, some cases that will not be solved by these approaches, for various reasons, both emotional and practical. Many of these cases might be described as containing an imbalance of power between the parties.

In a few cases, the parties may simply prefer to be told what course of action would be best—feeling unable to decide for themselves on a course of action and wanting a person “in authority” to decide for them.

Individuals and their partners in those circumstances are most likely to use the courts to determine how their money and parenting should be divided after separation. It is not surprising, therefore, that many of them will be dissatisfied with the result that they receive, perhaps because of unrealistic expectations or because dissatisfaction with their situation generally becomes projected on to the court system.

Family law attempts to reflect social trends in a society which is changing rapidly. Courts (or any other similar tribunal) will always lag behind in their reflection of societal change.

Nevertheless, we believe that there are ways in which courts could be improved which would offer greater satisfaction to their users. Our proposals relating to private children law procedures are contained in our response to the current consultation paper on parental separation. A copy of this response is being provided to this Committee, as an annex to this paper, so we have not covered these issues in this paper.

There are currently pilot schemes being tried in relation to private children law cases and a pilot integrated domestic violence court in Croydon. It would be valuable to have the results of empirical studies of these pilots before significant proposals for changes to the system are considered.

1. Unified court

A unified court dealing with family law and criminal law could offer real savings in terms of estate and administration costs and efficient use of judicial time. For example, listing could be administered in one central office; files could not be “lost” between courts. It would also mean that staff working in the family court would have the opportunity to develop even greater expertise than currently.

Savings made by establishing a unified court might also allow the appointment of more family judges, thus helping to tackle delays.

Plans are currently being discussed to develop a unified civil court which will impact on family cases heard in the county court. This might be a good time to also consider a unified family court.

2. Specialist training and assessment of judges

Specialist training would ensure that judges develop the right approach to family law, as well as the requisite statutory knowledge. Family law requires a special understanding of people and their relationships and how to craft orders so that they look to the future and not just the past. Law in this area is complex and changes rapidly. Ideally we would like to see judges specialising either in children law or in ancillary relief cases.

3. Continuity of judges in cases

At present a case can be transferred to any judge with an appropriate “ticket”. This often means that the previous history of a case is unknown to a new judge and that judge has no time to read what are often lengthy files. Litigants are either frustrated by that lack of knowledge or they use the situation as an opportunity to replay the history of the action. If a case were to be reserved to a specific judge who was aware of its history he or she would not need to spend time reading papers to acquaint themselves with facts already known to their predecessor.

Where this is not possible, it is even more important that judges should be allowed the time to read papers before a case commences, thereby reducing court time. It is disruptive to a case for it to stop while a judge reads papers. It gives an impression to parties that the documentation they produce is ignored and that they have wasted their time and energy in producing it. Reading the documents before the hearing would cut down the time required to open cases.

This might lead to less delay in hearing cases. We are told by members that delays in excess of six months for a hearing at the Principal Registry of the Family Division are not uncommon. The delay leads to parties’ attitudes becoming entrenched (so that cases are even more difficult to settle) and statements and reports becoming outdated so that extra costs are incurred in redrafting or recommissioning them.
4. Court venue

If local courts are closed judges should be allowed to sit in local venues in other buildings, so that litigants are able to reach the court building without incurring large costs for transport and child minding.

5. Ancillary relief

We urge the adoption of guidance as to how s 25 of the Matrimonial Causes Act is to be applied, as we proposed in our paper “Financial Provision on Divorce: Clarity and Fairness”. We think this would offer parties a clearer understanding of how the law works and so encourage settlement. At present most litigants have little idea of the rationale by which money is divided between parties on divorce. They are often misled by reports in the press, which do not explain legal principles. If they understood the process by which money was divided, they would be more inclined to settle their disputes without a court hearing.

We also support the proposals by PARAG to unify enforcement proceedings. We consider that the current system of enforcement by which only one asset at a time can be attached is wasteful of courts’ and litigants’ time and resources.

We have put forward proposals in “Financial Provision on Divorce: Clarity and Fairness” for changes to forms and procedure in ancillary relief cases. We think that these would make the court process more open and comprehensible to litigants. We believe that if they understood the process better, many parties would be more inclined to consider settlement.

6. Domestic violence

At the time of writing this paper the Domestic Violence Crime and Victims Bill has not yet become law. We applaud the ends which the Bill seeks to attain but we have already expressed our concerns about the viability of some of the means proposed to attain them. We will not comment further until after we have seen the effect of the Bill in practice.

Although we appreciate that cost is a factor, it would considerably increase litigants’ confidence that they were in a safe environment if separate waiting rooms for applicants and respondents were introduced.

Shona Ferrier
Parliamentary Advisor
The Law Society
November 2004

Evidence submitted by the Solicitors Family Law Association

Introduction

The Solicitors Family Law Association (SFLA) is an association of 5,000 family solicitors. SFLA was established by lawyers concerned that the practice of family law was too adversarial and who sought to develop a more conciliatory approach. Since its inception in 1982, SFLA has contributed to a significant change in the practice of family law. SFLA’s members are committed to a Code of Practice that is designed to promote a constructive and non-adversarial approach to resolving family disputes. This Code of Practice has been widely adopted and has been incorporated into the Law Society’s Family Law Protocol, which applies to all solicitors practising family law.

SFLA advocates a constructive approach to family disputes and promotes the use of alternative dispute resolution. SFLA members were involved in the development of mediation for family matters and SFLA trains and accredits lawyer mediators. SFLA has recently brought the Collaborative Family Law Group under its umbrella and will be providing training programmes on collaborative law and working to develop appropriate accreditation systems. SFLA’s Collaborative Law Committee aims to develop collaborative lawyering as another resource for lawyers and their clients to resolve family disputes.

Legal aid is a vital resource to SFLA members and their clients. Over two thirds of SFLA’s members provide publicly funded services, including publicly funded mediation.

The context

The operation of the Family Justice System has been an issue of concern for some time now. The problems with the establishment of CAFCASS have been well rehearsed, and SFLA contributed to the Constitutional Affairs Committee’s earlier enquiry into CAFCASS. SFLA is encouraged by the appointment of a new Board for CAFCASS as well as a new Chief Executive and by the increased emphasis on front line services.
Delays in the family courts are a matter of serious concern. It is a clear principle in the Children Act that delay is inimical to the interests of the child and this applies in both public and private law cases. The need to deal with delays is urgent.

For example, the President of the Family Division recently issued a framework document in which she said that first appointments should be issued within four to six weeks. However, delays in first appointments are currently taking 10 to 12 weeks. We are told that this is due to a lack of CAFCASS Officers and a shortage of conciliation appointments.

Another practitioner has reported to us an international contact case which was listed for final hearing on 21 July 2004 at the High Court. It was set down on 24 March and a CAFCASS report ordered. Various delays have ensued and the final hearing is now 24 November “at risk”. The delay is particularly detrimental as the non resident parent lives in the US and is having very limited contact with his seven year old daughter in the UK.

We are concerned that delays are being caused by lack of resources in CAFCASS in the first instance, but are not convinced that if the CAFCASS problem is solved, that further delays in court listing will not ensue. We note that CAFCASS has dealt with the issue of delay in public law cases, but that there is still serious delay in private law cases. Delay in both aspects of children cases must be tackled—there should be no “cinderellas” in these vital services.

The operation of the Family Justice system in private law cases has been the focus of much media attention in the past 18 months due to the activities of Fathers 4 Justice. While it must be acknowledged that these activities have probably pushed the issue of resolving contact disputes up the political agenda, SFLA is deeply concerned about the climate of that debate, which has become highly polarized and, it must be said, highly genderised. The heightened language of the current debate on contact has exaggerated differences about how to resolve difficult family cases, rather than encouraging consensus and a positive way forward. It must now be the job of responsible commentators, the media and politicians to bring that debate back into the middle ground in the interests of the children of families which separate. SFLA is concerned that this issue is becoming a party political issue. We believe that this is not helpful to finding real solutions.

SFLA believes that how private family law disputes are handled should be a matter of cross party agreement and urges the main parties to form a consensus.

The following represents SFLA’s views on how best to approach the resolution of family disputes involving children.

**PRINCIPLES AND LANGUAGE**

The existing presumption that arrangements for post-separation parenting arrangements should be based on the interests of the child should remain in force. However SFLA believes that there should also 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. Such a presumption would reinforce the message that contact with both parents is for the benefit of the child and is not a “gift” that one parent makes to another. It would also emphasise that contact is about the well-being of the child and not about parent’s “rights”.

The current language used in disputes about children is unhelpful and contributes to the feeling of alienation that parents can experience on relationship breakdown. SFLA believes that the emphasis should be on co-parenting, where both parents offer physical, emotional and financial support for their children in a co-operative framework. We prefer to adopt the terms “parenting time” and “orders for parenting time” rather than the terms “contact” and “contact orders”, which many non-resident parents feel removes their status as parents and demotes them to the status of visitors in their children’s lives.

Parents should have a clear idea of what the Court is likely to order in a typical dispute about parenting time. Various forms of information should be available to separating parents early in the process, such as website information, information from healthcare providers, via solicitors, advice agencies and relationship counselors amongst others. The information should set out the likely orders a Court may make, but should make clear that there is not a one size fits all approach. It should also make clear that most parents arrive at suitable arrangements by themselves and do not use the courts.

SFLA believes that the aim should be for children to feel comfortable in two homes. In our experience, a typical division of parenting time post-separation is for children to have a main residence in one parent’s home and to spend alternate weekends, a midweek visit, alternating festive occasions and extended time during the school holidays (including an opportunity to take the child away) with the other parent. In the absence of unusual factors, it is difficult to envisage less than this amount of parenting time being appropriate. However, such an arrangement may be unsuitable for very young children, teenagers and for parents who live a distance from one another.
THE DISPUTE RESOLUTION PROCESS

Most separating couples manage to make their own arrangements for parenting post-separation without any intervention from the Courts. For those parents who cannot, there should be a swift and effective dispute resolution process, starting with early information, advice and help with resolving disputes and only moving into the Court procedure when disputes cannot be resolved through an early intervention. These cases should be identified early referred quickly to the Court, and should be managed throughout the lifetime of the case by the same judge.

SFLA believes that before any Court application can be issued, parents must attend an early intervention appointment for information, advice and help with forming an agreement. This should be a Court based service. All parents should be required to submit and agree a parenting plan in the preliminary session or in subsequent intervention sessions. Parenting plans will replace the statement of arrangements for divorcing couples. If agreement is reached through the intervention appointments, a Court order would not normally be necessary.

There must be early means of identifying safety issues by a check box provision on the C1 or acknowledgement form and intervention appointments are not suitable for the dispute, the matter should move promptly into the Court process.

WE SUGGEST THE FOLLOWING TIMEFRAME FOR CASES:

<table>
<thead>
<tr>
<th>Stage in process</th>
<th>Function of stage</th>
<th>Week</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Preliminary session Information/advice/Help with agreement</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>2 Issue of application</td>
<td>(1) Interim hearing and interim order (2) Referral for further intervention (3) Directions (4) Court reporter involved</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 Second appointment</td>
<td>(1) Final hearing (2) Directions for hearing (3) Court reporter report (4) Other evidence</td>
<td>10</td>
</tr>
<tr>
<td>5 Final hearing</td>
<td></td>
<td>15–17</td>
</tr>
</tbody>
</table>

There should be two clear separate tracks, with interventions for cases that can settle. Intractable disputes or cases where there are safety issues should be diverted swiftly to the Court process. If intervention appointments are not suitable, a report from the service which provides the intervention appointments will be attached to the application to the Court, identifying this and explaining why.

There must be a consistent response in the handling of cases with continuity of input from CAFCASS officers and judges. The same CAFCASS officer should deal with each case through all appropriate stages. In the same way, each case should be assigned to a Judge, who would deal with the case through its lifetime. In our view, it is vital that there should be this consistency from those dealing with the case. This will help to reduce delay, as Judges and CAFCASS officers will not have to revisit issues and will be familiar with the case. Such continuity will also help to increase the family’s confidence in the Family Justice system. We believe that these changes would help the parents, knowing that they will be dealing with officers of the court who are familiar with their circumstances, saving them from repeating their stories, and also bringing pressure to bear on the parents, who will know that they will face the same judge who made the original order. This could help to promote a more timely determination of the issues in dispute.

SPECIAL CONSIDERATIONS

REPRESENTATION OF CHILDREN

Where it is desirable to ascertain the wishes and feelings of children, the children could be involved in a subsequent session, with a separate representative (a CAFCASS officer), avoiding the direct involvement of children in the parental dispute resolution process.

The CAFCASS officer should flag up where a child wants a voice in proceedings or where expert evidence may be required. At the conclusion of the report, the CAFCASS officer should meet with the child again and explain his/her reasons for any recommendations made. The CAFCASS officer should indicate to the Court where the child supports or opposes his/her recommendations, and flag up the need for the judge to consider whether the child should be heard by way of separate representation.
At further hearings, the child can be represented separately either if the judge so directs or as a result of the child’s application. The child should be represented by a lawyer with special accreditation to represent children. Where the child is not separately represented, the judge should be able to appoint a guardian.

**DOMESTIC abuse**

SFLA welcomes the introduction of a means for early identification of domestic abuse by a check box provision on the C1 form. There should be a further check box to indicate whether parenting time should be suspended, whether or not domestic abuse is alleged. An allegation of domestic violence or an application to suspend parenting time should lead to an accelerated first hearing, where findings of fact should be made as to domestic abuse. The Courts should also apply a mandatory risk assessment checklist, which should consider—

- the nature of the abuse and its impact on children;
- whether the abuse is likely to recur;
- the perpetrator’s motive(s) for wanting parenting time;
- the perpetrator’s capacity to change and comply with any conditions attached to the parenting order;
- how to address the sufferer’s fears about the parenting arrangements;
- the children’s wishes; and
- what safety issues might arise from any order for parenting time made at that stage.

**ENFORCEMENT**

More effective sanctions to deal with breaches of orders are now crucial to restore public confidence in the Family Justice system. Breaches of orders for parenting time are extremely serious and must be dealt with quickly. If the Court has undertaken a full fact finding process, there is no justification for parenting time not taking place. Ideally enforcement should be dealt with by the same judge throughout the case.

The Courts should explore the possibility of using other methods of supervising compliance with orders for parenting time, for example, using family assistance orders. Where children refuse to comply with an order, there should be careful consideration of the reasons, with provision for a “children’s friend”, i.e. a CAFCASS officer, specifically designated to listen to and help deal with concerns raised by children direct.

Where there is a failure to comply with a Court order, the first steps should be preventative. In the first instance, it should be established whether a breach has occurred and an assessment made as to whether it is sufficiently serious to require immediate Court action. Once the investigative stage has been undertaken, the Court should consider a treatment model, if appropriate, including parenting classes, anger management or therapy.

In some cases, it might be necessary to move to the punitive stage, but only in intractable cases or in cases of repeated non-compliance. A range of orders should be available to the Court, including fines, community service orders and imprisonment. Change of residence and instituting care proceedings would be a final resort.

SFLA also believes that there should be educative enforcement for parents who do not apply for parenting time or who do not keep up their parenting time obligations. A frequent complaint heard by practitioners is that the non-resident parent is not meeting his or her obligations to spend time as agreed with the child.

In Germany, we believe that the Courts have powers to fine absent parents. We do not believe that this approach would be helpful, but it would be useful if the Court had powers to order the non-resident parent to attend parenting classes or a similar educative programme to impress on him or her the importance of staying in regular contact (if circumstances allow) with the children of the family.

**LEGAL aid**

Legal aid must continue to be available to those who need financial help to support them through the process of resolving family disputes. Legal aid underpins the family justice system. Many families would not have the resources or ability to resolve their disputes without the support and help of solicitors. However, many families do not have the means to pay solicitors. Increasingly SFLA is concerned that there are both insufficient numbers of solicitors prepared to undertake publicly funded family work and that the pressure on the legal aid budget is eroding the legal aid scheme with dire consequences for those who depend on it to help resolve their disputes. The lack of legal aid has resulted in many more litigants in person appearing in court and handling their own cases. This can lead to the use of valuable court resources in supporting the litigant in person; it can also run up the costs for the other side, as the other party’s solicitor has to take greater time dealing with the litigant in person.

SFLA is therefore strongly opposed to the current proposals to further erode financial eligibility levels. This would leave too many people without the help that they need to resolve their family disputes, leading to longer drawn out disputes that become more difficult to settle.
However, SFLA believes there should be incentives in the legal aid scheme, as elsewhere, for cases to settle early and that perverse incentives to litigate should be removed from the legal aid scheme. Broadly we support the Legal Services Commission’s intention to encourage early settlement by removing the incentives to move onto a legal aid certificate and to issue proceedings.

The legal aid scheme needs to support government policy. We have a concern that where early court intervention services exist, the appropriate level of legal aid should also be available to support ready access to those interventions, to enable legally aided parties to make use of those schemes. We would hope that the LSC’s intention to make certificated legal aid more difficult to access would not create unnecessary barriers to court based conciliation and intervention services.

SFLA also supports the LSC’s intentions to reduce legal aid support for repeat and multiple applications to court in contact cases. However, it is often difficult to second guess the reasons for multiple applications. SFLA recommends that the LSC profiles firms to identify those with an apparently high rate of court proceedings and multiple applications and to then look into the reasons for any discrepancy from the norm.

Legal aid policy needs to be truly “joined up” with any changes to and developments in the operation of the family justice system and attempts to improve the resolution of family disputes. This means retaining a level of flexibility in funding decisions that would allow legal aid to be used appropriately according to the services available. SFLA believes that early access to good legal advice and other forms of intervention can help families resolve their disputes in an ordered and lasting fashion. We strongly support the FAInS initiative which puts an experienced solicitor in the role of early diagnoser and case manager.

CONCLUSION

SFLA broadly supports the thrust of the Government’s proposals for the reform of the Family Justice system. We believe that these proposals are traveling in the right direction. We hope that the other political parties will give these proposals their support and not make family disputes and the interests of children into a political football.

Solicitors Family Law Association

October 2004

Annex

SFLA CHILDREN COMMITTEE: POLICY ON PUBLICITY IN CASES INVOLVING CHILDREN

In the light of recent concerns about the perceived “secrecy” of the family courts and the case of Sarah Harman being found in contempt of court for passing case details to her sister, Harriet Harman, the Solicitors General, the Children Committee were asked to review the current SFLA policy on publicity in cases involving children.

SFLA’s current stance is to support the status quo. The Children Committee reviewed this and formed the view that SFLA policy should be to support more openness in family cases involving children. Case reports should be anonymised. Cases should not be heard in public, but judgements should be made in public, suitably anonymised. Currently prohibitions are so tight that there can’t be any sensible debate and accusations that the family justice system favours one party or another cannot be examined. The powers of the state are so extensive in matters affecting children that cases should not be in private behind closed doors. The CAFCASS report should address the issue of whether publicity in a given case would be harmful or not to the child(ren). The Committee felt that this issue does have to be considered from the children’s point of view.

A further issue is that under the current prohibitions, experts cannot be identified. This leads to a problem of identifying poor quality experts’ reports. There may be some difficulties with experts not wishing to be identified, but the Committee felt that, on balance, it was in the public interest for experts to be known.

November 2004

Evidence submitted by Celia Conrad, Freelance Legal Consultant

MY BACKGROUND

1. I qualified as a solicitor in October 1994 and practised exclusively as a family law practitioner until March 2001 when I left full-time private practice. I continued to work part-time in private practice until April 2003 while I researched and wrote Fathers Matter—A guide to contact on separation and divorce (Creative Communications October 2003). I no longer work in private practice but continue to research and write and
to work as a Freelance Legal Consultant on Family law matters. I have appeared on BBC 1 and Channel 4 as a direct consequence of my work. I am interested in all areas of Family law reform, but have a particular interest in the field of Child law.

**Basis of my submissions**

2. I am making these submissions in my capacity as a family solicitor and from my experience of dealing with the family courts in the course of my work and from my research on the subject.

3. I note that the Committee welcomes additional submissions from interested parties on the Government’s own proposals ((Green Paper—Parental Separation: Children’s Needs and Parents’ Responsibilities (Cm 6273)) and that this inquiry is limited to the area of responsibility retained by the Department of Constitutional Affairs DCA), namely the operation of the family courts system. However, since the Department for Education & Skills (DfES) is now co-ordinating a Family Resolutions Pilot Project to run in the Brighton County Court, Sunderland County Court and Inner London family Court which is to be evaluated to enable the Government to decide whether or not to roll out the project nationally in the Spring of 2006, an analysis of the Family Resolutions Pilot Project (FRPP) is required when considering reforms to be made to the operation of the family courts system.

4. Additionally such an analysis is relevant to any investigation the Committee will make in relation to key areas such as whether the family court system is being run effectively; whether the family court judges have sufficient powers; issues surrounding delays caused by the current system, and whether people using family courts are getting the service they deserve. This is because the FRPP contains elements which bear directly upon those key areas.

**The current Government proposals for change to the operation of the family court system**

5. I am not of the opinion that these proposals are satisfactory. It is disappointing to note that although the Green Paper highlights many of the problems with the current court system namely:

   — That the current way in which courts intervene in disputed contact cases does not work well.
   — That major changes are needed so that where it is necessary for the state and the courts to intervene, they are much more effective in helping to secure to effective resolutions which are in the interests of the child.
   — It is in the interests of the child to have a meaningful ongoing relationship with both parents and so the system needs to be much better at securing this outcome, it does not advance the proposals of the Early Interventions Reform Project, which are infinitely better geared to achieving those goals.

**The Early Interventions Pilot Project (EEIP)**

6. The EEIP is based on the Florida Early Interventions model which was designed to resolve contact disputes before they reach court through pre-emptive and pre-hearing parenting plans, parent education and contact-focused compulsory mediation. It has proved to be a success in reducing costs, delay and in producing enhanced outcomes with enforcement being a rarity. These are all areas the Green Paper seeks to address (Executive Summary, paragraph 4; Chapter 2, paragraphs. 16 and 20–29; Chapter 3, paragraphs. 53–55, 58–85) which reinforce the need for such a model to be piloted in our courts. Yet it has been rejected by the DfES. With Early Interventions in Florida Judges demand minimum written contact orders, contact is rarely litigated and their time is freed up to deal with intransigent cases and cases involving domestic violence and abuse. There is also a triage programme where cases are evaluated so that cases which are high priority are dealt with first. It therefore addresses those areas of concern as well.

7. In April 2003 New Approaches to Contact (NATC) held a seminar Contact Dispute Resolution: Early Interventions—Towards a Pilot Project chaired by Bracewell J. who gave a pilot scheme her strong support. NATC proposed a system whereby:

   — On issue of the proceedings the parents will be diverted into a non-court process involving court issued information, parent education and contact-focused mandatory mediation.
   — In residual cases where agreement has not been reached the parents re-enter the court system and are streamed into one of two categories—either non-serious cases which can be dealt with rapidly or serious cases which need earlier attention. In this ways the cases requiring significant judicial input will be reduced and more time can be given to those cases which require it.

8. The NATC Early Interventions—Proposal for a Pilot Project (The Best Interests of Children in Divorce Cases, Section 8, The Children Act 1989) was submitted to the DfES and DCA in final form on 8 October 2003 after eight years development. This was fully specified, properly designed and costed, and fully endorsed by the President of the Family Division, the High Court Judiciary, child development specialists, the parenting groups, the Family Law Bar Association and the Solicitors Family Law Association. These proposals received ministerial support from Lord Filkin on Newsnight on 21 October 2003 and Margaret Hodge in Parliament on 23 October 2003. These proposals then disappeared.
9. 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.

**WHAT HAS HAPPENED TO NATC’S EARLY INTERVENTION PILOT PROJECT?**

10. Paragraph 68 of the Green Paper States that “the development of the Family Resolutions Pilot Project (FRPP) has been informed by the earlier work of an ad hoc group which presented its early intervention proposals to the government in Autumn 2003.” However, FRPP is not the same as the NATC EIPP. See Mr Justice Munby’s comments In the matter of D, [2004] EWCH 727 (Fam) in Open Court on 1 April 2004 where he referred to the Early Interventions Pilot Project which Whitehall is now refusing to implement; The Times Law Section page 7, 22 June 2004 “Contact: A question of time by Oliver Cyriax, former solicitor and founder of NATC; Article in The Guardian, Monday 19 July 2004 by Clare Dyer, Legal Correspondent “Warring Parents to be taught conflict management” refers to the disappearance of the EI PP. The Folly of a Law that puts children last.” by Deborah Orr, Independent, 29 June 2004.

11. It has come to light that CAFCASS advised those at Whitehall that the EIPP was broadly similar to a project of theirs called Family Resolution. It is not the same. In November 2003 funding was then obtained for an EI/FR project on the basis that the two were the same. Lord Filkin proceeded with a proper evaluation of the original EI project after meetings on 3 November 2003, 4 December 2003 and 9 February 2004 and forwarded the EI project to the DFES for implementation. But it has not been implemented. The EIPP has been replaced with the FR project, a CAFCASS inspired FR project with no judicial support.

12. It is a major cause of concern to anyone within the legal profession and not least for all those families that will be affected by these reforms that what has now been recommended was not what was approved. An article by Mavis Maclean in the September issue of Family Law September 2004 confirms that the FRPP is:
   — the opposite of the project announced by the Government in the Green Paper;
   — the opposite of the project announced last year in Family law;
   — the opposite of the project submitted to Government; and
   — the opposite of the project which had across-the-board professional support.

13. An article in the November issue of Family Law by family law barrister Caroline Willbourne entitled Family Resolutions v Early Initiatives confirms that what was recommended is not what has been approved.

14. Mr Justice Munby refers in his judgment (see paragraph 10 above) to the fact that “Children’s Minister Hodge has opposed these reforms from the start, refusing to heed the advice of Britain’s highest ranking judges, politicians and child-therapists.” In my view there are no justifiable grounds for her stance. It is also equally a matter of great concern that CAFCASS could have such an influence or be considered to have the requisite skills to advise on reforms of this import in the first place.

**HOW FAR DOES THE GREEN PAPER TAKE US IN TERMS OF PROGRESS?**

15. Paragraph 4, Chapter 1 of the Green Paper reads “in the event of parental separation, a child’s welfare is best promoted by a continuing relationship with both parents, as long as it is safe to do so.” At paragraph 6, Chapter 1 it reads that “both parents have a responsibility to ensure their child has meaningful contact with the other parent.” The question is whether the proposals fully support those statements. I do not believe they do for the reasons set out below.

16. FRPP is based upon a well-rehearsed mantra that “every case is different” which is the antithesis of EI. The DFES has decided that “quality” rather than “time” should be the defining factor when considering how much “contact” a child should have with a non-resident parent. Paragraph 25, Chapter 2 of the Green Paper reads “most parents who turn to courts for contact with their children are given it... less than 1% of applications for contact are rejected.” The fact is that in 99% of the cases that come to court contact is ordered but the statistic does not quantify specifically how much contact is ordered.

**QUANTITY v QUALITY**

17. The Government’s model rejects the idea that children should have the right to spend “time” with a non-resident parent and instead suggests that it is the quality of contact rather than the simple quantum that is the more important issue. The aim is to make parents step back from the adult conflict and to focus on quality ahead of quantity. This will feature in the Planning sessions. What seems to have been overlooked or ignored is that contact cases are about quantum. It is not productive for a father who has two hours contact per week, and who wants more, to be sent off to Planning Sessions where he will be told that quantum does not matter and that he should focus on the quality of the contact he has. How is “quality contact” to be defined?
18. Since mediation will be voluntary in practice this will mean that those implacably opposed to ensuring their child has meaningful contact with the other parent (the meaningful contact advocated by Paragraph 6, Chapter 1 of the Green Paper) can go straight to court and make the other parent’s contact as difficult as possible. How therefore is the child’s welfare to be best promoted if it is next to impossible for that child to have a continuing relationship with both parents? Ironically these are disputes that end up in court and where mediation was necessary but where voluntary participation is most unlikely.

Recommendations

19. I am disappointed that the FRPP has not only lost the positive proposals contained in the EEIP but also appears inconsistent with the Green Paper proposals. The EIPP should be reinstated for all the reasons stated above.

20. It has already been confirmed that the court and associated professional services could each play their part in a revised procedure, where professional services solve most cases before they reach court, guiding parents towards timely parenting plans. The parenting courses in Florida provide families with the information regarding the process by which the courts make decisions on issues affecting their children and this does not relate to how to bring them up, but to teach parents about the process of restructuring their families after separation and re-educating them as to what the courts expect from them. That is what is important and should be the aim of policy reform in this area.

Celia Conrad
25 October 2004

Supplementary evidence submitted by Celia Conrad, Freelance Legal Consultant

1. I make these supplementary submissions further to my original submissions dated 25 October 2004, and at the request of the Constitutional Affairs Committee. I confirm that these submissions should be read in conjunction with my original submissions and that although these supplementary submissions address other points in respect of the Family Courts there is inevitably a degree of overlap between the two.

2. My original submission focused on Early Interventions (as per the Early Interventions Pilot Project referred to at paragraph 8 of those submissions). I believe that early intervention in line with that project would enable the family court system to be run more effectively. Judges would be able to use the powers they already have to the full extent in a court led process, thereby reducing delays, and the number of cases proceeding through the courts, and the cases to be enforced. As a result families would be given a better service.

Basic principles

3. The Children Act 1989 states that the welfare of the child shall be the paramount consideration of the court when an application is made to it. The Government confirms that it shall remain so in the Green Paper—Parental Separation: Children’s Needs and Parent’s Responsibilities and that it “firmly believes both parents should have responsibility for and a meaningful relationship with their children after parental separation—with the important proviso that it is safe” (Chapter 3, paragraph 40). This is further affirmed at Chapter 3 paragraph 41 in relation to the courts “that the general principle to be applied by the courts is that both parents have equal status as parents and that the courts expectation is that both parents should continue to have a meaningful relationship with the children following separation, as long as it is safe and in the child’s best interest.”

4. How is it proposed that this “meaningful relationship” between children and their parents post separation is to be achieved? It is generally accepted that the current family court process does not work for those cases where the parties cannot reach an amicable agreement between themselves. Resorting to the legal system to try to resolve what they cannot does not produce desired results. The law only works for parties who are able to act in the best interests of their children and reach an amicable agreement, because in that situation the law does not need to intervene at all! This is clearly demonstrated by the non-intervention and no-order policy under the Children Act, which assumes that parties will endeavour to make their own arrangements and do their best to resolve differences by negotiation and co-operation. The court will only intervene and make an order where it would be better for the child to make an order than no order at all. The problem is that obtaining a worthwhile order is in itself beset with numerous obstacles as referred to below.
ACHIEVING A “MEANINGFUL RELATIONSHIP”

5. In the Green Paper the Government has put forward a raft of proposals which are supposed to assist the facilitation of this “meaningful relationship” and to divert parties away from the adversarial court process and to help them to agree issues relating to contact and residence between themselves. These include proposals in relation to collaborative law, mediation, protection of children from harm, case management (earlier listing of hearings, reducing delay, judicial continuity etc), post order follow up, use of Family Assistance orders to facilitate contact and enforcement along the lines of the CASC report Making Contact Work. Any proposals to divert parties away from an adversarial court process are to be welcomed and the intention of the Green Paper is meritorious. But the question is whether these proposals go far enough, and if their implementation will achieve the desired result. There already seem to be problems as demonstrated by the Family Resolutions Pilot Project (FRPP).

6. The FRPP aims to help separated/separating parents to reach agreement about contact and residence without the need for formal family court proceedings by providing information to parents at the start of proceedings about, _inter alia_, the negative impact of parental conflict on children, workshops on conflict management and a planning session with CAFCASS where they are given examples of parenting sessions that work. This is positive BUT the premise from which FRPP starts is to say that the welfare of the child is best promoted by quality of contact between the child and the non-resident parent rather than quantum. (I refer to the quality v quantity element at paragraph 17 of my original submissions). Since contact applications are about time I do not agree with this approach. Parents are given no guidance as to how much time equates to a ‘meaningful relationship’ in their particular case. It takes time to build a quality relationship.

CONTACT AND TIME

7. Contact applications are all about time, for example:
   — How much time it takes to obtain an order and for a child’s contact arrangements with the non-resident parent to hang in the balance.
   — How much time the child spends with each parent.
   — It should also be borne in mind that delay is time related.

8. The intention of the Children Act is to encourage both parents to continue to share in their children’s upbringing, even after separation and divorce. How is this to be achieved unless the child has time with both parents? But how much time should that be? To be precise, what apportionment of the child’s time with each parent represents the child’s best interest? By infrequent visits lasting a couple of hours? By a 50/50 split or a 30/70 split of the child’s time? By overnight stays? By alternate weekends and holidays with around 100 nights contact per year or more or less? The argument against any definition of time is that “every case is different” and so no generalisations may be made. I deal with this below.

9. The Government states at paragraph 42, Chapter 3 of the Green Paper that it does not believe “that an automatic 50:50 division of the child’s time between the two parents would be in the best interests of most children” and that the “best arrangements for them will depend on a variety of issues particular to their circumstances: a one-size-fits-all formula will not work.” Consequently introducing a legal presumption of contact to give parents equal rights to equal time with their children after parental separation is not appropriate. The problem is that currently there are no court backed time-linked guidelines as to what is appropriate and so the apportionment of time could be anything between 0% and 100%.

EXISTING APPROACH

10. The starting point is that the child has a right to know both parents and should have contact with the non-resident parent. The child has a right, where the parents are separated, to know the non-residential parent and his brothers or sisters. There is a normal assumption that a child will benefit from continued contact with his parent, but that assumption can always be displaced if the child’s interests indicate otherwise. The problem for a non-resident parent seeking contact is that the onus is always on him/her to prove that more contact would be in the best interest of the child, whereas the resident parent is not obliged to show why contact should not take place. Because of the “every case is different” approach and because CAFCASS do not have any guidelines on how much contact to recommend, it follows that any outcome can flow from any facts and contact can be stopped for any reason. A “fit” parent has no presumptive entitlement to any time with the children.

11. Further, where the contact has stopped and there has been a period of no contact the test to be applied is whether there are any cogent reasons why the child should be denied the opportunity of contact with the non-resident parent. Before ruling out the establishment or re-establishment of contact the court will wish to be satisfied that all avenues have been tested. So we venture into the realms of protracted litigation, delay, CAFCASS reports, investigation of allegations of abuse, violence etc.
REASONABLE CONTACT

12. There is no definition of reasonable contact. It is argued that it cannot be defined because “every case is different” and so we cannot legislate on it because we do not have a consensus on what it is. That makes for dissatisfaction all round so a less confrontational approach would be to develop Parenting plans for various categories of case based upon the individual child’s needs. What is key to this is that at the beginning of the case when an application is made to the court guidance is given to the parties on how much contact the court is likely to order if they cannot agree (it may be appropriate to have default guidelines which can only be departed from for very good reason) frequent and continuous contact is in the child’s interests and that there is a clear presumption that the child is going to have parenting time with both parents.

EARLIER INTERVENTION AND PARENTING PLANS

13. If the Court’s expectations can be conveyed in advance that creates predictability. Under the current process parties have no idea of what level of contact the court expects them to agree until they are well entrenched in the proceedings. I have dealt with cases where no amount of pleading from one party to the other to reach an agreement has worked, but where the judge has intervened and clearly directed that he will make a certain order if the parties do not agree by that direction he has promoted agreement. It is unfortunate that his intervention could not be earlier but that is down to the current process, not the judge. So if we had judicially led backed time-linked guidelines setting out what sort of outcome is appropriate if the parties were to litigate which are communicated to the parties at the time the application to the court is made that will focus the parents’ minds.

14. How would this be achieved in practice? There is a three stage non-court process:

— Court issued information is given to the parties at the moment proceedings are issued. They are provided with a video focusing on what is best for the child and a leaflet setting out the court’s expectations and guidelines on proper parenting after separation. Early Interventions hinges upon giving parents guidance before the case, on how much contact there should be and leads to the development of parenting plans which would set out norms of contact as a framework for negotiation.

— Parent education. A parent orientation class for potential litigants is the next stage.

— Contact-focused mediation. One-off mediation for those still struggling to agree which is compulsory.

15. So what happens to ensure that the safety of the child is addressed? When an application is made the case is immediately assessed to ascertain whether there are any concerns. If there are it will be taken out of the non-court process and placed into the court process. Because many more cases are kept out of court, the court’s time is freed up and valuable judicial input can be given to the more urgent cases. In Florida they have trained court managers to assess the cases when they come in to recognize a case that needs to be fast-tracked in this way.

16. Time-linked parenting plans are crucial. Without knowing what contact arrangement is likely to be in the child’s interests for various categories of case, it is not possible to advise parents in advance of how much contact they should allow. Parenting plans are open to infinite variation depending upon the facts of the case, so deal with the problem that “every case is different.” By reviewing the information given to them, attending the parent education and resorting to mediation if necessary, parents can design a parenting plan which in the best interests of the child.

17. The Early Interventions Pilot Project fulfils the intentions of the Children Act to encourage both parents to continue to share in their children’s upbringing, even after separation or divorce. Frequent and continuous contact is in the child’s interests and an affirmative obligation is to encourage and nurture a relationship with the other parent. With Family Resolutions reasonable contact is only an option.

CAFCASS

18. CAFCASS’s role is very important as a CAFCASS officer acts as the court’s expert in contact disputes. A Court reporter via a Welfare report makes a recommendation to the court on what level of contact is appropriate, so how these reports are produced is crucial. The problem is that CAFCASS does not have guidelines in relation to the amount of time a child should spend with a non-resident parent and what sort of contact should be recommended in what sort of circumstances.

19. CAFCASS state that every case is different so if there are no categories of case there can be no parenting plans outlining what should happen in the various case categories (Contact: Principles Practice and Procedures (CAFCASS 15 August 2004)). Consequently CAFCASS does not keep records of how much contact it recommends or why because if every case is different then it is not necessary. Accordingly no training is given on what to do on any case as each case is different.
20. CAFCASS receives a great deal of criticism as it is alleged that some of the reports are based on idiosyncratic, highly personal and often outrageous personal opinions and since there are no guidelines for determining how much time children should spend with both parents after separation, it is not surprising that such criticism is made.

21. The power of CAFCASS is no more evident than when a party is publicly funded. If the CAFCASS officer produces an unfavourable report and states that the applicant has no reasonable chance of success in his/her application and that it is unmeritorious then it is possible for that party’s legal aid certificate to be revoked. Essentially the Court reporter’s opinion, which may not be well-founded, is depriving that party of legal representation which may be desperately needed and essentially adjudicating on the case.

DOMESTIC VIOLENCE AND ABUSE

22. These are very serious issues and any allegations rightly need to be assessed by the court, including if the court considers, through a finding of fact. The problem we have currently is that there is nothing to secure the children’s right to parenting time when it is being obstructed without there being any safety issue at all. Also the process is too slow and allegations which have to be investigated cause delay, which is why cases need to be streamed as referred to above.

23. Allegations made in affidavits are often unreliable and difficult to prove and if children are involved, courts invariably favour the mother. Judges have to err on the side of caution and grant injunctions. The problem is that making allegations is all too easy. There seems to be no redress against someone who has made false allegations. In other areas of the law this would be seen as perjury.

24. Where there has been a misdiagnosis of child abuse as per Angela Cannings, Sally Clark and Trupti Patel for it to be sufficient for one expert to claim on the balance of probabilities that the parent is guilty does not bode confidence in the legal system.

25. A review of the Munchausen cases has been carried out by social services scrutinising their own decisions. The Court of Appeal has affirmed that non-medical evidence is relevant and cogent and meets the threshold criteria. It is a cause of major concern that circumstantial rather than direct evidence will be sufficient to justify a decision that a parent has deliberately harmed his/her child.

BIAS

26. The law may be gender neutral in intent. However that is not the perception of many non-resident parents who have been through the current court process. They have no faith in it to produce an unbiased result.

27. Compared with the number of children involved, it is true to say that the number of cases that reach a final hearing are small because the majority of cases are compromised along the way. However, this does not mean the parties are satisfied with the compromise reached and that they feel they have been well served by the legal system. Many give up because they feel the system is too heavily weighted against them. The fact that a case is compromised is definitely not an indication of a positive outcome for either the non-resident parent or the children.

28. I believe that this is not so much gender issue but a parent issue. It is a balance between the “resident parent” and the “non-resident parent” irrespective of gender. This is because the non-resident parent is always on the back foot. The non-resident parent, usually the father has to show why contact which has been stopped should be restarted. The burden of proof is on the non-resident parent to show why reasonable contact should be ordered.

29. The term “non-resident parent” is seen as discriminatory. The Children Act provides for shared residence. If we had a presumption of shared residence that can only be departed from if there are strong and clear reasons for doing so, then at least the non-resident parent would not be disadvantaged from the outset. The distinction between the non-resident and resident parent would disappear and so would a lot of the resentment and the applications to court.

SECRECY

30. I believe that there should be more openness in the courts. One argument put forward when the fathers’ groups stated that the courts are biased to them is that this is because cases are held in private and full details are not released to the public, so decisions are being misinterpreted. The problem for parents is that they feel they have no “voice” if they are deemed in contempt of court by talking about their case.

31. Section12 Administration of Justice Act 1960 stipulates that it will be a contempt of court to publish any information relating to the proceedings if the proceedings relate to children. (There is specific reference in that Act to proceedings issued under Children Act brought under High Court’s inherent jurisdiction and generally where there is an issue relating “wholly or mainly to the maintenance or upbringing of a minor.” In such cases no publication is allowed.) The reasoning behind the confidentiality of family court proceedings is that the child’s welfare must come first and that the child must not be put at risk of being identified. Vital
first judgments at first instance are made in private and they are unavailable for scrutiny. However, once the
case goes to appeal, although anonymised, public reporting of judgments that reveal many identifying
features is permitted.

**ENFORCEMENT**

32. The primary difficulty is not in enforcing orders but in obtaining an order worth enforcing in the first
place. Currently it takes years to obtain an order for reasonable contact. There is no point in having a system
that does not work coupled with punishments when contact orders are breached for whatever reason. What
is crucial is a legal system which enables parents to obtain contact with their children in the first place.
33. Financial punishments are not always satisfactory as the resident parent, generally the mother, does not
have the money to pay, although that is no compensation to a parent who has expended money on a holiday
only to have that trip thwarted. Punishment in terms of giving more time to the other parent would work
in line with the aim of the contact order in the first place.

**GRANDPARENTS**

34. Research repeatedly records the level of childcare provision by grandparents at a steady 60% plus.
Under the current law before a grandparent can apply for a residence or contact order the Children Act 1989
requires them to obtain leave of the court. In deciding whether or not to grant leave the court must take into
consideration the grandparents relationship with the child and the risks and disruption to the child’s life.
35. Should grandparents require leave? Given that grandparents are currently providing the majority of
non-parental childcare in this country, there should be much more discussion on the matter.

*Celia Conrad
December 2004

Evidence submitted by Tony Coe, President, Equal Parenting Council

**SUMMARY OF PEOPLE/ORGANISATIONS REPRESENTED**

1. EPC represents parents—primarily separated mothers and fathers, also grandparents whose role in their
children’s lives has been terminated or limited by the family courts, simply because the *de facto* custodial
parent wants rid of them. Our leadership team have had direct, personal experience of the workings of the
family justice system. Many of us have effectively been stripped of our parental status and have lost our
relationships with our children for no good reason.
2. As a consequence of our experiences, we studied our family justice system as it pertains to private law
cases and have, over the past four years, been comparing it with Best Practice jurisdictions in the USA. We
have found that the UK system is at least 20 years behind such jurisdictions.
3. EPC also speaks for our children—and all the children of separated parents—whose welfare suffers as a
consequence of our defective system—a system that falsely purports to hold as paramount the welfare needs
of these children. These children suffer in silence while the State fails to help them keep their relationship
with their other parent. They suffer now and they suffer in the future, as universal research has proven. EPC
is the UK Branch of the Children’s Rights Council (CRC) headquartered in Washington, DC. I was
introduced to CRC by Lady Catherine Meyer, a past Honorary President of CRC and wife to the former
British Ambassador, Sir Christopher Meyer.
4. EPC is a key member of the Coalition for Equal Parenting (CEP). CEP is a collective of like-minded
parenting organizations who have all united behind the campaign for an introduction of a legal presumption
of “contact” (which we prefer to call “parenting time” in line with Best Practice jurisdictions) for all fit
separated parents. For further information on EPC please visit our website at: www.EqualParenting.org

**ABOUT THE WITNESS/AUTHOR OF THIS SUBMISSION**

5. My name is Tony Coe. I am President of EPC. My bio can be found at: www.equalparenting.org/
tonycoebio.htm

**KEY AREAS OF COMMITTEE’S INVESTIGATION**

6. I understand the key areas to be investigated are:
   — whether the family court system is being run effectively;
   — whether family court judges have sufficient powers;
7. EPC has already submitted to this Committee our response (entitled Reform Proposal 2004) to the Government’s Green Paper which sets out our position generally. That document should be considered as part of this submission (not printed). It can be found at: www.EqualParenting.org

8. I will therefore not repeat here the contents of our response to the Government’s Green Paper. Rather I will use this opportunity to briefly comment on the 4 key areas of investigation which the Committee is specifically addressing.

*Is the Family Court System being run effectively?*

9. It is not. The system is entirely discretion-based. Personal opinions and biases (of family judges, CAFCASS officers and other so-called ‘experts’) take the place of clear laws. Judges are told in effect,

> Decide whatever YOU think is in the best interests of the children of the families that come before you, and whatever you decide will be right!

10. Worse, there is the “no order principle” which says that courts should not make any order until the court has investigated what would be in the children’s best interests. By the time the investigation has been carried out it is usually thought by the court to be too late to disturb the status quo. That means the court squarely puts its weight behind the parent “with possession” of the children—that is to say the de facto custodial parent. The other parent ceases to have any importance, except when it comes to providing financial support. Delay, not the best interests of the children, thus determines the outcome.

11. The children’s parenting time with both parents needs to be secured by the court at the earliest possible point in time. Unless a parent is unfit*, this should be by way of a temporary or interim order made at the first hearing. Of course, an order is needed! The fact that a fit* parent has had to apply for contact means that parenting time is being blocked! At this vital time in the family’s transition, the children must not be starved of the oxygen of parenting time, otherwise the child/parent relationship may wither and die.

[*A parent should be presumed fit until proven unfit. The test of fitness should be this: is there a reason why this parent’s role in his/her child’s upbringing should be limited or restricted by the State that would apply even if the parents were still together?]

12. The case for a burning need for a legal presumption is argued in my July 2004 Westminster presentation, which please consider as part of this submission (not printed). It can be found at: www.EqualParenting.org

13. 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. However, EPC is well aware that the system is broadly just as oppressive when the non-resident parent is the mother.

(Non-resident parents are separated parents who no longer can live with their children. In my submission, in the majority of cases, neither parent should be so characterized, because both parents should be considered resident parents. This is because Parliament’s clear intention behind the Children Act 1989 was that shared residence should be the normal form of order. This wise intention has been ignored by judges and by CAFCASS).

14. In order for this Committee to gain an objective understanding of just how badly our private law family justice system is failing children and families it is essential, in my respectful submission, to examine the performance of the courts and CAFCASS in actual cases. There is no doubt in my mind that the Honourable Members of this Committee would be shocked and horrified to compare the reality of what is happening in cases and to measure it against the testimony before this Inquiry of judges, CAFCASS representatives and others.

[Why this submission has been amended]

15. But I do not expect this Committee to take my word for it. This Inquiry, naturally, will expect evidence. On that basis, EPC prepared for Honourable Members of this Committee in time line format an actual, real life case study (“FAMILY X”) that vividly demonstrates (among other things) just how ineffectively the family court system is being run. Further it shows that there is nobody (including very senior, key people in the family court system) who is willing to take overall responsibility for a proper outcome that truly serves the children’s best interests; nor indeed for systemic failures, no matter how catastrophic. The case of FAMILY X is typical of what EPC (and similar parenting organizations) see day in/day out.

16. Of particular interest to this Committee will be the fact it can be seen that gross negligence, incompetence and corruption rise to the highest levels within CAFCASS: and yet there is no redress available to the injured parties and children that suffer as a consequence. This is an actual case study and I can personally vouch for the accuracy of this time line and for the facts asserted.
17. This case proves that not even our top family judge, the President of the Family Division herself, was able (or prepared) to take responsibility for making certain that this case was placed on a proper course (even when she knew full well that it had already gone badly wrong) or to hold CAFCASS accountable for its abject failures in this and so many similar cases.

18. I would add that it is one thing for the President to tell this Committee in general and anecdotal terms about how she views the widespread user dissatisfaction with the private law system. It is quite another for Dame Elizabeth Butler-Sloss to be required to account for such a lamentable performance by the system over which she presides.

19. Therefore, in my original submission I respectfully asked the Committee to study the THE FAMILY “X” CASE STUDY TIME LINE which demonstrates the realities on the ground which non-resident parents are faced with every day. I believed it would give this Committee a better insight into the anger and despair that exists across the country—anger and despair that drives some to embark on colourful, sometimes dangerous and inappropriate forms of protest.

20. I have noted in our research of Best Practice jurisdictions across North America that when their legislatures have in the past been considering changes in the law in the direction of shared parenting, they have been especially moved by testimony and/or impact statements from affected parents and family members.

21. That said, on receipt of my original submission to this Committee, I was told that the THE FAMILY “X” CASE STUDY TIME LINE could not be given to the Committee members because it might be a contempt of court and it should be removed from the submission. Hence this amended submission. However, I should like to respectfully suggest that the FAMILY “X” CASE STUDY document can be reviewed by the Committee Members without there being any contempt of court for the following reasons:

- Neither the parents nor the children are identified in the document.
- It is not a court document.
- The information is already firmly in the public domain.
- The case was covered in a BBC One TV programme that was advertised on BBC’s web site as follows:

  Britain’s Secret Shame, Friday 5 Nov, 12:30 pm—1:00 pm 30 mins

  **SECRET COURTS**

  The Family Courts operate in secret, so can we trust them to treat parents fairly and put our children first when families break up? Whistle-blowers say thousands of youngsters are growing up deprived of their fathers because the courts are failing. Jan says the family law system encouraged her to give her ex-husband only minimal access to their daughter. The pair eventually abandoned the courts and made their own peaceful agreement to share bringing up their daughter. Steve hasn’t had access to his son for four years. He says the courts have refused to enforce their own order giving him access. He’s one of thousands of angry fathers waging a campaign of civil disobedience. Some have even lobbed purple powder at the Prime Minister. They claim it’s the only way they can get their voices heard on what they say is one the greatest social injustices in Britain today.

- In the above TV documentary, one of the children (now 17) spoke out about how she felt the system had let her down and adversely impacted her life.
- The case is the subject of two successful (but practically fruitless) appeals to the Court of Appeal conducted in open court.
- The first of these was extensively reported in Family Law Journal.
- The document is publicly available to all on the EPC web site.

22. I submit that it is entirely appropriate that the Committee Members have access to this document and I would invite the Honourable Members to review it and to be fearless in pursuing answers to the questions that will inevitably arise in the minds of Committee Members.

23. On the other hand, if it is true, that for the Inquiry to have access to this information would be unlawful, then I respectfully submit that this Committee is impossibly hampered in its work by secrecy laws that are patently contrary to the public interest. I reject the notion that these secrecy laws are there to protect children. EPC has researched jurisdictions across USA and Canada where these cases are open to public scrutiny, where the openness of court proceedings is treasured. At no time have we heard anyone complain that a child has suffered harm as a result of court openness. It is, however, clear to me that secrecy in British family courts is damaging to the interests of children, parents and grandparents.
24. I refer to the words of Lord Denning, who said this on court secrecy:

Every court should be open to every subject of the Queen. I think it is one of the essentials of justice being done in the community. Every judge, in a sense, is on trial to see that he does his job properly.

Reporters are there, representing the public, to see that magistrates and judges behave themselves. Children’s courts should also be open. Names should be kept out but the public should know what happens to the child and proceedings should never be conducted behind closed doors . . . Somehow I believe, in the words of Jeremy Bentham, that in the darkness of secrecy all sorts of things can go wrong. And if things are really done in public you can see that the judge does behave himself, the newspapers can comment on it if he misbehaves—it keeps everyone in order. It is of first importance that all proceedings should be held in public and this includes the delivery of judgments together with the reasons for them. This is so that everyone who wishes to do so can come into court and hear what takes place; and also that the reported cases can be taken down by reporters for their own use.

25. The realities of what the system is doing to children and families are simply not understood by judges, Government Ministers or CAFCASS Board Members; that is unless/until they are unlucky enough to be subjected in their personal lives to the indignities and injustices imposed by this seriously flawed system. In short, they simply don’t get it! They can’t see the wood for the trees; just as nobody could see the wood for the trees at any time during the FAMILY “X” CASE. So nothing effective was done until it was too late!

[Why this submission has been re-amended]

26. I think it is important that I state for the record why this submission has had to be re-amended. Having submitted the amended version (which disposed of the objection to the inclusion of the FAMILY “X” CASE TIME LINE document on the basis that it might constitute a contempt of court) I was then given a new and different reason why this anonymized case study could not go to the Committee. The new reason was that the Committee had decided not to look at individual cases. With all due respect to Honourable Members of this Committee, I believe this decision to be a serious mistake.

27. The proof of the pudding is in the eating and this case study demonstrates beyond any doubt that the system, at all levels, is not putting children’s welfare first. Failure to analyze what went wrong in this case allows the culpable people involved (some of whom occupy most senior positions within our family justice system) to continue to hide behind the lie that they are acting in the best interests of children.

28. For the President of the Family Division to come before this Committee and state that she has (or her senior judicial colleagues have) been prepared to meet with EPC leaders and to listen to our point of view is disingenuous. EPC has repeatedly asked Dame Elizabeth (and other senior members of the judiciary) to meet with us. We have requested that they attend educational events and conferences that we have scheduled. These requests have fallen on deaf ears. The President operates at an altitude from which she cannot see the realities of what is happening to children, parents and grandparents in her family courts across the land. Yet these family courts are her ultimate responsibility.

29. The President has not even been prepared to listen to one of the UK’s most pre-eminent mental health professionals and court experts—one who she tells me she thinks highly of. Indeed, because he has been prepared to work with parenting organizations like EPC to achieve positive reforms, she told him at a function that she did not like the company he was keeping. He therefore does not feel that he can speak out for fear that he will be stigmatized by our top family judges. This is a most unhealthy situation and the President should know better than to impose her anachronistic and wrong-headed views on experts who should feel free to advise courts and make recommendations according to what they know is truly best for children.

30. The family courts are ineffective because they start (just as the Government starts) from the premise that they can only help those parents who don’t need them! They are like the bank that will only offer you a loan when you don’t need one! We are constantly told most parents agree their children’s arrangements outside court. What is the relevance of this fact? Is this any justification for oppressing the minority of parents (and their children) who do need assistance from the courts in order to stop their fundamental Human Rights being trampled over?

31. The Children Minister, Margaret Hodge, has looked my colleagues and me straight in the eye and told us that if a custodial parent is determined enough to exclude the other parent there is nothing a court can do about it. With that sort of leadership on this issue, the Government is beaten before it starts! What of the children’s and the excluded parents’ individual legal and human rights to a family life together?

32. These cases represent 100% of the cases that EPC, and all the other member-organizations of CEP, are concerned about. They are the reason we need an effective, fair and balanced family justice system.

33. The reforms that EPC have proposed would go a long way towards ensuring that children maintain a full and meaningful relationship with both their fit parents. The Government’s proposals, as set out in the Green Paper, will not.
Do family court judges have sufficient powers?

34. They already have formidable powers that they could deploy (but rarely do) to protect the children’s right to keep both parents, including (but not limited to) the power to:

- grant shared residence, thereby equalizing the status of parents who should be treated equally before the Law (as Parliament intended) thereby removing the need for a battle over the most emotionally charged component—ie who gets custody and who loses their children!
- transfer residence* away from a parent who is blocking the other parent’s role in their children’s upbringing;
- order “make up” time when a parent has lost time due to the other parent’s lack of cooperation;
- order that contact travelling/costs be shared fairly;
- order the involvement of mental health professionals to facilitate contact**;
- refuse to finalize finance orders until a proper shared parenting plan has been established;
- award costs against a blocking parent; and
- impose the ultimate punishment of a spell in prison***.

*[Only recently have a tiny number of (mainly very senior) judges started to transfer residence largely because we have been pointing out that judges in Best Practice jurisdictions have been successfully applying these sanctions for years.]

**Trained professionals are rarely brought in early enough or at all—see FAMILY X.

***Experience from Best Practice jurisdictions shows that the threat of prison is often enough to correct the problem. UK judges won’t even do that!]

35. It all comes back to the need for the law to have a clear objective and a clear definition of what is in the best interests of children. Under our current law (like beauty) the concept of the best interests of the children is in the eyes of the beholder! Unclear law is ineffective law.

36. It is common ground (see the Green Paper) that children should be having a full and meaningful relationship (including normal contact) with both parents. Judges need the powers to make that happen and they must use those powers and use them early in a case. Those powers should not be compromised by the ill-conceived no order principle.

37. An additional power that judges need is the power to order parents into Parent Education Classes and mandatory mediation.

38. Judges should apply the Law as Parliament intended; they should not be free to make it up as they go along!

What are the issues surrounding delays caused by the current system?

39. Delays are caused (among other things) by courts routinely commissioning “investigations” even when there is no safety issue. What is the investigation supposed to be achieving? Not only does it cause delays, but it actually fuels hostilities between the parties. The blocking parent becomes more determined. A status quo sets in (ie contact does not happen or there is paltry contact) and the court will not disturb it for fear of acting against what it perceives as the child’s best interests. Thus delay determines the outcome, which is plainly wrong.

40. Where there is no issue of safety there should be contact as the Government’s Green Paper asserts. The court should be under a positive duty to:

(a) order contact quickly; and
(b) enforce its orders promptly and with determination. Delays should not be tolerated.

41. Best Practice jurisdictions use mandatory mediation to help the parents agree a parenting plan that then is enshrined in a court order. Mediation requires a tough, determined, fair and balanced court system working in the background to motivate parties to settle on a basis that is best for the children and the family as a whole.

42. Delays are primarily caused by:
- the lack of clear law, rules and procedures;
- Incompetence/negligence;
- bias; and
- malign intent.
All these elements are evident in the FAMILY “X” CASE STUDY.

Are people using family courts getting the service they deserve?

43. Clearly they are not. Non-resident parents (mostly fathers, but increasingly mothers too) are being driven out of their children’s lives. Children are losing one of their parents (and extended family, such as one set of their grandparents) for no good reason. These children are suffering now and into their futures. Their adult relationships suffer and their own children’s lives are negatively impacted. The damage to our society grows exponentially as parental separations become the norm, rather than the exception. Dysfunction breeds dysfunction, breed dysfunction.

I look forward to appearing before the Committee, as arranged on 11 January 2005, to elaborate on this submission and to assist this Inquiry to the best of my ability.

Tony Coe
President
Equal Parenting Council
18 November 2004 [re-amended 3 December 2004]

Further evidence submitted by Tony Coe, President Equal Parenting Council in response to evidence given by Dame Elizabeth Butler-Sloss, President, Family Division

I should like immediately to make the following brief representations to the Committee regarding Dame Elizabeth Butler-Sloss’s written comments on my submission to the Committee1 which you kindly attached to your email.

1. There are, of course, plenty of EPC representatives that the President (or her judicial colleagues) could have met with apart from me. Never once did the President (nor any of her colleagues) suggest that they could not meet for the reason tendered by her now for the first time. It is EPC’s contention that the President (and her colleagues) are deliberately avoiding input from parent-consumers whose views they largely treat with contempt.

2. This is further evidenced by the fact that the Family Justice Council rejected excellent candidates from parenting organizations (including—among many others—one from EPC Vice President, Paul Duffy) in favour of a contributor who would not “rock the boat” from an organization that (a) has no practical experience of the court system and (b) relies heavily on Government funding. The plain fact is that the judiciary are determined to provide no machinery for factoring-in the views of qualified parents/court consumers.

3. The President is right that I have appeared before her as a Litigant in Person. However, I am at a total loss to understand why she would want to deliberately mislead this Committee by stating that I was “unsuccessful”. Both my Children Act appeals were successful. Indeed one of my two successful Children Act appeals was reported extensively in Family Law Journal. On the subsequent appeal, the President kindly went out of her way to make plain to me, early in the hearing, that she and her fellow Court of Appeal judges were ALLOWING my appeal. No doubt the Committee will form its own conclusions as to the President’s motives for being economical with the truth.

4. It is noteworthy that the President has not commented upon my criticism with regard to educational events that in EPC’s view our top family judges should most certainly be attending—especially those run by AFCC which are attended by family judges (and family law experts) from all over the world. I raised this issue with a prominent High Court Judge whose gave me this lame and defensive response, “How do I know we’ve even received an invitation?” We of course made sure they had full details to no avail!

All this reinforces EPC’s position that our judges need to be held accountable. It is important not to accept what they say simply because they are judges—even if they are very senior judges!

I should be most grateful if you would kindly forward this email to the Committee members.

Tony Coe
President
Equal Parenting Council
10 January 2005

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Evidence submitted by Families Need Fathers

The Social Context

More than half children are reported as wanting more contact than they get from the parent they see less of. More than half residential parents—excluding those who have shared care already—want to see more of their children than they are allowed.

A majority of men now want a balance between work ambitions and family responsibility, and in some respects are now more egalitarian over the allocation of roles than women.

Fathers now provide a third of child care in intact families.

The normal court order for contact for divided families cuts this by about two thirds.

There is an enormous supply of loving care offered by non-residential parents and wanted by their children that is denied by current arrangements.

The pain and anger felt by contact parents is at last finding a voice. The more important suffering and damage is to children. This is still rarely acknowledged.

Britain has, however, a raft of social and personal problems that are related to insufficient involvement of children with parents. The amount of time children spend with their mother has fallen dramatically as more female parents go out to work. It would be neither right nor possible to reverse this trend. The increase in the time children spend with their father has been as a result of changed personal behaviour and despite little encouragement.

The problems are most acute and the needs are greatest where the family has divided. A formerly involved parent may find themselves excluded. There are suggestions in the research that the parents most involved before the split may be those least likely to be involved after. This exclusion is often combined with pressures and demands on the residential parent that may reduce their availability and effectiveness as a parent.

Shared parenting helps with the emotional loss of children and parents. It also helps reduce poverty, reduces behaviour that causes personal and social problems, improves health, education and work performance. It promotes social inclusion, the safety of children and reduces domestic violence. It improves family relationships and parenting in the next generation. It also saves public money.

The typical contact order, however, still revolves around a fortnightly overnight stay, some hours midweek and sharing holidays, with the rest of the time with the residential parent. Even this is easily frustrated, however, by the residential parent.

The solution to these problems require strategies across the whole of public policy. A key role, however, is the family court system. Only a small minority of parents go to law, but the settlements made by the others are in the shadow of the decisions that are formally decided. Some 40% of our children are affected. If the courts ensured that children had both children involved in their lives, the rest to society would follow. Our current ‘parenting deficit’ and many of the associated personal and social problems would rapidly diminish.

The Status Quo and the Personal Implications

Our current system:

1. Awards what amounts to the possession of the children to one parent.

2. Requires the other parent, either to accept this outcome or to institute moves, inevitable seen as aggressive, to challenge it. Those moves are adversarial, complicated, expensive, long delayed and often ineffective.

3. With some exceptions, condones residential parents refusing their children a relationship with the other parent, even when there is a court order.

Many of the people who seek our help have agonising personal choices. We can explore these with them but cannot make for them. It is that their ex allows their children only a little time with them, and that parent makes all the decisions over contact and other things. To use any formal procedure to challenge this puts at risk the little that they have. The costs of asking for more involvement with the children under present arrangements are certain—trouble, delay, expense and hostility. Any benefit is uncertain. There is no knowing what the court might decide. Any decision may not be enforced anyway.

Some members will take no action that could endanger goodwill. Some of these find that their and their children’s position improves. Some find that they lose even what they had and that this is irreversible because of the passage of time. Others take action. some of these get a better relationship as a result. Others find that the response of their ex is to deny or further reduce contact. They have to accept this, or go down the uncertain process of enforcement.
The outcomes are rarely prediciable. The sense of insecurity and stress is alarming. It is often the same or worse for the children.

This is often most acute over holidays and Christmas. The residential parent can simply impose arrangements. The other is powerless in the short run. Any legal adjudication will be long after the event.

**The reforms needed**

1. The children should be put centre stage. The issues should be reframed away from conflicts between the parents into seeking the best blend of the parents for the children. This should be driven by information about what children normally want and need and by parenting plans. These should be promoted by courts and by CAFCASS. We are very concerned, however, about what seems to be in increasing trend to ask children which parent they prefer. This is extremely distressing to children, and encourages parents to involve children in their conflicts. In the normal case children will want both parents in combinations to be explored with them and others.

Currently the issue as seen by the courts and other services, such as CAFCASS, seems to be to seek an accommodation between the demands of the parents. Often this is on the basis that the residential parent has the power and therefore their wishes are the ones that need most responding to.

We wish to see the agenda as being how to get the best parenting for the children and getting the parents to agree on that.

2. A presumption of equality. The children should be regarded as having equal rights to both parents. This means that the parents should be in a position of formal equality as far as formal responsibilities and “voice” is concerned. One way to help is to give both parents residence orders unless there are reasons to think this will damage the children. Discussion of the division of parenting time should also start from equality. The final outcome might only rarely be equality, but that should not be excluded. However, departures from equality would be ones that required justification. At present it is the non-residential parent who has prove that more than token contact is best for the children.

3. Recognition of the wider family. It is very wrong that only parents can apply to the courts. This rule is especially disrespectful of the customs of some communities. The right to contact should be enlarged to at least grandparents.

4. Use of non-adversarial methods. Formal contested court hearings should be a last resort. In them, the parents should be discouraged from rubbing the conduct character and parenting of the other. The aftermath of a hearing at present can be years of bitterness. Legal funding should cease for advocacy of the views of the parents except in special circumstances. Children however should have their advocates.

5. Some certainty of outcome. There is at present no guidance about what results are to be expected, even about what is relevant. This encourages litigation, and also results in what appears to be widely different approaches in different areas, or even judges in one area. These should be reduced by parenting plans and guidance.

6. Active case management. A present the court are purely reactive. They respond only when a party demands it and then put many barriers in the way of whoever asks for their help. The courts and CAFCASS should have a proactive role in seeking the best parenting for the children. There should be no final outcome of family proceedings—for example a divorce or a financial settlement—unless satisfactory co-parenting arrangements are in place.

7. A revamping of CAFCASS. This needs to be changed from an organisation that reports on the parents to the courts to one that actively promotes the parenting needs of children. The primary focus should cease to be assisting the court process. It should be diverting parents away from contested hearings into the making of child-centred parenting plans. They should offer preventative service of advice and support to parents including those who have not started proceedings. They should administer revitalised and reformed family assistance orders. This should be funded from savings in legal aid.

8. Judicial continuity. The constant chopping and changes is wasteful of resources and encourages habits that disadvantage the weaker party—namely each judge or magistrate trying a new tactic or giving an unco-operative parent “another chance”.

9. Accreditation. Decisions should only be made by parties with sufficient knowledge and experience in the needs of children, in communicating with children, in the effects on children of family separation, and in using non-adversarial methods in these contexts. Accreditation should apply to all parties, though the schemes may need to be different.

10. Quality control. There is at present no monitoring of what is ordered or why. This is essential information. There needs to be audit of court orders, publicly available statistics on key questions and investigation of prima facie discordant practices.

11. End to delay. Delay works against the interests of children. In particular it works against their needs for both parents. Very often a new status quo is instituted before the issue comes up for decision. There are not valid reasons for the extraordinary delays there are at present. The first hearing or meeting should be within a week of the first approach and a final hearing normally within a month. There must be provision for deciding urgent issues—such as disputes over holidays—in time.
12. Enforcement. 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.

13. Orders should show more respect for stability. This is particularly the case where a parent seeks to move a child in such a way as a relationship with the other parent becomes difficult or impossible. The onus should be on such parents to show that this rupture is for the benefit of the children involved rather than for the advantage of the parent seeking it. They should also be expected to offer practical and financial help to enable the child to retain and develop their relationships with both parents.

14. There needs to an assumption that where a child has lost contact for whatever reason, not only because defiance of an order but because of illness or some activity that disrupted the normal pattern of contact, that the child is given equivalent parenting time in lieu.

15. Better speedier investigation of allegations. One factor that urgently needs audit and quality control is the treatment of allegations, for instance those of sex abuse or domestic violence. Evidence of insufficient attention to these issues on occasion is combined with our experience of an over-reaction to allegations including malicious ones. Better guidance is needed and more resources devoted to speedy and fair investigation of allegations. At one pole children may be exposed to risk, at the other they may be wrongly denied a relationship with a loving and loved parent. If risk is established, the appropriate decisions need to be made. If the allegations prove to be false there should be robust treatment of perjury and attempting to pervert the course of justice.

16. Less secrecy. No judicial commentator said “It does not matter is justice is not done, so long as it seems to be done”. However, our family courts are no longer trusted. Things are done in secret family courts that would cause scandal if widely known. Hearings should be in public, and evidence and reports public, subject to protection of the identity of individuals.

17. Moral leadership needs to be shown where a parent neglects a child, for example not seeing them whether there is a court order or not. It should be open to a parent, perhaps even a child, to institute proceedings where a parent is not acting on their responsibilities.

18. An end to institutional sexism in the family justice system. Our prime objection to the status quo is to the “winner takes all” system, but there appears to be an assumption that extreme circumstances have to be shown before a father is given a residence order or children more than slight contact with a NRP. In the latter case, children whose mothers who do not have residence orders are also discriminated against. There may however be some movement in a less discriminatory direction recently and in the higher courts. Conversely, it is rare for a non-residential parent to be denied all contact—although most such decisions may not be visible. Making no order may have the same effect, and many may withdraw applications for orders.

Orders to see children only in contact centres are abused.

19. The right to seek help. At present the contempt of court rules create problems for parents seeking advice information and support other than from solicitors. The rules need relaxing.

20. There need to be more sources of information and help for parents in dispute over their children. Currently the first port of call is often solicitors who have an interest in conflict and may have no training in the needs of children. Many of the other sources of information may be biased towards the residential parent. Neutral, child centred services need to be more available, based on a recast CAFCASS.

ABOUT FAMILIES NEED FATHERS

Families Need Fathers is the second largest membership charity in the family field. (largest—Gingerbread). Its primary function is to help and support parents living apart from a child to maintain and develop that child’s relationship with them. We are the only organisation that provides this help on a national scale. We also do the sort of lobbying that charities traditionally do. We are almost wholly voluntary but, none the less, help some 100,000 families per year.

We are a gender-equality organisation that respects diversity. Through our branches and volunteer network we have contact with most sectors of society. Whilst we seek to help families before and after any legal conflicts, most people come to us for help at the point at which conflicts, often legal ones, are acute. Help at this point is central to our work, although our national helpline, using Telephone Helpline Association training and standards, has been finding a range of callers who can often be helped to avoid the destructive effects of our Family procedures.

We have been a charity, administering to the needs of people disempowered, and often forcibly estranged from family members, for over thirty years. We are not associated with other organisations that have recently been involved in high-profile publicity stunts.

The devil is in the detail in all family cases, and the Family Courts are no place for most of this detail to be thrashed out. We are at a loss to understand why the Family Courts, and their government overseers, cannot understand how such powerful courts have a pervading influence over the whole gamut of family disputes.

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We believe that some urgent reforms are needed that would be of immense benefit to the long-term interests of most children, reduce the workload of the courts, and reduce the damage in many cases that do not reach them.

John Baker
Chair
Families Need Fathers
15 November 2004

Evidence submitted by National Family Mediation

National Family Mediation is a network of services around the UK that provide mediation to families that are experiencing separation and divorce. Our services are registered charities and work in the not-for-profit sector. All services are contracted to supply mediation with the Legal Services Commission. We have worked in this field for 25 years and have always been available to undertake work diverted from the court system. Prior to CAFCASS the majority of services had partnership agreements with local probation services via Family Court Welfare Services to provide mediation for families in the Court setting. Recently these partnership arrangements have been reduced as a result of a change in focus and budget constraints within CAFCASS.

Whilst the number of clients referred to mediation has increased since it became compulsory for those wishing to apply for public funding to attend a meeting with a mediator, Access to Justice Bill (Section 11 Funding Code) this only affects people applying for public funding privately funded clients or litigants in person do not necessarily know about the availability of mediation. Previously people were diverted from court through the partnership arrangement regardless of public funding status.

1. WHETHER THE FAMILY COURT SYSTEM IS BEING RUN EFFECTIVELY

Timetabling at the onset of cases appears to work well but if there is a need for a full hearing there are often lengthy delays in listing and hearing the case with court and judicial availability restricted. For many families the fact that the final hearing is delayed, often by several months, can mean deterioration of family relationships whilst they await the outcome. This does not promote parental responsibility and does not enable families to conclude the emotional issues surrounding their separation. There is also no mechanism in the Court setting for alternatives to be used in the interim period with people relying on their solicitors or waiting to test the evidence of a CAFCASS report.

A frequent frustration is the change of judge at every hearing statements are rehearsed and re-rehearsed, different decisions made according to the particular judge on the day and there is no continuity of case management or decision making in the judicial process.

2. WHETHER FAMILY COURT JUDGES HAVE SUFFICIENT POWER

The Children Act 1989 provides the Court with a whole range of options for dealing creatively with family disputes that can benefit outcomes for children. These do not appear to be used very creatively. For example the use of shared parenting until recently these were seldom used as it was felt there needed to be a high level of cooperation for the order to be effective recently however, views appear to have changed. Shared parenting acknowledges both parents as having responsibility for their children and places the onus on parents to take joint responsibility for their children’s upbringing and welfare.

The issue of implacable hostility regarding contact is a perennial one and not easily solved. Punitive measures have been considered but it is difficult to image how a custodial sentence for one parent will benefit the children. It is however widely acknowledged that Orders made in the family court have little influence over a recalcitrant parent.

The Court could however be more active in directing people to alternatives such as mediation whether it is in a children’s case or an FDR. Being in the Court process does not preclude mediation from being considered at anytime during the lifetime of a dispute. Court direction and case management could be well used if judicial continuity were to be implemented.

In addition there is a need to consider ancillary relief and children’s issues more comprehensively. Contact issues are difficult to resolve when life altering decisions about accommodation, income, financial support etc have yet to be made. These decisions do impact upon children’s lives and need to be considered as a whole.

The implementation of the FLA 1996 made it a requirement for those wishing to apply for public funding to attend a meeting with a mediator to assess suitability for mediation and financial eligibility for public funding. As a result the route into mediation has changed. There is however currently no compulsion on the second party to the proceedings to attend an assessment meeting with a mediator as a result the first party
to the proceedings issues a court application. At Court this is then presented as mediation having failed when
in fact it has not taken place. The Court then timetables the case often adjourning for a CAFCASS report
to be prepared and moving into hearing and contested evidence mode.

For private paying clients this is a particular issue as they often do not know that mediation is available and
are reluctant to add to their costs with an additional service having instructed a solicitor. This effectively
means that there exists a two tier system with mediation not being available to all.

Section 13 and 14 of the Family Law Act would have given judges more power to direct parties into
mediation however this part of the FLA 1996 was not implemented

3. ISSUES SURROUNDING DELAYS

Only 10% of the divorcing and separating population uses the Court to resolve its difficulties yet for that
10% achieving a resolution is a very lengthy affair. There will always be people for whom the Court is the
only and necessary process for the vast majority however alternatives such as mediation may help to reduce
the delays if it is actively considered by the court at all times during the lifetime of the case.

CAFCASS has of course had its difficulties since its inception and in some areas there continue to be back
logs with private law cases waiting as long as 26 weeks for reports to be prepared, many of these cases could
be referred to mediation in the interim however, with reduced partnership arrangements between CAFCASS
and NFM services and complex issues of for-profit and not-for-profit providers there is confusion about
who can be referred to whom.

There is now discussion about “front loading” the service CAFCASS provides. CAFCASS does not
however have a remit to initiate work before court proceedings are initiated. Additionally whilst Courts
appear to like the quick fix arrangement that currently exists through in-court conciliation procedures all
the evidence suggests that agreements brokered in the shadow of the court are pressurized and frequently
breakdown. Research confirms that agreements reached outside of the Court setting are more durable and
lead to better outcomes for children. Part of the courts aim is to enable families to reach lasting agreements
that meet children’s needs.

4. WHETHER PEOPLE USING THE FAMILY JUSTICE SYSTEM GET THE SERVICE THEY NEED

As stated earlier the system from beginning to end takes too long for families. There are often protracted
negotiations that take place before proceedings are issued. There are several new initiatives being piloted
FAInS, collaborative law and Family Resolutions Pilots are three examples. Much of this work replicates
what National Family Mediation services already provide but are not being utilized to best effect. When in
the Court setting timetabling and availability of resources to conclude matters can take many months. For
children caught in their parental conflict this can be very damaging and alternatives to disputed adversarial
proceedings are not considered as a matter of course.

Providing information that is easily accessible and readily available that empowers people to retain control
of the difficulties in their lives is a serious challenge and requires a cultural change in thinking to the
traditional view that solicitors and Courts alone will solve the problem.

National Family Mediation
26 November 2004

Evidence submitted by Refuge

FAMILY JUSTICE: THE FAMILY COURTS

GENERAL STATEMENT

1. It is well understood that separation and divorce can have a negative affect on children, particularly
where conflict characterises the break up and in general Refuge believes it is valuable for children to maintain
contact with both parents where it is safe to do so. The negative impact of harsh and punitive parenting is
also well understood as is the harm that can be caused by witnessing domestic violence. It is vital therefore
that there is a balance between the child’s right to maintain contact with both parents following separation
and the duty of society to protect children from harm; a parents’ right to maintain contact with their child
should not overshadow either of these central aims.

2. The contentious issue of contact and residence presents particular problems for legislators and policy
makers yet the importance of “getting it right” cannot be more strongly emphasised, for to get it wrong can
and indeed does lead to fatal consequences. Legislative change in other jurisdictions has led some to create
a legal presumption of “safe contact” together with mandatory risk assessment in an effort to protect
children from harm. Yet even with these safeguards in place, protecting children (and the non-abusing parent) during contact visits with a father who has perpetrated domestic violence remains difficult, though it is not impossible if stringent screening, effective assessment and monitoring systems are in place.

3. The role of the family courts in ensuring the protection of children (and the non-abusing parent) cannot be overstated. All those working in the system should have a firm grounding in domestic violence and its impact on victims. There must be a clear understanding and acceptance that domestic violence, whether experienced or witnessed, represents a serious risk both now and in the future for any child and where this risk exists, there must be a resolve to say “no” to contact, at least in the short-term.

THE RISKS
— Domestic violence has overtaken gestational diabetes and pre-eclampsia as a cause of foetal death.
— Attempts to leave a violent partner, with children, is one of the most significant factors associated with severe domestic violence and death.
— Research has shown that the emotional and behavioural problems of children exposed to domestic violence are associated with their relationship their father. The more fear and anxiety, the greater the problems; the longer children are away from a violent father, the greater the improvement in adjustment.

THE REALITY
— Less than 1% of contact applications were denied in 2002.
— In 35% of contact applications there were concerns about the safety of a child or the residential parent.
— 10 children were killed during contact visits in the past two years.
— Around 75% of children on the child protection register live in homes where there is domestic violence.

4. In view of these concerns, Refuge’s response has focused upon the fourth of the select committees questions, that is “whether people using family courts are getting the service they deserve” and how the system, in its broadest sense could be improved to better meet the needs of domestic violence victims. And with this in mind, Refuge recommends.

SUMMARY OF RECOMMENDATIONS
1. A centrally driven and appropriately funded national strategy on domestic violence. This would ensure that domestic violence victims across the country received the same high quality service both within and outside the court system. It would also ensure a consistent and appropriate response to perpetrators.
2. A legal definition of domestic violence.
3. Appropriate domestic violence training for all professionals and mandatory training for professionals working in and for the courts.
4. Legislation in favour of a presumption of safe contact at the earliest opportunity.
5. Appropriate policies and procedures that prioritise and ensure safety for children and non-abusing parents with regard to contact and residence including:
   — thorough and on-going screening for domestic violence prior to and during the process of contact;
   — that family courts always accept evidence “on the balance of probabilities” when investigating allegations of domestic violence or abuse to a child;
   — a mandatory risk assessment in cases where domestic violence is a known or suspected factor;
   — prior attendance at a group/individual therapy for perpetrators of domestic violence (focusing on the effects of domestic violence/abuse on children) should be a precondition of contact agreements in all high-risk cases;
   — the wishes and feelings of children should be ascertained in relation to decisions which concern them;
   — an effective, comprehensive assessment of the impacts of abuse where a child has been exposed to domestic violence;
   — the development of effective assessment protocols for infants and pre-schoolers exposed to domestic violence;
   — a balance between minimising delay in resolving matters concerning children and allowing sufficient time to ensure that effective assessment and investigations are undertaken;
   — automatic separate representation for children exposed to domestic violence in private law proceedings and the use of domestic violence experts and other specialists to assist the court;
— assessment of and protection for the non-abusing parent;
— clear protocols to ensure contact is safe;
— the development of protocols to ensure consistency between orders and appropriate communication across jurisdictions, placing safety for victims at the centre of decision making;
— the premise that orders for protection should over-ride orders permitting unsafe contact;
— clear policies regarding confidentiality and disclosure of information about domestic violence victims; and
— routine exemptions from mediation, in-court conciliation, family resolution projects and enforcement of orders in circumstances where domestic violence or child abuse is a risk.

Refuge

December 2004

Evidence submitted by NCH

NCH is a leading children’s charity that runs more than 500 services for children, young people and families across the UK. Every year in our family support projects we work with thousands of children and parents who are going through the process of separation and divorce. NCH also operates eight mediation projects for separating parents and their children in England and Wales—projects for which, ironically, we are finding it increasingly difficult to secure Government funding, despite the significant public and political interest in this area. Finally, NCH has developed a website to help children whose parents are separating, which can be accessed at www.itsnotyourfault.org.uk

The key areas the inquiry is investigating are:

— Whether the family courts are being run effectively.
— Whether family court judges have sufficient powers.
— Issues surrounding delays caused by the current system.
— Whether people using the family courts are getting the service they need.

These four issues are closely related so our views about them similarly overlap to some extent. We are confining our responses to private law issues, though obviously NCH also has extensive practice experience of working with the courts in the context of public law (eg care proceedings).

Are the Family Courts being run effectively?

In NCH’s experience there is no simple answer to the question of whether the family courts are being run effectively. Performance seems to vary significantly from one area to another. However, the following is a description from an NCH mediation project of practice in a city court where things seem to be running ineffectively:

The long delays caused by the Court process means 12 weeks or more go by when a Court Report is ordered. Often parents end up seeing a different judge with each application. Staff shortages and a lack of financial resources have seen CAFCASS officers taking on both public and private law cases, with public law taking precedence.

The Courts are very old and space is very tight. Often there are no separate waiting areas, and this causes endless problems and distress to those waiting to go in. Parents in conflict are forced to hang around for up to one and a half hours in a very small area, which causes animosity even before they see the Judge. While parents wait to see the Judge, the two solicitors often try and talk to each other to negotiate a settlement before they are called. However a lack of space precludes this from happening appropriately.

The Court Clerks organise listings inefficiently. We saw four or five cases listed for the same time. This means the other four cases have to hang around waiting for their turn. We saw many cases where one party failed to attend, which meant that the case could not actually proceed and the Judge was forced to postpone.

I would suggest that all first directions are lumped together on one day—this is a short appointment. The Judge hears the situation and if the parties agree then an Order is made. If they can’t agree the case should go on for a report.

Other NCH projects also commented specifically on the difficulties caused by the lack of appropriate waiting areas in family courts.
Do family judges have sufficient powers?

NCH feels that others are better placed than us to respond to this question. However, it is our experience that when one parent is being obstructive, Judges understandably tend to give them many opportunities to comply. There may be a six week gap between hearings and a different Judge often seems to hear the case on each occasion.

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. The quality of the relationships between family members is something the courts cannot remedy with force or punishment, and so all too often family members are left to deal with the problems arising from difficult relationships on their own.

For NCH, the real policy challenge is to help parents to overcome the conflicts between them, in the best interests both of themselves and their children. We set out some ideas about how this can best be done in our answer to the fourth question.

What are the issues surrounding delays caused by the current system?

Delay is undoubtedly a major problem in the family courts, as we have already explained. Delay increases the acrimony between the parties and can also lead to great distress for the parent who is seeking redress, and for the children. In particular, we are concerned that in some cases the delays can result in contact arrangements which have clearly become inappropriate for the child being continued, because social workers are reluctant to alter them without the court’s approval.

SOME OF THE FACTORS THAT CAUSE DELAY ARE:

Inefficiency in organising Court lists. We think Court Clerks should allot cases a set time, not just lump all cases together.

Delays are also caused by one or both parties failing to attend the Court hearing.

A delay of 12 weeks or more is not unusual while a CAFCASS Officer prepares and then files their report. The time set aside for the preparation of these reports should be much shorter, in our view.

In our view the same Judge should, wherever possible, see the parties for the duration of the Court process. Early intervention should also be encouraged. All Court applicants should be given information about mediation, relationship counselling etc. At the moment this clearly doesn’t happen.

We think it would be helpful if Magistrates Clerks and Judges were proactive in ensuring mediation is considered, perhaps even requiring CAFCASS to give reasons when this is deemed not to be appropriate. One of our mediation projects reports that while it works quite closely with CAFCASS, it rarely receives a direct referral from the Court.

We believe that a significant proportion of parents attending a First Directions Hearing could be referred to mediation. This especially applies to those who are not entitled to public funding, since it is possible their solicitor has never told them about mediation, as they are not required to attended mediation appointments in the same way as are those seeking public funding. If more cases were referred to mediation then this might reduce delays.

It seems as if referrals for mediation are often dependent on whether the CAFCASS officer at Court is “mediation minded”, since certain officers refer regularly, whereas others never do. CAFCASS managers need to be more proactive in keeping mediation in the forefront of Court Duty Officers’ minds. Another NCH mediation projects reports that it periodically attends CAFCASS staff meetings and that this leads to mediation referrals increasing in the period after their visit. The same project reports a good rate of success with court referred cases. 75% of cases referred to it from court do not require a welfare report, with the parents either agreeing while in mediation or subsequently.

Are people who use the Family Courts getting the service they need?

It is clear to us that a significant number of people who use the family courts are frustrated by the delays and other problems in the system discussed above, and are ultimately disappointed by the service they receive. NCH believes there is a danger, however, of us having unrealistic expectations of what the courts can deliver: they are rarely able to resolve the deep-seated conflicts that underlie the difficulties that lead parents to come to court in the first place. We need to engineer a cultural shift away from seeing courts as the places where such disputes are resolved—something that is hard to do at a time when we seem as a society to be becoming more, rather than less litigious.
The Government has, to some extent, recognised this problem and in its recent Parental Separation Green Paper it proposes an increase in in-court mediation to help divert parents in dispute away from polarising court processes, so they can agree their own solutions. The drawback to this proposal is that by the time such parents reach court they are often already in entrenched positions, and “forcing” them to agree at the door of the court is probably unlikely to produce enduring agreements.

Many organisations that work in this field, including NCH, believe that what is needed is a far more systematic set of support services to help intact families, families that are breaking down and families that have separated, in recognition of the fact that separation is a process, not an event. We regret that the Government’s Green Paper does not offer this strategic response. As we have outlined above, as part of this strategic approach more early intervention is required, to help prevent a cycle of unproductive court cases developing, with much more proactive use of mediation.

Last but by no means least, there is a crying need for more child-focused support services to help children whose welfare is being seriously jeopardised by the conflict between their parents. The extent to which children’s voices are heard in key decisions about residence and contact is unclear. However, neither mediators nor solicitors routinely see children. Moreover, the new Legal Services Commission contract for mediation does not pay for child consultation or liaison with Social Services! The research shows that both professionals and parents are struggling to adjust to the relatively new concept of children as citizens, with rights to have their views taken into account. It has been suggested that this has particular relevance in the context of contact: some argue that children who say they want contact are taken seriously, but those who refuse are not, even if there are issues about their safety.

At present, children have limited opportunities to participate in contested court proceedings, generally via a report from a CAFCASS Children and Family Reporter. However, representation by a children’s guardian or solicitor will hopefully become more common once the power to order it becomes law following the implementation of section 122 Adoption and Children Act 2002, planned for the end of 2004. NCH does not want to see cases needlessly going to court, but we strongly support the view that children should have the right of representation in those court cases where their best interests are at risk of being lost.

In the UK NCH has helped to pioneer models of mediation that are supportive of parents and appropriately inclusive of children. We believe more Government support is needed to help spread this good practice throughout the country.

Caroline Abrahams
Director of Public Policy
NCH
October 2004

1. INTRODUCTION

Women’s Aid Federation of England (Women’s Aid) is the national domestic violence charity which coordinates and supports a network of over 270 local organisations in England, providing nearly 500 refuges, helplines, outreach services and advice centres. Women’s Aid’s work is built on 30 years of campaigning and working in partnership with national and local government, health authorities, the justice system and voluntary organisations to promote the need for an integrated approach to prevent domestic violence and to protect abused women and children.

Local Women’s Aid organisations work annually with thousands of children and mothers who have experienced domestic violence, and for whom contact problems and post-separation violence are everyday concerns. Last year these local Women’s Aid services accommodated 23,500 children and supported over 110,000 children.

We welcome the opportunity to submit evidence to the Select Committee on Parental Contact, particularly as our national network of services has many concerns about the safety and well-being of children involved in contact or residence proceedings with violent parents. It is this knowledge and experience that informs the concerns and recommendations set out in this paper.

3 Lowe N and Murch M, (2001), Children’s participation in the family justice system—translating principles into practice, Child and Family Law Quarterly, 13(2)
4 Smart C et al, (2001), Residence and contact disputes in court, volume 1, (Research series 6/03), Department for Constitutional Affairs
5 Saunders H, (2003), Failure to protect? Domestic violence and the experiences of abused women and family courts, Women’s Aid Federation
2. IS THE FAMILY COURT SYSTEM BEING RUN EFFECTIVELY

Contact and residence cases involving domestic violence tend to be the most difficult and intractable cases in private law family proceedings, frequently involving more than 10 or 15 hearings. As the granting of unsafe contact orders to abusive parents is a major cause of repeat applications and non-compliance, Women's Aid considers that the family court system could be run much more effectively, if measures were taken to ensure that safety is prioritised in cases of abuse.

Women’s Aid believes that the granting of unsafe contact orders to abusive parents has in many ways helped to fuel the fathers’ rights lobby, because fathers who have been granted contact orders are understandably angry when their ex-partners do not comply and the enforcement procedure becomes protracted. We do not support any woman who refuses to comply with a court order without good reason. However, when orders for unsupervised contact or residence are often being granted to violent or abusive parents, we think there is an urgent need to scrutinise family court practice.

Women’s Aid agrees with the Government, that “contact arrangements which put the safety of the child or the resident parent at risk should not be put in place.”6 However, we do not consider that the safeguards proposed in the Green Paper are adequate to protect abused women and children.7 This is a complex problem involving not only the family justice system but also statutory and voluntary agencies, so it needs to be addressed in many different ways.

If contact is going to be safe for children in cases of abuse, Women’s Aid thinks that the following measures need to be taken:

— Ensure that family court professionals differentiate between cases involving domestic violence and those which do not and prioritise safety in cases of abuse;
— Provide training to enable family court professionals, including expert witnesses, to understand the dynamics and risks of domestic violence;
— Establish effective procedures for assessing risk in cases involving allegations of abuse;
— Provide funding for specialist assessments of children involved in private law family proceedings where there are allegations of abuse and, if necessary, separate representation so that their voice can be heard;
— Make supervised contact available in every area of the country;
— Amend the Children Act 1989 to overrule case-law precedents which have undermined the welfare principle and to require the courts to prioritise the safety of the child in cases involving allegations of abuse.

We provide additional information on these issues in our response to the third and fourth key areas specified by the Select Committee.

Here, however, we want to stress that well run family courts should never lose sight of the need to safeguard children. To demonstrate why we are so concerned about the issue of safety, we outline the known risks to children who have experienced domestic violence and evidence that the family courts are failing to ensure their protection in private law contact proceedings. We emphasise the need for a differential approach in contact cases involving domestic violence, and we also identify the case-law precedents, which have become such an obstacle to effective court practice in these cases.

3. THE RISKS TO CHILDREN AFFECTED BY DOMESTIC VIOLENCE AND THE CONSEQUENCES OF NOT PROTECTING THESE CHILDREN IN FAMILY PROCEEDINGS

In 2003 the Department of Health stated: “At least 750,000 children a year witness domestic violence. Nearly three quarters of children on the “at risk” register live in households where domestic violence occurs.”8

Research commissioned by the Department of Health shows that domestic violence is a major indicator of risk to children, and that children are often abused physically sexually or emotionally by the same perpetrator who has abused their mother.9 Children whose mothers experience domestic violence also tend to have the worst outcomes in child protection cases.10

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7 See Women’s Aid Federation of England’s response to Parental Separation: Children’s Needs & Parents’ Responsibilities
8 Department of Health (2003) Into the Mainstream—Strategic Development of Mental Health Care for Women, p 16
Indeed, it is worth noting that research indicates that domestic violence accounts for about half of all child deaths. Women’s Aid has compiled a list of 29 children (in 13 families) who have been killed as a result of contact (or in one case residence) arrangements in England and Wales over the last 10 years. In five of these cases contact was ordered by the court. Anonymous details of three of these cases are provided in the briefing, *The need for accountability in the family justice system.* (See Annex).

In 1999 a survey of 130 abused parents found that out of 148 children who were ordered by the courts to have contact with a violent parent, 76% were said to have been abused in the following ways during contact visits:

- 10% sexually abused
- 15% physically assaulted
- 62% emotionally harmed
- 36% neglected
- 26% abducted or involved in an abduction attempt.

Most of these children were under the age of five.

In 2001 research revealed that children involved in private law contact proceedings “were highly distressed (46% had significant levels of emotional and behavioural difficulties). Levels for children who were interviewed were comparable with those reported for children subject to child protection proceedings and nearly twice the level expected in the general child population. Distress in children was linked to distress in the resident parent and to domestic violence. For boys, it did not alleviate once proceedings were over and it remained high for girls.”

In 2003 a survey involving 178 refuge organisations in England and Wales revealed numerous examples of children and mothers being put in danger or harmed as a result of current family court practice with regard to child contact and domestic violence. Here are some of the key findings:

- Only 3% of respondents thought that appropriate measures are now being taken to ensure the safety of the child and the resident parent in most contact cases involving domestic violence;
- Only 6% believed that children who do not want contact with a violent parent are being listened to and taken seriously in most cases.
- 12% reported cases where contact orders were granted to parents whose behaviour had caused children to be placed on the Child Protection Register, and 6% reported cases where contact orders were granted to Schedule 1 offenders. This involved a total of 82 children, and 21 of these were ordered to have unsupervised contact with the known abuser.
- 20% knew of cases where residence orders had been granted to abusive parents, often because the abuser had remained in the family home and could offer “stability.”
- Respondents knew of 175 women who had been threatened with sanctions to make them comply with contact orders. In many of these cases there was evidence of police involvement, breached injunctions or convictions for violence to the mother or child. The most common threat used was that residence would be granted to the abusive parent, and in some cases this is what happened. (See Appendix 3).

4. **The need for a differential approach to cases of abuse**

While promoting contact is essential in most cases for the well-being of children whose parents have separated, in cases of domestic violence there is an urgent need to adopt a differential approach which emphasises the need for contact to be safe. This means recognising that cases of domestic violence are fundamentally different from cases where abuse is not an issue, and that these cases require different remedies. This distinction needs to be made as a result of initial enquiries and before any attempt is made to promote family resolution.

Women’s Aid supports the approach outlined by Peter Jaffe, who is renowned for his work on domestic violence at the Family Court Clinic in London, Ontario. For your information, we enclose a table setting out his Differential Approaches to Custody Disputes in the appendix to this document. (see Appendix 4)

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12 Letter dated 16.6.2002 to Women’s Aid from Rosie Winterton, then Parliamentary Secretary at the Lord Chancellor’s Department
5. THE UNDERMINING OF THE WELFARE PRINCIPLE IN THE CHILDREN ACT 1989 BY CASE-LAW PRECEDENTS

Why are children being ordered against their wishes to have unsupervised contact with abusive parents, when the Children Act 1989 contains a welfare checklist and states that the welfare of the child is paramount? When Women’s Aid has raised this issue with solicitors, barristers and judges, often they have referred to the following rulings in case-law precedents:

— That contact is “almost always in the interests of the child”—Re 0 (Contact: Imposition of conditions)[1995];

— That a higher standard of proof than the simple balance of probabilities should be required in cases involving more serious allegations (Re H & R (Child sexual abuse: Standard of Proof) [1995]).

— That the welfare of the child is not paramount in committal proceedings—(Re A v N (Committal: Refusal of Contact)[1996];

It is frequently stated that judges must be able to exercise their discretion in each individual case, but the judges appear to be fettering their own discretion as contact is refused in less than 1% of cases.17 Women’s Aid believes that this is a direct result of the Re O judgment. (In this case the father had been given a suspended sentence for breaching an undertaking not to pester or molest his ex-partner, but the court focussed on the mother’s “unreasonable” hostility to contact).

It is no coincidence that many of the worst cases detailed in our recent Failure to Protect report involved allegations of child sexual abuse. The AMICA survey also made the bizarre finding that direct contact is slightly more likely to be ordered in cases involving allegations of physical or sexual abuse to the child (as opposed to cases involving allegations of violence to a parent).18 (See Appendix 2) Women’s Aid regards this is a direct consequence of the Re H & R judgment, which requires a higher standard of proof in such cases, even though there will usually be no independent witness to a crime which is committed in the family home and the child will often be too young to give evidence. Lord Browne Wilkinson, who dissented from this ruling, expressed concern that it would “establish the law in an unworkable form to the detriment of many children at risk”, because child abuse, particularly child sexual abuse “is notoriously difficult to prove in a court of law”. Unfortunately our experience indicates that he was right. This judgment makes it much harder to protect those children who are most at risk i.e. those who are involved in cases where there are “more serious allegations.”

It is also not surprising that the family courts sometimes enforce contact orders against mothers in cases where fathers have been convicted of violent offences against their ex-partners19—as this is exactly what the Appeal Court did in Re A v N. (This case was quoted at length in the consultation paper, Making Contact Work,20 without mentioning domestic violence).

Women’s Aid hoped that court practice would improve following the Appeal Court judgment in Re L, V, M & H [2000] with regard to four test cases involving child contact and domestic violence. However, despite emphasising the need to minimise any risk of harm to the child, this judgment unfortunately states that it is no way inconsistent with earlier decisions on contact. In our opinion, the beneficial effects of this judgment are also undermined by the House of Lords ruling on the standard of proof.

Women’s Aid does not agree with the Government’s claim that the broad effect of the current law and case-law is that both parents should continue to have a meaningful relationship with their children as long as it is safe,21 because case-law has undermined the welfare principle in the Children Act 1989, particularly with regard to private law family proceedings.

In fact, the paramountcy of the welfare of the child has been weakened to such an extent that the NSPCC recently commented; “It is striking that some professionals in the field appear to be under the impression that there isn’t a welfare checklist in private law.”22

The new safeguards proposed in the Green Paper on Parental Separation cannot solve this problem, because they do not overrule these damaging case-law precedents. It is for this reason that Women’s Aid believes that the Children Act 1989 must be amended to require the courts to prioritise the safety of the child in cases of abuse.

19 Saunders, H & Barron, J (2003) Failure to Protect? Women’s Aid Federation of England
20 Lord Chancellor’s Department (2001) Making Contact Work
22 NSPCC Review of Legislation Relating to Children in Family Proceedings—Consultation Draft 10 March 2003 (p 17)
6. DO FAMILY COURT JUDGES HAVE SUFFICIENT POWERS

Women’s Aid believes that judges in the family courts have too much power, because they have discretion to make whatever order they consider appropriate under the Children Act 1989. Although there is a right of appeal, in practice the wide discretion given to judges under the Act means that the grounds for appeal are very narrow. If the judge has considered every relevant aspect of the case and has not made a mistake in law, the applicant is likely to be told that another judge might have made a different decision but there are no grounds for appeal.

This would not matter if the courts always made orders, which are safe for children and in their best interests. However, despite the introduction of Good Practice Guidelines in 2001, some judges still consider it appropriate to grant orders for unsupervised contact or residence to abusive parents, even when there is evidence of violence and every reason to believe that the child will be at risk.

The failure to take account of the child’s safety in cases of domestic violence has already had tragic consequences (See Annex). For this reason Women’s Aid wants the Government to consider how family court professionals can be held accountable, if they knowingly make decisions which place children in danger.

We believe, however, that the best solution would be to amend the Children Act 1989 to require the courts to prioritise the safety of the child in cases of abuse. This would have the additional benefit of helping to reduce non-compliance with contact orders, as research indicates that concerns about domestic violence or child abuse feature in 58% of contact enforcement cases.

Women’s Aid does not support any parent who refuses to comply with a court order without good reason. However, in our experience many women who have fled from domestic violence then find themselves in a desperate battle with the family courts to protect their children from unsafe contact with their abusive ex-partner. In these cases it is not unusual to have numerous court hearings—we know of a current case involving 36 hearings—because arrangements usually break down due to continuing violence and yet the courts grant contact to the perpetrator again and again. These women are very afraid not only of their ex-partner but also of the family justice system.

The family courts are not powerless. Women who do not comply with unsafe contact orders are often warned that they will be fined, sent to prison or that their children will be ordered to live with the abusive parent—and Women’s Aid is aware of an increasing number of cases where unsupervised contact is being enforced in these ways despite evidence of violence to the mother or the child.

Women’s Aid recognises that in some cases it may be helpful for the courts to have the power to order a parent to attend parenting classes or counselling sessions, but such measures are unlikely to reduce non-compliance with unsafe contact orders, as mothers who care about their children will always try to protect them from harm.

However, Women’s Aid would like the courts to be given new powers to require parents who are alleged to be sexually abusive to submit to specialist assessments by organisations such as the Lucy Faithfull Foundation. In non-compliance cases involving allegations of child sexual abuse hopefully this would end the dangerous practice of transferring residence to the alleged abuser without requiring any specialist assessment of that person.

We would also like the courts to have the powers to:

— Ban an applicant from applying for contact for several years in high risk cases;
— Deny legal aid to a parent who has used family proceedings or contact visits to harass or abuse their former partner and child(ren);
— Order abusive parents to contribute to the cost of providing supervision;
— Refuse or reduce contact, if supervision cannot be provided for as long as there is an identifiable risk.

7. ISSUES SURROUNDING DELAYS CAUSED BY THE CURRENT SYSTEM

It is important to consider the various reasons for delays, before deciding whether these delays are justified and whether they are being handled appropriately. In particular, Women’s Aid would highlight:

— The massive increase in private law contact cases;

23 The Advisory Board on Family Law: Children Act Sub-Committee (2001) Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence, London, Lord Chancellor’s Department (para. 1.5(b))
26 Women’s Aid briefing (2004) The Need for Accountability in the Family Justice System
— The need to carry out adequate assessments in cases involving abuse.

The Green Paper on Parental Contact acknowledges that it is best for parents to avoid court proceedings and to reach agreement informally about contact and residence arrangements for their children. Yet the Judicial Statistics for England and Wales show that recently there has been a huge increase in the number of contact orders being granted:

<table>
<thead>
<tr>
<th>2000</th>
<th>2001</th>
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<tbody>
<tr>
<td>Contact orders granted</td>
<td>46,070</td>
<td>55,030</td>
<td>61,356</td>
</tr>
<tr>
<td>Contact orders refused</td>
<td>1,276</td>
<td>713</td>
<td>518</td>
</tr>
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This increase in private law contact cases must be exacerbating delays in the family courts, but we hope that the “diversionary” measures outlined in the Green Paper on Parental Separation will help to reduce the number of contact cases coming to court.

However, Women’s Aid is extremely concerned that the pressure of numbers and the need to deal with cases quickly could result in domestic violence cases being scheduled for conciliation hearings or included in Family Resolution Pilots. It is essential that enough time is allowed for screening and safety checks to ensure that domestic violence victims are not treated in this way.

The judicial statistics also show an alarming decrease in the number of cases where contact is refused (now in less than 1% of cases). As domestic violence survivors typically apply for non-molestation orders after leaving a violent partner, the 601 contact refusals in 2003 are in stark contrast to the 19,112 non-molestation orders with power of arrest attached, which were granted during the same period.30 If so many adults need protection, why should the courts assume that their children do not? The low number of contact refusals is also very worrying when set against an annual figure of about 16,000 contact cases involving domestic violence, where a court welfare report is ordered.31 Our experience leads us to conclude that many abusive parents are now being granted contact orders without the necessary safeguards being put in place.32

As domestic violence and child abuse are a major reason for non-compliance with contact orders,33 it is not surprising that these cases often involve numerous hearings, which again contributes to delays in the family court. In our experience it is not unusual for such cases to involve more than 10 or 15 hearings, and this considerable distress not only to abused women but also to their children. At our recent Listening to Children event, one child asked:

“Why do our mums have to go to court so many times about our dads seeing us? Why can’t it be dealt with pretty quick so we don’t have to worry so much?”

Women’s Aid knows of one case involving 46 court hearings over four years where a domestic violence perpetrator with serious mental health problems was given legal aid to demand contact with a child who was traumatised by witnessing his violence to her mother. In this case litigation only stopped when the father committed suicide. The child, fortunately, was not with him at the time. This girl did not appreciate the enormous amount of time and money that the family justice system spent in trying to promote contact in her case. At our Listening to Children event in June, she asked a Home Office Minister:

“Why do the courts force children to see their dads when they are frightened of them?”

It is also important to remember that it takes time to assess children and their families, especially when there are allegations of domestic violence or child abuse. Children who have been traumatised by witnessing violence or experiencing physical or sexual abuse, could be placed in even greater danger, if the new measures to promote resolution result in these cases being rushed through the courts.

At present, if an allegation of child abuse is made during private law family proceedings, the judge will usually order social services to investigate the situation and prepare a report under Section 37 of the Children Act 1989. Often this will involve a home visit lasting for perhaps an hour and including a private discussion with the child(ren). In many of these cases young children do not mention the abuse, the social worker reports that s/he could find no evidence to substantiate the allegations, and the court then concludes that there is no reason to refuse contact.

However, the survey involving 178 refuge organisations found that 83% say that young children usually do not disclose abuse during a one-off interview with a professional (such as a social worker, psychiatrist or psychologist). This is because abuse is a very sensitive issue, and there is no time to build a trusting relationship with the child.

31 Association of Chief Officers of Probation (1999) Response to the consultation on Contact between Children and Violent Parents, (p 5)
In these cases specialist assessments are needed, because it is only by assessing the child in a child-friendly
environment over several weeks that professionals are likely to gain an insight into how the child views his or her family. To our knowledge, very few organisations provide specialist assessments of children involved in private law family proceedings, and those who do (eg Barnardo’s Keeping Children Safe Project in Liverpool) are heavily oversubscribed. As this service is vital for the protection of children in cases of abuse, it should be made available throughout the country. We hope that the new children’s trusts and children’s centres will help to make this possible.

Women’s Aid would also point out that delay might be very necessary to protect children and adults who have been seriously injured or traumatised by abuse.

8. DO PEOPLE USING THE FAMILY COURTS GET THE SERVICE THEY DESERVE

Children and parents who have been subjected to domestic violence need and deserve to be protected by the family courts. It is crucial to consider the reasons why this often does not happen at present and to identify ways of addressing these problems.

We have already outlined our concerns about the case-law and also the need for a differential approach to cases of domestic violence and for specialist assessments of children. Here we focus on the need for training on domestic violence, for effective risk assessment, for more supervised contact centres, and an amendment to the Children Act 1989 to require the courts to prioritise the safety of the child in cases of abuse. Finally we include comments on the family justice system by children who have experienced domestic violence.

UNDERSTANDING THE DYNAMICS OF DOMESTIC VIOLENCE

It is widely acknowledged that domestic violence perpetrators have an obsessive need to exert power and control over their partners and also over their children. The vast majority of domestic violence perpetrators are men, and the abuse often starts during pregnancy or soon after the birth of a child. In our experience perpetrators usually maintain control by seeking to ensure that their victims are too frightened or too ashamed to mention the abuse to anyone else or to flee from the family home. Key tactics include making dire threats, isolating their partner and their child(ren) from friends and relatives, blaming them for the violence, and humiliating them so that they lose any confidence that they will be supported and believed if they seek help. Women who have been subjected to violent and controlling behaviour will often return to their abuser several times before making the final break.

It can be very difficult to provide evidence of domestic violence, because this usually takes place in the family home when no independent witness is present. In most cases women and children will not feel able to disclose abuse until they are in a place of safety and they are confident that they will be protected. These mothers are also likely to distrust and avoid social services, because most women who experience domestic violence say that their greatest fear is that their children will be taken into care. (The information sharing databases being set up under the current Children Bill may help to improve the recording of abusive incidents and the effects on children so it vital that this information is made available to CAFCASS (the Children and Family Court Advisory and Support Service)).

As perpetrators have such a strong need to maintain power and control over other family members, they are often most dangerous when they can no longer control the situation eg. when the non-violent parent has fled from the family home taking the children. Research shows that women are at greatest risk of homicide at the point of separation or after leaving a violent partner, and Home Office homicide statistics for England and Wales show that on average two women a week are killed by their partners or ex-partners. The 1996 British Crime Survey states with regard to domestic assault: “For women, risks were particularly high at the point of separation or after leaving a violent partner.” The murder of Georgina McCarthy is a classic example of post-separation homicide in a case of domestic violence.

We have already outlined the very serious risks to children who are affected by domestic violence, particularly in the context of family proceedings (see pages 3 and

Despite this wealth of information, there are still some family court professionals who:

— believe that allegations of domestic violence are usually exaggerated;
— assume that the violence will stop if the woman is no longer there to provoke it;
— do not believe that anyone would assault a pregnant woman;

34 Pence, E (1985) Coordinated Community Response to Domestic Assault Cases, Duluth, Minnesota, Domestic Abuse Intervention Project
38 Wilson & Daly (1992) Homicide, New York, Aldine de Gruyter
— assume that domestic violence is “all about drugs and alcohol”;
— decide the violence “can’t have been that bad” if the woman returned to her abuser;
— assume that allegations are untrue, if the woman did not report the violence to a statutory agency before leaving the family home;
— disregard children who say they are frightened and do not want to see a violent parent;
— assume that contact is a “good thing”, even when there is clear evidence of violence and no reason to believe that the perpetrator has changed.

Any solicitor, CAFCASS officer, expert witness, magistrate or judge who holds such views with regard to domestic violence is likely to make decisions which put children and non-violent parents in danger. For this reason it is vital that all family court professionals have training to enable them to understand the dynamics of domestic violence and the associated risks.

With regard to expert witnesses, the survey involving 178 refuge organisations found that only 12% think that psychiatrists and psychologists have a good understanding of domestic violence, while 45% say they do not and 44% answered don’t know. As the family justice system deals with so many cases of domestic violence, this finding suggests that there is an urgent need to ensure that expert witnesses have appropriate training and experience to offer advice on such cases.

THE NEED FOR NATIONAL RISK ASSESSMENT PROCEDURES

Although CAFCASS was set up three years ago, it still has no national policy on risk assessment. We have been told that a new policy on domestic violence is likely to be introduced soon, and that a national risk assessment policy will be introduced in 2005.

In the meantime Women’s Aid hopes that CAFCASS and other agencies with child protection responsibilities will consider making use of the significant risk indicators and risk assessment procedures developed by the Cardiff Women’s Safety Unit, NSPCC and the South Wales Police. The introduction of a mandatory risk assessment checklist into the Children Act 1989 would also help to improve family court practice with regard to domestic violence. For example, the risk assessment checklist in the amended New Zealand Guardianship Act 1968 provides a clear framework not only for welfare reports but also for any hearing involving allegations of abuse. This legislation has been in place for the last eight years, and a recent review concluded that it was effective and should not be changed. (Copy enclosed with our written evidence, but not available on disk)

In many cases of abuse there will also be a need for specialist assessments of children, especially if there are conflicting allegations and no independent witnesses (see page 10).

MAKING SUPERVISED CONTACT AVAILABLE THROUGHOUT THE COUNTRY

The Green Paper on Parental Separation states that judges have complained about the insufficient provision of supervised contact centres, but the judicial statistics (quoted on page 9) suggest that this has not affected their willingness to grant contact in many cases of domestic violence. Clearly this remains an urgent problem despite additional funding being provided recently.

CAFCASS’s current consultation paper on contact states that contact centres are used in only 1% of cases. It should also be noted that the vast majority of contact centres do not offer individual supervision for high risk cases.

Frequently relatives will be asked to supervise contact visits involving violent parents but, in the experience of Women’s Aid, this can be dangerous because perpetrators often abuse their relatives as well. Problems are also likely to arise if the relative believes that the perpetrator is innocent. In these circumstances there is not likely to be much protection for the child.

Women’s Aid hopes the development of children’s centres and children’s trust will provide further opportunities to expand the provision of supervised contact.

However, we would also point out that the acute shortage of supervised contact is exacerbated by the granting of contact orders in very high risk cases (eg Schedule 1 offenders) where supervision is likely to be needed for much longer. When resources are so limited, it does not make sense to allocate significant amounts of supervision time to cases where there is very little prospect of an abuser changing his or her behaviour.

41 For further information on the full assessment process see www.crarg.org.uk
THE NEED TO AMEND THE CHILDREN ACT 1989 TO REQUIRE THE COURTS TO PRIORITISE SAFETY

The Green Paper on Parental Separation acknowledges that the implementation of the Good Practice Guidelines on child contact and domestic violence has been “patchy”. However, the Government believes that the problem of safety will be resolved in January 2005, when new court application forms will ask questions about domestic violence and the definition of “harm” in the Children Act 1989 will be extended to include impairment suffered due to seeing or hearing the ill-treatment of another.

Women’s Aid does not believe that these measures will be sufficient to resolve the serious child protection problems outlined in our written evidence to the Select Committee, mainly because they will not overrule the case-law precedents which have undermined the welfare principle in the Act (see pages 5 and 6). There will always be problems in deciding whether a child has been “impaired” by witnessing violence, particularly when young children do not have the vocabulary to disclose abuse or to express their fears. Section 120 of the Adoption and Children Act will not safeguard children who have been physically or sexually abused, and because of the Re H & R judgment with regard to the standard of proof these are the children most likely to be denied legal protection (see pages 5 and 6). We also do not think that new forms designed to highlight allegations of domestic violence will alter the decision-making of judges, who see nothing wrong in granting unsupervised contact in cases where there is clear evidence of violence or abuse (see the Failure to Protect report—Appendix 3).

Women’s Aid considers that the family justice system should have a clear legal duty to ensure that contact and residence arrangements are safe for children. We are not seeking a ban on contact in cases of domestic violence, but we are demanding safety. That is what children and mothers fleeing from domestic violence need and deserve.

Having examined various different models, Women’s Aid has concluded that the New Zealand legislation on child contact and domestic violence offers the most effective and practical means of tackling this issue. Their legislation includes a mandatory risk assessment checklist and states that if a parent is found to be violent within the family the court must not grant unsupervised contact or residence to that parent unless the court satisfied that this will be safe for the child.

THE VIEWS OF CHILDREN WHO HAVE EXPERIENCED DOMESTIC VIOLENCE

When asked what children living with domestic violence need, children involved in a recent study “were astonishingly clear and consistent”. Most commonly cited was safety, closely followed by someone to talk to. One or both of these themes featured in every response to this question.43

The need for safety was also emphasised repeatedly during a Listening to Children event on 16 June 2004 at Portcullis House, Westminster, which was organised by Women’s Aid with the help of the Ragdoll Foundation. Fifty children and young people attended this event and put questions to Paul Goggins, the Home Officer Minister responsible for dealing with the Domestic Violence, Crime and Victims Bill. This included several very challenging questions about the family justice system:

— My father was given unsupervised access after I had given my views to CAFCASS of why I didn’t feel safe. I was asked my views and not listened to. They didn’t understand my views, can you do anything to change this for others?
— Will the government help my mum and me be safe from my dad? He beat us and we don’t want to see him.
— Why aren’t we allowed to go to court with our mums? We may be young but we still have a right to show our own feelings and wishes.
— Why don’t the courts make sure it is safe for mums and children when they know the dads are violent?
— Who tells the judge off when he doesn’t listen to the children?

As family court decisions are supposed to be made in the best interests of children, it is vitally important that the views of children who are not happy with their experiences of the family justice system should be taken into account—particularly when they relate to the crucial issue of safety.

We enclose three children’s drawings which show clearly how they have been affected by their experiences of domestic violence. We also hope that members of the Select Committee will have time to look at the CD enclosed with our evidence, as this contains 10 postcards which were sent by children living in refuges to the Minister for Children, Young People and Families as part of our Listening to Children campaign.

CONCLUSION

Women’s Aid is aware that the family courts have come under enormous pressure from the fathers’ groups not only to enforce contact orders more rigorously but also to make a 50:50 division of the child’s time the default arrangement in family proceedings. As a result of all the publicity on father’s rights, political leaders have made pledges to end the scandal of fathers being denied contact with their children. We regard this as a very dangerous situation for mothers and children fleeing from domestic violence, because their needs are being completely ignored in this debate.

We hope that the Select Committee on Parental Contact will recognise that there is another side to this story, which has remained concealed due to the confidentiality rules with regard to family proceedings involving children. Indeed, within the context of these Select Committee hearings, we have been told that we should not talk about individual cases even anonymously but should focus mainly on providing numerical evidence. Inevitably this makes it very difficult to convey the fear and distress that many children and mothers experience as a result of contact and residence orders being granted to abusive parents. (We hope that members of the Committee will also have time to look at the Newsnight video, which includes three statements by mothers, who have suffered trauma and loss due to contact disputes with their violent ex-partners).

While many of the proposals in the Green Paper on Parental Separation may be very helpful in cases not involving abuse, we hope that the Select Committee will bear in mind the need to ensure that safety is always prioritised in cases of domestic violence.

It is crucial that adequate legal safeguards are provided before new initiatives are introduced to promote resolution and to enforce contact more rigorously.

Hilary Saunders
Children’s Policy Officer
Women’s Aid Federation of England
29 October 2004

Annex

THE NEED FOR ACCOUNTABILITY IN THE FAMILY JUSTICE SYSTEM

THE FAILURE TO PROTECT CHILDREN IN FAMILY PROCEEDINGS

In recent years children have been abused, neglected, abducted and even killed as a result of contact orders being granted to violent parents.44 In 2003 a survey involving 178 refuge organisations also reported numerous child protection concerns relating to private law family proceedings, including several cases where orders for unsupervised contact had been granted to Schedule 1 offenders convicted of offences against children.45

Women’s Aid Federation of England has compiled a list of 29 children who have been killed over the last 10 years as a result of contact or residence arrangements in England and Wales. 10 of these children have died in the last two years. As the Government has not collected statistics on child contact homicides, the actual number may be higher. The Government has confirmed that in at least five of the 13 families concerned contact was ordered by the court.46

Due to the strict confidentiality surrounding family proceedings and the limited information provided, it is not possible to identify the five cases in which contact was ordered by the court. However, by requesting information on Serious Case Reviews carried out by Area Child Protection Committees, Women’s Aid has compiled the following details. We have not named the families concerned or the relevant local authorities.

In three cases it is clear that not only did the court grant orders for unsupervised contact or residence to violent fathers but that these decisions were made against professional advice, without waiting for professional advice or without seeking professional advice:

— In one case the father was on bail, awaiting trial for injuring the mother during a violent incident. The executive summary of the Serious Case Review states that Family Court Welfare Officers had recommended that the children’s contact with their father should not include overnight stays. In spite of this, the mother’s lawyer “encouraged her to make a compromise” and the judge “made the decision on contact, contrary to the recommendations in the Family Court Welfare report.” The children were killed during the first overnight stay. The local authority confirms that they brought this case to the attention of the Lord Chancellor’s Department. Neither the judge nor the solicitor was involved in the Serious Case Review. The local authority states: “We took advice on this from SSI and were advised it would not be possible.”

44 Radford, Sayer & AMICA (1999) Unreasonable Fears? Bristol, Women’s Aid Federation of England. Also letter to Women’s Aid dated 16.6.2002 from Rosie Winterton, Parliamentary Secretary, Lord Chancellor’s Department
46 Letter to Women’s Aid dated 16.6.2002 from Rosie Winterton, Parliamentary Secretary, LCD
— In another case a judge granted residence of two children to an extremely violent father without waiting for a mental health assessment of the father, although the Social Services report outlined an expectation that the father would receive treatment for his mental health needs. (He had apparently taken an overdose recently and declined hospital admission). The court also determined "detailed direct and indirect contact between each child and the non-custodial parent". The child, who chose to live with the mother, was subsequently killed by the father during an unsupervised contact visit. The father also left a note indicating that he had intended to kill all three children to take revenge on his wife for leaving him. The Serious Case Review states that "with hindsight, it could be argued that the Court should have waited before making a final decision until all the recommended reports were placed before them". However, the executive summary does not contain any recommendations on court practice.

— In a third case two children were killed by their violent father after their mother was reluctantly persuaded to agree to a contact order by consent. The mother states that she asked in vain for reports from the police, the GP and a psychiatrist to be added to the court welfare report. After the children were killed, a member of her family wrote to inform the judge of what had happened, and she was appalled to discover subsequently that his secretary had concealed this letter from him because she was afraid that he would find it upsetting. No Serious Case Review was carried out in this case despite previous involvement with the police and medical services. The mother states: "I cannot tell you how upset I am that a serious case review was overlooked. Right from the beginning I felt badly let down by the court system. (. . . ) Now, I find out that a lot could have been done at the very beginning to learn lessons. I am absolutely furious and devastated to realise that not only did the legal team not care about the children's safety when they were alive, but they don't care that they are dead. And they don't care about learning lessons."

These cases raise serious concerns about the accountability of the family justice system, particularly when children are killed after contact or residence orders have been granted to violent parents in private law family proceedings.

Recently there have also been major concerns about decisions made in public law family proceedings. On 19 January 2004, after the release of three mothers wrongly convicted of murdering their children due to unreliable diagnoses of Munchausen's syndrome by proxy, the Solicitor General announced that social services would review numerous family court cases, in which children had been removed from their parents following a cot death.

If these serious child protection issues had arisen in any other area of public life, there would almost certainly have been a public enquiry with extensive media coverage and professionals would have been held accountable—as happened in the case of Victoria Climbie. However, these cases have remained shrouded in secrecy because of the strict confidentiality which applies in family proceedings involving children.

CHILD CONTACT AND DOMESTIC VIOLENCE—THE WIDER CONTEXT

If a child wants to see a violent parent, Women's Aid believes that contact should be provided so long as the arrangements are safe for everyone concerned. We do not want to ban contact in cases of domestic violence, but we are demanding that contact should be safe.

Various research studies have shown that men who are violent to their female partners are likely to abuse their children physically, sexually or emotionally as well. Indeed, this is a major child protection issue, as the Department of Health has stated: "Nearly three quarters of the children on the "at risk" register live in households where domestic violence occurs."48

Although judges have complained about insufficient provision of supervised contact centres, the courts are continuing to grant contact orders in thousands of domestic violence cases. In 1999 the Association of Chief Officers of Probation revealed that domestic violence is involved in about 16,000 cases a year, where Section 7 welfare reports are ordered.50 However, the Judicial Statistics for 2003 show that contact was refused in only 601 cases (less than 1% of cases).51 We have quoted ACOP's overall figure because this can be compared with the actual number of cases where contact is refused, but more recent statistics on contact cases involving domestic violence are provided in the footnote.52

48 Department of Health (2003) Women’s Mental Health: Into the Mainstream—Strategic Development of Mental Health Care for Women (p 16)
50 Association of Chief Officers of Probation (1999) Response to the Consultation Paper on Contact, between Children and Violent Parents (p 5)
52 In 2003 the consultation paper, Safety and Justice, stated that domestic violence featured in 19% of contact cases according to an unpublished baseline survey in 2001. In 2002 a survey of 300 family court cases by Napo found that 61% of the fathers and 15% of mother had allegations of domestic violence made against them, and this was proved or admitted with regard to 21% of fathers and 3% of mothers. In 2002 there were 65,192 applications for contact. In 2003 research for the Department of Constitutional Affairs by Smart et al found that allegations of domestic violence were involved in one in four of a sample of 430 family court cases. In 2003 there were 72,060 applications for contact according to the Judicial Statistics for England & Wales.
Despite the introduction of Good Practice Guidelines in 2001, a survey of 178 refuge organisations in 2003 found that only 3% think that appropriate measures are now being taken to ensure the safety of the child and the resident parent in contact cases involving allegations of abuse.53

Women’s Aid believes that the failure to protect children can largely be attributed to damaging case-law precedents in cases involving allegations of abuse, particularly the Appeal Court rulings in Re O, 1995 and in Re A v N, 1996 and the House of Lords ruling in Re H & R, 199554. These judgments exert a powerful influence over decision-making in private law family proceedings and will continue to do so after new measures are introduced to improve safety in January 2004.

The Green Paper on Parental Separation states “It is vital—particularly if we are to provide for better enforcement of contact orders—that issues of domestic violence are fully and properly dealt with by the courts. Contact arrangements which put the safety of the child or the resident parent at risk should not be put in place.”55 Women’s Aid agrees with this principle, but we are concerned that extending the definition of ‘significant harm’ to include impairment suffered due to seeing or hearing ill-treatment of another person56 will not protect children who have been physically or sexually abused (and these are the children most likely to be denied protection due to the Re H & R judgment). Nor is there any reason to believe that new court application forms identifying cases of domestic violence will significantly alter the practice of some judges who consider it appropriate to grant contact orders even to parents convicted of violent offences against children or against their former partners.

CONFIDENTIALITY IN FAMILY PROCEEDINGS

For years it has been a criminal offence and potentially a contempt of court to publish any material which might identify a child as being involved in family proceedings, unless the court permits disclosure.

In the most sensitive and contentious cases the courts can also make “gagging” orders. A parent who is subject to a gagging order will typically be forbidden to say anything about the case until the child reaches the age of 18. Even if the parent has serious concerns about the child’s safety, s/he cannot discuss the case with contact centre staff or seek help from the local MP or any advice agency. There is no point in contacting the media, because the case cannot even be referred to anonymously.

On 19 March 2004 the situation became even more difficult, when Mr Justice Munby ruled in Re B that publication of any information about a children case whether or not it would identify the child is almost always prohibited without the permission of the court. He also ruled that the term “publication” covers almost all forms of communication whether by word or in writing.

The Government has now tabled an amendment to the Children Bill to amend the Administration of Justice Act 1960 so that a criminal offence will only be committed by publishing material to the public which is not authorised by Rules of Court. This move is intended to enable Ministers, MPs and statutory agencies to fulfil their statutory functions, to facilitate research and to permit parties involved in family proceedings to seek advice and support.57 The amendment is very welcome—but it does not ensure that in future the family justice system will be held accountable for decisions which result in a child being killed.

THE CONSEQUENCES OF THE CONFIDENTIALITY RULES

The confidentiality rules are supposed to protect children from unwanted media attention, but in reality they have prevented any effective scrutiny of the family justice system by the Government or by the media.

In recent years Women’s Aid has given the Lord Chancellor’s Department (now the Department for Constitutional Affairs) anonymous details of many cases where abused women and children have been put in danger because of decisions made in the family courts. We urged the Government to inspect the court records for these cases and offered to obtain case numbers, but we were told that they cannot intervene in cases which are ongoing. (Women’s Aid accepts that the Government cannot intervene in judicial proceedings, but we wanted them to know what was happening). We offered to arrange meetings with domestic violence survivors who have experienced major problems with child contact, but this too was declined. A parliamentary question about the current outcomes for the children involved in the Re H & R ruling also could not be answered on the grounds of confidentiality. Inevitably this means that the Government and MPs are denied information about what is happening in the family courts.

Meanwhile anyone wishing to make a formal complaint about an expert witness in family proceedings first has to seek permission from the judge and the expert witness—and there is no guarantee that permission will be granted for all the papers to be scrutinised. This is the process that a mother wrongly diagnosed as suffering from Munchausen’s syndrome by proxy would have to go through before being able to make a

54 Details of these three judgments are provided in notes at the end of this briefing
56 Section 120 of the Adoption and Children Act 2002 which will be implemented in January
57 Department for Education & Skills (October 2004) Briefing on Disclosure of Material Relating to Family Court Proceedings
formal complaint. (There is a connection here with domestic violence, as a survey of 130 abused parents in 1999 found that 7% had been accused by their violent ex-partners of suffering from Munchausen’s syndrome by proxy). 58

The confidentiality rules have also ensured that the current debate about fathers’ rights has been one-sided. This is because anyone can publicly criticise their former partner for not complying with a contact order, but it would be contempt of court in any individual case to say that the court has made an order which is not safe for the child. This is the dilemma facing many mothers who have experienced domestic violence and are trying to protect their children from abuse. The problem of non-compliance with contact orders is likely to continue until the Government requires the courts to prioritise the safety of the child in cases involving allegations of domestic violence or child abuse.

THE WIDE DISCRETION GIVEN TO JUDGES BY THE CHILDREN ACT 1989

It is frequently claimed that there is no need to amend the Children Act 1989, because the welfare of the child is paramount, there is a welfare checklist and there is the right of appeal. However, because judges have very wide discretion to make whatever order they consider appropriate under the Children Act, the grounds for appeal are very narrow. Unless the judge has clearly failed to consider something that should have been considered or has made a mistake in law, an applicant is likely to be told that a different judge may have made a different decision but there are no grounds for an appeal.

HOW CAN THE FAMILY JUSTICE SYSTEM BE MADE ACCOUNTABLE

1. The Children Act 1989 should be amended to require the courts to prioritise the safety of the child in cases involving allegations of abuse to a child or to a parent. This would provide stronger grounds for appeal, if a court makes a dangerous decision.

2. A mandatory risk assessment checklist should be introduced and used in all family proceedings involving allegations of domestic violence and also in family justice initiatives currently being proposed in the Green Paper on Parental Separation: Children’s Needs and Parents Responsibilities.

3. The Children’s Commissioner should be given the power of amicus curiae, so that s/he can investigate problems relating to legal cases and have a role in legal proceedings. (The Children’s Commissioner in Northern Ireland has this power).

4. The Government should implement Clause 122 of the Adoption and Children Act 2002 without further delay, as this would require the courts to consider whether a child involved in private law family proceedings needs separate representation.

5. There should be an urgent review of expert witnesses to ensure that they have appropriate training and experience to enable them to provide reliable evidence in cases involving allegations of domestic violence, child abuse or Munchausen’s syndrome by proxy.

6. Court professionals should be required to monitor the outcomes of decisions made by the family courts by means of home visits and also talking to the child in a neutral child-friendly location.

7. The rules of confidentiality should be amended to allow the media to report family proceedings anonymously. Women’s Aid believes that this is the only way to restore public confidence in the family justice system.

The third contact homicide case quoted in this briefing shows how important it is for the family courts to have access to information held by statutory agencies. For this reason Women’s Aid also recommends that in the Children Bill CAFCASS should be included in the list of organisations required to share information about children.

NOTES:

DAMAGING CASE LAW PRECEDENTS:

— In Re O (Contact: Imposition of Conditions)[1995] the Court of Appeal ruled that contact is “almost always in the interests of the child”. In this case the father had been given a suspended sentence for breaching an undertaking not to pester or molest the mother, but the judgment focussed on her unreasonable hostility to contact.

— In Re A v N (Committal: Refusal of Contact) [1997] the Court of Appeal upheld a decision to commit a mother to prison for six weeks for failing to comply with a contact order and ruled that the welfare of the child is not paramount in committal proceedings. In this case the previous judge “accepted that the father had a history of violence, including a very serious assault on his former wife for which he was sent to prison.”

— In Re H & R (Child sexual abuse: Standard of proof) [1995] the House of Lords ruled that a higher standard of proof than the simple balance of probabilities should be required in cases involving more serious allegations. (This judgment is particularly damaging in private law cases involving allegations of child sexual abuse, where the child is too young to give evidence but may be ordered to have unsupervised contact or residence with the alleged abuser).
— The Appeal Court made many helpful comments in Re L, V, M & H (Contact: Domestic violence) [2000] but unfortunately this judgment also states that it is in no way inconsistent with earlier judgments.

Evidence submitted by Fathers4Justice

Today Britain is a strange place for decent, committed, but separated parents:
— Fathers who walk away from their children are rightly condemned— fathers who act when they find themselves blocked from continuing to be dads are equally condemned.
— Fathers are routinely stigmatized as abusers, yet a mother is twice as likely to kill her child than a father.
— Fathers are routinely stigmatized as violent, yet the NSPCC states that 65% of domestic violence against children is committed by a mother.
— Government says that fathers are almost always granted contact with their children yet over half of all contact orders are ignored and courts say that there is nothing they can do.
— Government rightly seeks to eradicate family violence BUT refuses to act when a man suffers the abuse of having his children used as an emotional weapon against him.
— Government says that there should not be a legal presumption of contact yet this same presumption exists in public law children cases.
— Over 40% of mothers admit to emotionally abusing their child by stopping contact, yet Government turns a blind-eye.
— Over 40% of fathers lose contact with their children following parental separation, yet the Government does nothing.
— Children, who would otherwise benefit from the love and care of a decent parent, suffer when one parent denies this.

Yet . . .

Government ignores this harm. It is blind to the hurt and injury it causes. By ignoring this abuse of children, Government is an apologist for those that abuse.

Whilst this war of words goes on, 100 children every day lose contact with a parent, adding to the 250,000 children who have suffered this fate since Tony Blair came to office.

What a strange place Britain is today when a decent, loving and caring parent cannot do the one thing that all decent parents are pre-programmed to do, protect and nurture his child.

CHILDREN ACT 1989:

Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section) allow the child reasonable contact with his parents . . . Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and his parents.

Why, when Public Law protects the parent/child relationship, does the Government argue that this protection should not apply in Private Law cases?

FAMILY LAW ACT 1996 (UN-ENACTED):

children have the right to know and be cared for by both parents, regardless of whether their parents are married, separated, have never married or have never lived together.

The general principle, in the absence of evidence to the contrary, is that the welfare of the child will be best served by:

(i) his having regular contact with those who have parental responsibility for him and with other members of his family;

(ii) the maintenance of as good a continuing relationship with his parents as is possible.

Why, when this Act has been passed by Parliament, do children and parents still not have this protection in law?
European convention on contact

As it is such an important human right, obtaining and maintaining regular contact between the child and his or her parents should only be restricted or excluded where necessary in the best interests of the child.

41. Article 4 paragraph 2 of this Convention provides that contact may be restricted or excluded only where necessary in the best interests of the child. Therefore the only criterion shall be the best interests of the child. However, it must be beyond any doubt that such restriction or exclusion of what essentially is a human right is necessary in the best interests of the child concerned. The appreciation, by judicial authorities, of the necessity of a possible restriction or even exclusion of the right provided in Article 4 paragraph 1 shall therefore take into account the following elements: there shall be no other less restrictive solution available; the possible restriction or exclusion shall be proportional; the necessity of the restriction or the exclusion shall be duly justified. The more the right of contact is to be restricted, the more serious the reasons for justifying such restriction must be.

Why, when Europe moves toward greater protection for the parent/child relationship, does the Government not want British children and parents to have the same protection?

GORDON BROWN:

Nothing matters more than being a father.

Why doesn’t this philosophy permeate Government policy?

FATHERS4JUSTICE SUBMISSION

Our submission is brief, at its core is our Blueprint for Family Law in the 21st Century,\(^ 59\) a document that sets out the problems of the Family Courts and potential solutions that would provide for a more equitable, less adversarial, and, ultimately more successful, family justice system for private law cases that really puts children first. Our Blueprint should be considered as the main body of evidence that we submit to the committee (not printed).

Secondly, we submit the judgement of Mr Justice Munby in the case of Re D [2004] EWHC 727 Fam and its associated chronology, which, in so many ways highlights how courts let children and parents down (not printed).

Lastly, we submit a very small selection of the thousands of emails received from parents, grandparents and children who have suffered through the failings of Britain’s family justice (not printed).

In committee or court room it is easy to distance oneself from what this issue is really about, the love of a child for her parent and parent for his child. Something that is so precious, so important and easily tampered with during the emotional upheaval of parental separation, and something that we at Fathers 4 Justice believe should be protected by law.

Fathers4Justice has a unique insight into the hurt and harm that occurs when children and parents are split apart and we respectfully invite the committee to hear verbal evidence from us.

Gary Burch and Michael Cox
On behalf of Fathers4Justice
31 October 2004

Evidence submitted by Mavis Maclean CBE, Joint Director, Oxford Centre for Family Law and Family Policy

FAMILY JUSTICE AND THE CHALLENGE OF DISPUTED CONTACT; THE CONTRIBUTION OF EMPIRICAL RESEARCH

In an area where feelings run high, and individual cases have been the focus of media attention, it is important to make full use of the information produced by rigorous empirical research.

1. Changing families

In the UK couple relationships have become more fragile, while the relationships between parents and children have become more enduring. Current estimates suggest 28% of children in England and Wales will experience parental divorce before the age of 16 and an increasing proportion of children are being affected by the separation of cohabiting parents. (Hunt 2004). Children living in lone parent families in England and Wales in nine cases out of 10 live with their mothers (Census 2001) and stay in contact with their non resident parents (Attwood et al 2003).

“Work Life Balance” is changing, as fathers are gradually becoming more involved with the care of their children, while mothers become more involved with paid work. But although changes in family relationships and parental separation are now numerically “normal,” they are not anticipated nor sought by the children (Pryor and Rodgers, 2001).

2. WHO ARE THE FAMILIES WHO COME TO COURT OVER CONTACT?

Most parents (90% Blackwood and Dawe, 2003) who separate make their own arrangements for taking care of their children. This accords with the presumption in the Children Act that the court should not intervene by making an order about residence or contact unless it is in the best interests of the child to do so. We know little about how these private arrangements are made or how they affect the children. Research has concentrated on the difficult cases where parents are unable to reach agreement either by themselves, or with advice from family, friends, advisers, mediators, or solicitors. Recent research for DCA (Smart, May and Wade, 2003) found that parents who initiated court proceedings had done so often out of a sense of insecurity or a desire to have clear boundaries imposed on a problem they could no longer handle, and many found the courts helpful. Current research for DCA (Trinder, in press) has found a high incidence of multiple problems in these families, including debt, housing, employment and health. Only a small number of cases become drawn out and intractable, returning to court over a number of years. But even parents approaching court for the first time are highly conflicted and unable to communicate with each other (Trinder, in press) Children involved in these cases have been found to experience high levels of distress comparable with those found in children involved in public law care proceedings (Buchanan et al 2001).

Research carried out by the Court Service in New Zealand sought to identify at an early stage those contact cases which became highly conflicted, by looking back at completed cases. They found high conflict to be associated with untreated mental health problems, and lack of or changes in legal representation (Barwick et al 2003).

3. WHAT HAPPENS IN OTHER JURISDICTIONS?

There has been some confusion in popular debate in the UK about the legal position in other jurisdictions. For example in the Nordic countries joint legal custody is the norm, but this is different from either joint parental decision making or shared physical residence (Rystedt 2003). The “shared parenting” advocated by the Australian Parliamentary Commission in “Every Picture tells a Story” for cases where there is neither a history of entrenched conflict nor any risk to the child closely resembles our own formulation of parental responsibility under the Children Act 1989.

There is pressure from fathers’ groups for reform of the law relating to contact to give fathers greater access to their children in a number of other jurisdictions, for example, Australia, Canada, France, Italy, and many parts of the United States. Canada and Australia have recently set up commissions to examine the question (Rhoades and Boyd 2004). Both commissions began their work with strong but often anecdotal representations from fathers groups. But as the objective empirical research data came into play, the commissions in both countries chose to reject the proposals for a contact formula, arguing that there should be respect for the diversity of family life, and that there can be no “one size fits all” solution if the interests of the children are to be given priority. This approach also underpins many of the Parenting Guidelines adopted in a number of American states which look to developmental criteria to suggest suitable contact patterns but emphasise that these are not prescriptive in individual cases (Kelly, Warshak, 2000,Gould 2001).

No other jurisdiction has yet found a comprehensive solution to the problem of conflict over parenting after separation.

4. WHAT IS THE RESEARCH EVIDENCE ON THE VALUE OF CONTACT FOR CHILDREN?

Contact with both parents after separation is widely assumed to be in the best interests of the child. Few would argue with the assumption that loss of contact with a caring parent and experience of parental conflict are detrimental to a child’s welfare and development. The difficulties arise when maintaining a relationship with a non resident parent is associated with parental conflict as in the cases which come before the courts. Research findings reflect the complexity of the situation (Hunt 2004). Parental conflict is clearly associated with poor outcomes for children (Pryor and Rodgers 2001, Reynolds 2001) But the association between contact and outcomes for children is more complex. In the UK Dunn (Dunn 2003) reported that more contact was unequivocally associated with fewer adjustment problems for children. But a recent study of step families found that the quality of relationships in the primary home was a stronger predictor of a child’s well being than continuing contact with a non resident parent. (Smith 2001). An American review of child well being in motherheaded households (Amato 1993) found the two elements consistently associated with child well being were the economic contribution of the father and the closeness of the mother-child relationship. Pryor and Rodgers in their overview of the research literature found that “the mere presence
of fathers is not enough...it is the...aspects of parenting encompassing monitoring, encouragement, love
and warmth that are consistently linked with well being" (Pryor and Rodgers 2001). The current Green
Paper refers to the benefits to children of a “meaningful on going relationship with both parents”.

IMPACT ON CHILDREN OF CONFLICTED CONTACT

The risks to children of contact in situations where domestic violence is an issue are well established. Recent
research has raised concerns about the need for safeguards to deal with the risk of abuse or abduction in
contact centres (Aris, Humphreys and Harrison, 2002).

Even where conflict is not acute, moving from one parent to another is stressful for children and needs to
be carefully managed. While separation from a non resident parent impedes the development of a parent-
child relationship, the negative effect of absence must be balanced against the stress for the child of
experiencing frequent changeovers (Kelly, Warshak, 2004).

Research is not yet able to answer questions about the balance between the impact of short term stress for
children and the long-term benefit of sustaining the parental relationship, or of how a stressful relationship
may be helped to settle down.

5. What do parents argue about?

Trinder found that mothers and fathers raised different issues, with welfare issues being raised by mothers,
and power or control issues being raised by fathers (Tinder 2004 in press).

The mothers were anxious about the children being upset by contact, and the quality of parenting provided
by the father. Concerns included safety in traffic, in the home, exposure to risk related behaviour by the
father or a new partner such as alcohol or substance abuse, and the provision of a suitable domestic routine.
The fathers were anxious about contact being stopped or interrupted, and about being excluded especially
where there was a new partner in the former family home.

6. What do children want?

Most children want contact with their parents and continue to see both parents as part of their family (Dunn
2003). Frequency and regularity of contact are often important to younger children, while older children
put greater value on flexibility as they have social activities of their own (Tinder 2002). Children usually
enjoy contact, though it can be distressing. Problems include parents who fail to turn up as expected, being
exposed to conflict and feeling torn loyalties, harassment or abuse, being used as a go between and managing
relationships with a parent’s new partner or children (O’Quigley 1999).

Shared physical residence (50/50 parenting) can be successful for some children. But a recent study of
families who had chosen this arrangement found that although the children were reasonably satisfied when
first interviewed at follow up three years later a number of the children were looking forward to a time when
they could “stop living like nomads” (Neale, Flowerdexv and Smart 2003).

7. What can research tell us about what kinds of intervention help parents to manage if not
resolve their conflict, and achieve collaborative post separation parenting?

EARLY INTERVENTION

Advice and support for parents with relationship problems is thought to be helpful as early as possible. In
Australia this has resulted in the recent development of Family Relationship Centres, which are located in
the high street and can be approached at any stage in a family problem. Access is not restricted to those
using the justice system (Parkinson, 2004). These centres are very new, and have not yet been evaluated.

PATHWAYS TO ADVICE, SUPPORT AND CONFLICT RESOLUTION

When conflict goes beyond the stage of being resolvable by the parties themselves the parents may need help
with mediation and negotiation. A recent survey of access to justice (Genn 1999) showed how often
divorce couples sought the help of solicitors for child related issues at divorce, and subsequently entered
the legal system.

In Scandinavia and Germany contact is seen as a child welfare issue, not as an adult dispute, and routes to
help come through mediation in a family welfare setting (Moxnes, Maclean and Mueller-Johnson 2003). In
Denmark, for example, where divorce has long been an administrative procedure, a contact dispute cannot
be taken to court.

In Australia there have been recent moves to make the family court procedures less adversarial, by
restricting the use of expert witnesses and examination of past behaviour, and focussing on the future of
the family. (Family Court of Australia, The Children’s Cases Programm, Practice Direction 2004/227 February
INTERVENTION PROGRAMMES FOR MANAGING PARENTAL CONFLICT

Finding ways to assist families who bring their disputes to court is a problem exercising many other jurisdictions, and some innovative approaches are being developed particularly in the United States, Canada and Australia (Hunt, forthcoming). Educational classes are the most widespread and are typically aimed at parents who have a dispute but are not yet in entrenched conflict. Evaluation of these projects, understandably at this stage in their development, is not yet conclusive. There is evidence that they can have an impact on parental behaviour and attitudes, and on children's exposure to conflict. Some programmes report reduced litigation. However there is little evidence as yet on their impact on the well-being of the children.

An overview of interventions including parent education programmes is being conducted by Joan Hunt for the Nuffield Foundation. This indicates that there are two key elements common to the well-regarded programmes: firstly raising awareness of the child's point of view, and secondly teaching conflict management skills. This review has informed the development of the FRPP which it is hoped may address the issue arising in relation to In Court Conciliation schemes currently run by CAFCASS which are achieving high rates of out of court agreement but not as yet having any measurable impact on the levels of underlying conflict between the parents (Tinder, work in progress for DCA).

In Australia, when parent education was used as a mandatory remedy after breach of contact, the programmes used were not sufficient to deal with parents in entrenched conflict. Programmes targeting parents who breach orders have been developed, for example, Parents Without Conflict, a six week programme in Los Angeles. There are also alternative approaches which appear promising, such as the intensive group-based therapeutic mediation practised in the Alameda project in California.

In Australia agencies involved in the government-funded Contact Orders Pilot provide a range of services including mediation, children's groups, parent education, counselling, supervised contact, case management and telephone support during and after the programme.

Finally there are a number of programmes to assist parents after an order has been made. In the United States a new initiative is that of Parenting Coordinators, who support contact, and to whom the parents turn to mediate or arbitrate when a difficulty arises rather than return to court. The parents agree to abide by the decision of the coordinator on entering the programme. There is some evidence that this results in reduced litigation.

8. CONCLUDING OBSERVATIONS

In my view, it is unhelpful to regard contact as either an object to be given or withheld, or a right to be claimed or exercised. The American term “Parenting Time” provides a more constructive formulation. Parenting is never easy, and “Contact” after separation is parenting in particularly difficult circumstances. There is a need for ongoing support and advice for parents who are committed to their children’s welfare but have difficulty in working together while still coping with the ending of their own relationship as partners. We are unlikely to find a single solution, given the variation in families and their problems. The most constructive way forward in my view is to respect this diversity, and to look to a variety of forms of support and intervention. The Green Paper, in my view, offers a number of helpful proposals which will support families at different stages and with different issues to resolve in working out their parenting time, while maintaining a clear focus on Children’s Needs and Parents’ Responsibilities.

Mavis Maclean CBE
Joint Director, Oxford Centre for Family Law and Family Policy
Senior Research Fellow, Faculty of Law
University of Oxford
4 December 2004

Evidence submitted by John Eekelaar, Oxford Centre for Law, Policy and the Family

1. My interest is in the appropriateness of the use of law in regulating family relationships.

2. While people live together, legal mechanisms are generally considered unsuitable and ineffective for regulating the way people deal with one another in their personal relationships or organise their time with their children. This is because these matters involve intimacies of family living which are hard to assess by legal methods, are very fluid, raise deep emotions and very sensitive in their implications for children. (See the analogous case of regulating health and diet).
3. While the fact of separation creates a new situation which may require legal involvement, most of the reasons why legal mechanisms are inappropriate remain. It should be remembered that only a tiny proportion of separations lead to legal conflict.

4. Desirable patterns of post-separation parenting therefore need to be promoted through non-legal means (e.g., education, mediation, counselling). Government policy can appropriately promote recommended patterns.

5. Legal presumptions are likely to be of limited value, or even counter-productive, for the following reasons:

(a) How would they be framed? If: “the court should order contact unless satisfied this would not be in the child’s interests”, this presumes that contact in legally conflicted cases (which, by definition, these would be) is beneficial to children unless shown otherwise, whereas the research evidence shows that this is not so. If: “the court should order contact if beneficial to children”, this is unnecessary, since the welfare principle requires the court to do what is best for children anyway.

(b) The degree of contact “presumed” might need to be specified (would the presumption be interpreted as referring to all types of contact from minimal to “equal sharing”?).

(c) It might be necessary to frame counter-presumptions, such as: “the court should not order contact in favour of a parent who has behaved in a violent way unless satisfied that this would be in the child’s interests”. Such conflicting presumptions would encourage forensic dispute and polarise attitudes. There is evidence from New Zealand (which has such a presumption) that it causes delay because judges will not hear the main issues until allegations of violence are resolved.

(d) In any event the courts operate on a number of “assumptions of fact” about where children’s interests lie: e.g., mothers can deal with very young babies better than fathers, that violent situations are bad for children, that children will normally benefit from contact. These are different from presumptions in that a presumption points to an outcome unless sufficient positive evidence to the contrary is accepted, whereas a fact which is assumed to benefit a child simply takes its place alongside other facts about the child’s interests so the court can decide on the preponderance of evidence where the child’s best interests lie.

6. Enforcement: whether or not the welfare principle technically applies to the enforcement of orders, the fundamental basis of the order would be subverted if enforcing it operated against the child’s interests.

7. This dilemma influences my preferred solution. This is that, if non-legal interventions fail, coercive legal measures should only be taken where necessary to protect a child from clear harm.

8. Thus the procedure would be that, in a disputed case, the last non-coercive step would be a recommendation which could go to compulsory mediation. If that failed to produce an agreed outcome, or if an agreed outcome failed to work, a formal order would only be made if:

(a) investigation showed that the lack of contact is causing the child clear harm (e.g., by damaging a relationship which the child values); and

(b) the court considered that the prospective harm likely to be inflicted on the child by the legal conflict was less than the harm currently suffered by the child by the lack of contact.

9. If the child is not suffering clear harm, the court would not impose orders on unwilling parties, thus creating the known harms of legal conflict, in the hope of speculative benefits in the future. There is room, of course, for interpretation of “clear harm”, in which I would include deliberate deception of the child about the absent parent.

10. This approach could mean that in some cases a parent (usually the father) would not be able to “build” a hoped-for relationship in the future with the child if this could not be established by agreement. However, this would be justified for the following reasons:

(a) The state will have fulfilled its duty under human rights law to support the fathers’ legitimate interests by its efforts to procure an agreed arrangement.

(b) It would still be possible to intervene coercively if the child is shown to be suffering clear harm, either through deprivation of a valued relationship or deception about the father.

(c) If all this fails, it is necessary to face the fact that, although the father’s legitimate interest may be frustrated, this is only so because preventing the harm likely to be inflicted on the child by coercive intervention in such a case is given priority over satisfying the father’s wishes. This is acceptable under human rights law, and should be so in policy too, because no child should suffer preventable harms as a result of the failures of the adult world, of which the child is the innocent victim.

John Eekelaar
Reader
Oxford Centre for Law, Policy and the Family
December 2004
Evidence submitted by Sarah Harman, Solicitor

INTRODUCTION

1. I am a solicitor with more than 25 years experience in family cases, mostly dealing with child protection cases. In 1995 I was appointed as an Assistant Recorder in the civil courts, and sat in private law family cases until I resigned in February 2004.

2. More recently, I have specialised in the field of clinical negligence, dealing particularly with women’s health cases.

3. I was the solicitor instructed by the mother in the case of Re B, which (with the case of Re U) was considered by the Court of Appeal earlier this year Re U (a child) and Re B (a child) (serious injury: standard of proof) [2004] EWCA Civ 567. These were two “test cases” where mothers had been diagnosed with Munchausens syndrome by proxy and separated from their children. The appeal was heard post-Canning to establish if any lessons from the Canning, Patel and Clark criminal cases could be learned in the family jurisdiction.

4. I was seriously criticised by Mr Justice Munby in the case of Kent County Council v Mother, Father and B [2004] EWHC 411 (Fam). I disclosed documentation from the case to my sister the Solicitor-General, the Minister for Children Margaret Hodge MP and members of the media and misled the court as to these disclosures to the extent that I informed the court about them some two weeks after they were made.

5. I make submissions for consideration in respect of the two following issues which are part of the brief of the inquiry:
   (i) Whether the family court system is being run effectively.
   (ii) Whether people using family courts are getting the service they deserve.

SUBMISSION

6. My submission to the inquiry is that the restrictions imposed by section 12 of the Administration of Justice Act 1960 are quite inappropriate for a modern family court. We should follow the Australian and Canadian family courts which are open but still are founded on promoting the best interests of the child. The evidence upon which judgments are made and the judgments themselves should be made available to the public, and as Canada and Australia have shown, this can be achieved while ensuring the identity of the child is not revealed.

7. 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.

8. I further believe that users of the family courts, particularly those who feel aggrieved (for instance where diagnoses of Munchausens 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.

9. In making these submissions I would (ironically) refer to a comment made by Munby J in the B judgment which was so critical of my actions. He said in paragraph 103:

   We cannot afford to proceed on the blinkered assumption that there have been no miscarriages of justice in the family justice system. This is something that has to be addressed with honesty and candour if the family justice system is not to suffer further loss of public confidence. Open and public debate in the media is essential.

10. But apart from making that comment, Munby J gave the most restrictive interpretation of section 12 of the Administration of Justice Act 1960 to the extent he condemned Mrs B for seeking advice and support and encouragement in her case from her local MP. It may well be said that such a view is in conflict with the law of parliamentary privilege. It is a view that is as far divorced from reality as is possible. There can be few MPs who have not assisted constituents over family court issues. Are they really in contempt? Does this indicate a senior family judge out of touch with the real world?

11. At the present time a Parliamentary Committee is considering some amendments to the Children bill which will allow for some disclosure of information from the family courts to outsiders in certain limited circumstances. The proposal is that parties in proceedings can talk about their cases to various individuals “to obtain appropriate advice and support”, to statutory agencies, to MPs and for “approved research to be undertaken”. This represents a considerable “loosening up” of the restrictions of the Administration of Justice Act 1960 as interpreted by Munby J. However, it gives no opportunity for the work of the family court system to be appropriately scrutinised from outside.
12. Over the last few years the small but powerful “fathers lobby” has insisted that the family courts are unfair to fathers and favour mothers. My experience as a part-time family judge and as a solicitor does not support that view in any way. But secrecy lends itself to such assertions being made and gathering momentum. If we are to have confidence in our family justice system, this demands transparency.

13. Very few people would disagree with the fundamental principle that the welfare of the child must be paramount. Transparency and openness must be balanced against the welfare of the child. I am not suggesting in any way that openness should be achieved at the cost of the child. I look at it another way. It is the most draconian step in a child’s life if he/she is deprived of a parent’s care, love and affection. If justice is to be done to a child, where the court proposes to intervene and remove him/her from the family, then this is not simply a private matter but an issue for the whole of society. The level at which the courts intervene to separate families needs to be achieved by a justice system which is seen to work effectively and fairly.

14. An examination of the Australian and Canadian family court systems indicates that they operate with openness and transparency and still aim to meet the welfare of the child principles. Achieving such a balance is not easy. There may be gains and there may be some losses. But how can any democratic system justify the restrictions on openness imposed by the Administration of Justice Act 1960, a statute passed in an entirely different era as far as the care of children is concerned, and at a time when the welfare of the child was not paramount! (The paramountcy of the child’s interest was only introduced subsequently)?

15. There are of course obvious difficulties in opening up the family court system. Salacious media reporting intimate family details and expert witnesses being vilified are reasons often given for keeping our family courts secret. The Canadian experience shows that firstly that the media are not particularly interested in reporting family cases, secondly that the judiciary there are sensitive to such possibilities and can close courts from time to time. Judges in those jurisdictions are astonished—perhaps even appalled—that our system upon which theirs is founded is so restrictive.

16. Australia and Canada are not the only jurisdictions which operate with more openness than our own. New Zealand, after extensive consultation and with some trepidation, is moving towards a system similar to those in Australia and Canada. Ireland is now enabling court reporters to attend family court proceedings. I believe that we need to move in that direction also.

17. I would point out that our system is not only secretive but inconsistent. Appeal court judgments in family cases are published and, curiously, in view of the fact that children should not be identified, the appeal court reports contains the child’s actual initials (though not the names), which can lead to identification.

It was quite extraordinary in the report of the Re U and the Re B appeal that both children’s actual initials were used but a greater degree of protection was accorded to the experts who were known as eg Dr X/Dr Y rather than their own initials. Do we have a family court system which puts the protection of experts as a higher priority to the protection of children?

18. I believe the committee needs urgently to consider ways to modify our family court system so that it can function in a transparent way but at the same time maintain the confidentiality of the children involved. These two concepts are not incompatible. Closed courts where decision making is not open to scrutiny is incompatible with a democratic society.

Sarah Harman
Solicitor
November 2004
PART 2

3. Relationship Breakdown: Focusing on the Needs of the Changing Shape of Families

Introduction 3.1
Contact arrangements 3.2
Needs of parents 3.3
Continuing contact 3.4
The Government’s proposals 3.5
The changing role of CAFCASS 3.6
Compliance 3.7
Disclosure and privacy 3.8
The International Dimension 3.9

INTRODUCTION

1.1 DEPARTMENT FOR CONSTITUTIONAL AFFAIRS

1.1.1 The Department’s responsibilities are justice, rights and democracy. Its objectives are to provide effective and accessible justice for all to ensure people’s rights and responsibilities, and to enhance democratic freedoms by modernising the law and the constitution.

1.1.2 In order to serve the public more effectively, we are driving forward improvements to the justice system, and modernising and safeguarding the constitution. We aim to empower citizens to obtain justice, safeguard their rights, and participate in a transparent and accountable democratic process.

1.1.3 The Department supports the Secretary of State, in his capacity as Lord Chancellor, in the appointment of members of the judiciary, Queen’s Counsel, lay justices and justices’ clerks. It also supports him in the appointment of the chairs and members of a number of tribunals and other Non-Departmental Public Bodies and Executive Agencies that it sponsors. These include the Court Service, Legal Services Commission, the Public Guardianship Office and the Official Solicitor.

1.2 THE DEPARTMENT’S ROLE IN FAMILY JUSTICE

1.2.1 The Department’s prime responsibilities in family justice are the operational delivery of the administration of the courts (see 1.3.1–1.3.3); the appointment of the judiciary; and sponsorship of the Legal Services Commission, which is responsible for the administration of the Community Legal Service.

1.2.2 The Department continues to have a joint responsibility for a number of key legislative policy areas including adoption, domestic violence and civil partnership. The Department, in partnership with the Department for Education and Skills, and the Department for Trade and Industry issued a Consultation Paper entitled Parental Separation: Children’s Needs and Parents’ Responsibilities in July 2004.

1.3 INTER-AGENCY AND INTER-DEPARTMENTAL PARTNERS IN FAMILY JUSTICE

1.3.1 The Court Service is an Executive Agency of the Department for Constitutional Affairs, charged with the delivery of justice. The Agency is currently responsible for the administration of the court system, with the exception of magistrates’ courts (see 1.3.2), in England and Wales. It provides the necessary services to the judiciary and court users to ensure impartial and efficient operation.

1.3.2 The magistrates’ courts are currently administered by 42 regional semi-autonomous Magistrates’ Courts Committees (MCCs). These Committees are responsible for all aspects of the daily operation of magistrates’ courts falling within their area, including strategic planning and overall policy as well as employment of staff.

1.3.3 From April 2005, the administration of all courts will be unified in a single body as Her Majesty’s Courts Service (HMCS), following a comprehensive restructuring of the current organisation of the Court Service and MCCs.

1.3.4 The Legal Services Commission (LSC) is an executive Non Departmental Public Body created under the Access to Justice Act 1999 to replace the Legal Aid Board. It is responsible for the Community Legal Service (CLS), which replaced the old system of legal aid, and brings together networks of funders, such as local authorities, into local partnerships, to provide the widest possible access to information and advice.

1.3.5 Responsibility for the Children Act 1989 was transferred from the Department to the Department for Education and Skills (DfES) in June 2003 as part of the machinery of Government changes. Responsibility for the Children and Family Court Advisory and Support Service (CAFCASS), a statutory Non Departmental Public Body, was also transferred to DfES in January 2004. Transferred responsibilities include Child Contact Centres, parental responsibility and providing services that support children and families in family court proceedings in England and Wales. Responsibility for the family courts remains with this Department. The Department and DfES work closely together on policy development and implementation (see 1.2.2).

60 CMM 6273 (July 2004)
1.3.6 New legislation on civil partnership is the responsibility of the Department for Trade and Industry (DTI) in conjunction with this Department. The Minister responsible for women’s issues is based at DTI, as is the Women and Equality Policy Unit.

OVERVIEW OF THE FAMILY DIVISION (SECTION 2.1–2.6)

2.1 BACKGROUND

2.1.1 The family courts deal with matrimonial proceedings and proceedings relating to children including Children Act 1989 matters (eg care proceedings), domestic violence and adoption applications (see section 2.2). The Act introduced the Children (Allocation of Proceedings) Order, which came into force in October 1991, establishing for the first time a single family jurisdiction across all tiers of court, including the family proceedings courts (in magistrates’ courts). The type of cases that the courts hear depends on their jurisdiction.

2.1.2 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 (including life and death issues). The High Court hears appeals from family proceedings courts and cases transferred from the county courts or family proceedings courts. In addition, the Family Division (along with the Chancery Division) deals with all probate cases.

2.1.3 The Family Division of the High Court sits 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.

2.1.4 Family county courts are a discrete cohort of county courts that have been designated by the Lord Chancellor to determine any matrimonial cause (ie divorce proceedings or matters concerning the annulment of a marriage). These courts can issue all private law family proceedings. 62 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 law63 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. 64

2.1.5 Family proceedings courts’ work is dealt with by lay magistrates and sometimes by district judges (magistrates’ courts) sitting 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. 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).

2.1.6 In order to hear family matters, particularly those detailed in the Children Act (see 2.2.17), district and circuit judges in county courts must receive special family work training and guidance and 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.

Key agencies and other relevant bodies

2.1.7 There are a number of key agencies and other relevant bodies involved in the administration and delivery of justice in the family courts. Some of these are part of the Department and others are independent of the Department, although they work closely with it.

2.1.8 The Court Service is an executive agency of the Department with the purpose of supporting the delivery of justice. It is responsible for the administration of the court system in England and Wales (other than magistrates’ courts), and provides the necessary services to the judiciary and court users to ensure impartial and efficient operation. The Crown and county courts are located in six regional circuits, each

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61 Some parts of which have been amended by the Adoption and Children Act 2002
62 Private law cases are those brought by private individuals, generally in connection with divorce, the parents’ separation or care arrangements for children following parental separation
63 Public law cases are those usually brought by local authorities or the NSPCC, and include matters such as care, supervision and emergency protection orders
64 At present, all family county courts are, by statute, able to process applications relating to the adoption of a child. However, it has long been recognised that increased specialism lends itself to improved case management and enhanced levels of customer service. To this end, in October 2001, the President issued new guidelines for dealing with adoption and freeing proceedings, ‘Adoption, A New Approach,’ and supported these by establishing a network of specialised adoption centres. Feedback of court users, undertaken by the Department in 2002/03, found a significant shift in favour of this new approach to adoption
headed by a Circuit Director. The Supreme Court (including the Royal Courts of Justice) operates as a
circuit or region in its own right. The Court Service will cease to exist in April 2005, on the establishment
of Her Majesty’s Court Service (HMCS).

2.1.9 The Magistrates’ Courts Committees are semi-autonomous bodies statutorily charged with ensuring
the efficient and effective administration of the magistrates’ courts within their jurisdiction. Each MCC is a
body corporate and compromises approximately 12 magistrate members, selected by a statutory selection
panel for each MCC area. MCCs must produce a strategic plan, which details matters such as resource
management, organisation of petty session areas and justices’ training. The MCCs will be abolished in April
2005, again on the establishment of HMCS.

2.1.10 In April 2005, Her Majesty’s Courts Service will become responsible for delivering an efficient and
effective system of administration for all courts.

2.1.11 The Department works closely with the judiciary on family matters. The President of the Family
Division has overall responsibility for all judges who hear family cases other than magistrates. The President
issues Practice Directions, which provide general guidance to be followed in particular circumstances or
cases, in conjunction with the Lord Chancellor. The President also issues guidance and protocols to family
judges on the handling of family cases.

2.1.12 The Children and Family Court Advisory and Support Service (CAFCASS) has over 1,400 front-
line practitioners and is now a responsibility of the Department for Education and Skills. CAFCASS
operates across England and Wales (CAFCASS Cymru). It has a statutory duty to promote the welfare of
children involved in family court proceedings.

2.1.13 In all public law cases, CAFCASS practitioners are appointed as Children’s Guardian to advise the
courts on issues such as care and supervision applications. In private law cases (for example, section 8
applications), a judge may direct that a Child and Family Reporter (from CAFCASS) prepare a report
setting out recommendations as to the order to be made. In public and private law, the report will base its
recommendations on the “welfare checklist” set out in the Children Act (see 2.2.17 below).

2.2 Legislation,65 Applications and Volumes

2.2.1 In general terms, matters dealt with by the family courts fall into one of the following categories:
matrimonial (divorce and ancillary relief), domestic violence, adoption, wardship, care, supervision,
residence and contact.

2.2.2 The majority of family proceedings, particularly those heard under Children Act arrangements, are
started by application in the manner prescribed in the rules of court66.

2.2.3 All family proceedings are usually heard by the courts in private, other than divorce proceedings,
which are conducted in open court.

Dissolution of a marriage

2.2.4 Marriages are ended either by decree absolute of divorce, which ends a marriage or by decree of
nullity, which declares that the marriage is void (ie no marriage ever existed) or voidable (the marriage
ceased to exist from a particular date). No petition for divorce may be made in the first year of marriage,
other than for annulment.

2.2.5 A circuit judge must deal with a contested petition for divorce and all hearings in relation to a petition
for annulment. A district judge will usually hear uncontested divorce petitions. If the ground is proven, a
decree nisi (the first decree of divorce) will be granted with the final decree absolute granted usually after
there is a final order in relation to finances. Once the court has issued the decree absolute, both parties are
free to remarry. Where cases are of sufficient complexity, difficulty or gravity they can be transferred to the
High Court.

2.2.6 Where the couple has children, the court has to be satisfied with the arrangements for their welfare.
These have to be submitted in writing and will, if possible, have been agreed with both parties. If the judge is
dissatisfied in any way with the arrangements made for the child because of, for example, conflict in counter
proposals between the parties, he or she may order the parents to appear before him, although this happens
very rarely.

2.2.7 During 2003 petitions for divorce fell by 2% while petitions for nullity also decreased, by more than
51%. Divorce decrees nisi rose by 1% while the number of decrees absolute rose by 3%. Separation decrees
graded decreased by 56%.

65 The legislation governing Family Law is supplemented by case law
66 Family proceedings Rules 1991; Family proceedings Courts (Matrimonial Proceedings etc) Rules 1991; Magistrates’ Courts
1998
MATRIMONIAL SUITS: SUMMARY OF PROCEEDINGS IN SELECTED YEARS SINCE 1938

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<td>505</td>
<td>657</td>
<td>758</td>
<td>368</td>
</tr>
<tr>
<td>Decrees nisi</td>
<td>170</td>
<td>496</td>
<td>819</td>
<td>959</td>
<td>389</td>
<td>281</td>
<td>297</td>
<td>158</td>
<td>137</td>
</tr>
<tr>
<td>Decrees absolute</td>
<td>158</td>
<td>459</td>
<td>758</td>
<td>941</td>
<td>494</td>
<td>267</td>
<td>241</td>
<td>212</td>
<td>167</td>
</tr>
<tr>
<td>Judicial separation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Petitions filed</td>
<td>71</td>
<td>158</td>
<td>233</td>
<td>2,611</td>
<td>2,925</td>
<td>916</td>
<td>513</td>
<td>499</td>
<td>359</td>
</tr>
<tr>
<td>Decrees granted</td>
<td>25</td>
<td>88</td>
<td>105</td>
<td>1,228</td>
<td>1,917</td>
<td>519</td>
<td>310</td>
<td>331</td>
<td>145</td>
</tr>
</tbody>
</table>

2.2.8 The Matrimonial Causes Act 1973 contains the main provisions relating to divorce and ancillary relief (the division of any assets owned by the spouses upon divorce). In respect of divorce, section 1 of the Act sets out the ground for divorce, ie the irretrievable breakdown of the marriage, and the five “facts” that may be relied upon to prove that the marriage has irretrievably broken down. The court must find that the petitioner has proved that the marriage has irretrievably broken down, with reference to one of the “facts”, before granting a decree nisi (the first decree of divorce).

2.2.9 To obtain a decree of nullity, the marriage must be proved to be legally invalid where the marriage was void or voidable.

2.2.10 A decree of judicial separation is sometimes granted as an alternative to divorce. This does not dissolve the marriage, but absolves the parties from the obligation to live together. This procedure might, for instance, be used if religious beliefs forbid or discourage the use of divorce.

Ancillary Relief

2.2.11 The Act also contains provision for the division of assets between married couples where a decree nisi has been granted. The court must give first consideration to any children of the family. Thereafter, section 25 contains a list of factors that the court must take into account when deciding how assets are to be divided. In most cases the main exercise of the court is to balance the needs and the responsibilities of the parties (especially the need of any child to be housed and the responsibility of the primary carer to meet the child’s material needs) against the available resources. The court has the power to transfer the legal ownership of assets from one spouse to another and/or to order that one spouse make monthly maintenance payments to the other spouse for a set duration or for the parties’ joint lives.

2.2.12 Orders for the sale or transfer of ownership of capital assets may be enforced by requesting a judge to sign the necessary documentation on behalf of the defaulting party. Orders for maintenance may be enforced by securing the payments against a property, thereby providing the payee with a charge over a property belonging to the payer, or by an “attachment of earnings” order. This means that the payer’s employer deducts the maintenance payments from the payer’s salary.

2.2.13 Child maintenance, ie maintenance payable for the benefit of a child by the parent with whom the child does not live to the child’s primary carer, is governed by the Child Support Agency (CSA), an agency of the Department for Work and Pensions, save in limited specified circumstances. The family courts therefore do not have jurisdiction over child maintenance. However, they can approve agreements between married parents for the payment of child maintenance as part of an overall settlement regarding finances. Agreements approved by the family courts in respect of child maintenance are only legally binding on the parties for one year, after which either party may refer the matter to the CSA.

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67 Judicial Statistics 2003
68 For example, either party was under 16 years at the time of the marriage, either party was already married or the parties are legally prohibited from marrying
69 For example not consummated due to incapacity or wilful refusal (most nullities are on these grounds) or where one party was suffering from a communicable venereal disease or the woman was pregnant by someone else at the time of marriage
70 Section 8 Child Support Act 1991
71 The courts can still make maintenance provision (i) by consent, (ii) for the costs relating to a disabled child, and (iii) to “top-up” maintenance under the Child Support Act 1991, or (iv) for education
2.2.14 The court has the power under Schedule 1 of the Children Act 1989 to make financial provision for children. Applications under Schedule 1 of the Children Act are usually made between unmarried parents, as married parents rely on the Matrimonial Causes Act.

2.2.15 In relation to capital, the court may order that a sum be paid to the parent with care for a specific purpose connected with the child (such as buying a car for transport). The court can also order that the absent parent pay the primary carer a capital sum with which to purchase a property for the benefit of the child. The property is then usually held in trust for the absent parent until the child no longer requires the use of the property.

2.2.16 The parent who has primary care of a child may apply for income payments (for the benefit of the child) payable by the child’s absent parent. It is immaterial whether the child’s parents are, or were, married. The CSA normally deals with child maintenance. However, where the absent parent has an income higher than the ceiling imposed by the CSA, the parent with care may apply for “top up” maintenance to be paid in addition. The parent with care may also apply for income where there is a requirement for additional child maintenance; for example the child is disabled. When deciding applications under Schedule 1 of the Children Act the court must take into account the financial positions of both parties.

MATRIMONIAL SUITS—ORDERS MADE FOR ANCILLARY RELIEF, UNDER THE MATRIMONIAL CAUSES ACT 1973, IN THE COUNTY COURTS—2003

<table>
<thead>
<tr>
<th>Nature of proceedings</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Periodical payments:</td>
<td></td>
</tr>
<tr>
<td>Orders made for maintenance pending suit73</td>
<td>3,845</td>
</tr>
<tr>
<td>For spouse:</td>
<td></td>
</tr>
<tr>
<td>Applications dismissed</td>
<td>6,692</td>
</tr>
<tr>
<td>Orders made for fixed term</td>
<td>5,989</td>
</tr>
<tr>
<td>Orders made pending further order</td>
<td>11,751</td>
</tr>
<tr>
<td>Orders made for child</td>
<td>24,508</td>
</tr>
<tr>
<td>Lump sum and/or property orders made</td>
<td>30,883</td>
</tr>
<tr>
<td><strong>Total Orders Made</strong></td>
<td><strong>83,668</strong></td>
</tr>
<tr>
<td>Ancillary relief orders above made by consent (76.8% of total)</td>
<td>64,203</td>
</tr>
</tbody>
</table>

Children

2.2.17 The law relating to the upbringing of children is set out in the Children Act 1989. Some provisions of the Children Act have been amended by the Adoption and Children Act 2002, although the amendments mainly relate to public law. Section I(1) of the Children Act states that the welfare of the child is paramount. The Act also contains a “welfare checklist” at section I(3) which sets out a list of factors that the court must take into account when deciding what, if any, order to make under section 8 or Part IV of the Act. The Act states that the court should not make an order unless it would be better for the child than making no order at all.

2.2.18 Public law cases always start in the family proceedings court. The Children (Allocation of Proceedings) Order 1991 does allow for cases to be commenced elsewhere where there are existing proceedings in respect of the same child already taking place. Where they begin in the family proceedings court, they may be transferred to the High Court or county court to minimise delay, to consolidate with other family proceedings or where the matter is exceptionally serious, complex or important. Public law cases are usually brought by local authorities.

2.2.19 Private law cases can commence at any family proceedings court or county court and can be transferred laterally between courts. Private law cases are those brought by private individuals, generally in connection with divorce or the parents’ separation.

2.2.20 During 2003, a total of 22,725 public law applications were made to the family courts (a decrease of nearly 4% from 2002), and a further 115,944 private law applications (an increase of 4%) were made.

72 Judicial Statistics 2003
73 ie maintenance payable to one spouse by the other for the duration of the proceedings, until long term maintenance needs are decided upon
PUBLIC AND PRIVATE LAW APPLICATIONS\textsuperscript{74} MADE IN EACH TIER OF COURT
BY CIRCUIT, 2003\textsuperscript{75}

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Public Law FPC\textsuperscript{76}</th>
<th></th>
<th></th>
<th>Private Law FPC</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CC</td>
<td>HC</td>
<td>Total</td>
<td>CC</td>
<td>HC</td>
<td>Total</td>
</tr>
<tr>
<td>Midland</td>
<td>2,675</td>
<td>1,189</td>
<td>27</td>
<td>3,891</td>
<td>6,189</td>
<td>14,754</td>
</tr>
<tr>
<td>North Eastern</td>
<td>1,585</td>
<td>1,425</td>
<td>18</td>
<td>3,028</td>
<td>2,847</td>
<td>15,130</td>
</tr>
<tr>
<td>Northern</td>
<td>1,604</td>
<td>1,370</td>
<td>29</td>
<td>3,003</td>
<td>3,220</td>
<td>11,280</td>
</tr>
<tr>
<td>South Eastern:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>London</td>
<td>2,939</td>
<td>—</td>
<td>—</td>
<td>2,939</td>
<td>2,538</td>
<td>5,079</td>
</tr>
<tr>
<td>Provinces</td>
<td>2,123</td>
<td>1,962</td>
<td>5</td>
<td>4,090</td>
<td>2,047</td>
<td>24,555</td>
</tr>
<tr>
<td>RCJ</td>
<td>—</td>
<td>1,429</td>
<td>36</td>
<td>1,465</td>
<td>—</td>
<td>4,812</td>
</tr>
<tr>
<td>Wales &amp; Chester</td>
<td>708</td>
<td>929</td>
<td>34</td>
<td>1,671</td>
<td>902</td>
<td>8,232</td>
</tr>
<tr>
<td>Western</td>
<td>1,548</td>
<td>1,062</td>
<td>28</td>
<td>2,638</td>
<td>1,754</td>
<td>12,227</td>
</tr>
<tr>
<td>Total</td>
<td>13,182</td>
<td>9,366</td>
<td>177</td>
<td>22,725</td>
<td>19,497</td>
<td>96,069</td>
</tr>
</tbody>
</table>

2.2.21 There are four ways in which public and private law applications can be dealt with: order made, order of no order (where the court applies the principle of non-intervention), application dismissed (where the grounds are not proved) and application withdrawn (in some cases withdrawn by order of the court).

2.2.22 During 2003, a total of 111,809 section 8 orders (see 2.2.24) were made in private law, an increase of 8% against 2002 (Section 8 can also apply to public law cases).

### DISPOSAL OF SELECTED APPLICATIONS IN PRIVATE LAW FOR ALL TIERS OF COURT\textsuperscript{77}—2003\textsuperscript{78}

<table>
<thead>
<tr>
<th>Nature of application:</th>
<th>Applications withdrawn</th>
<th>Applications dismissed</th>
<th>Orders of no order</th>
<th>Orders made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parental responsibility</td>
<td>1,002</td>
<td>267</td>
<td>215</td>
<td>9,524</td>
</tr>
<tr>
<td>Section 8:\textsuperscript{79}</td>
<td>1,654</td>
<td>202</td>
<td>652</td>
<td>31,966</td>
</tr>
<tr>
<td>Residence</td>
<td>2,753</td>
<td>601</td>
<td>1,522</td>
<td>67,184</td>
</tr>
<tr>
<td>Contact</td>
<td>380</td>
<td>60</td>
<td>101</td>
<td>9,487</td>
</tr>
<tr>
<td>Prohibited steps</td>
<td>284</td>
<td>24</td>
<td>82</td>
<td>3,142</td>
</tr>
</tbody>
</table>

### DISPOSAL OF SELECTED APPLICATIONS IN PUBLIC LAW IN ALL TIERS OF COURT\textsuperscript{80}—2003\textsuperscript{81}

<table>
<thead>
<tr>
<th>Nature of application:</th>
<th>Applications withdrawn</th>
<th>Orders refused</th>
<th>Orders of no order</th>
<th>Orders made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Care</td>
<td>433</td>
<td>38</td>
<td>13</td>
<td>904</td>
</tr>
<tr>
<td>Contact with a child in care</td>
<td>121</td>
<td>38</td>
<td>13</td>
<td>798</td>
</tr>
<tr>
<td>Discharge of care</td>
<td>199</td>
<td>36</td>
<td>13</td>
<td>641</td>
</tr>
<tr>
<td>Refusal of contact</td>
<td>50</td>
<td>11</td>
<td>125</td>
<td>1,955</td>
</tr>
<tr>
<td>Emergency protection order</td>
<td>228</td>
<td>25</td>
<td>36</td>
<td>2,051</td>
</tr>
<tr>
<td>Secure accommodation</td>
<td>76</td>
<td>6</td>
<td>13</td>
<td>641</td>
</tr>
<tr>
<td>Supervision</td>
<td>71</td>
<td>1</td>
<td>50</td>
<td>2,383</td>
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<tr>
<td>Supervision order—discharge</td>
<td>4</td>
<td>7</td>
<td>6</td>
<td>46</td>
</tr>
<tr>
<td>Section 8:\textsuperscript{82}</td>
<td>95</td>
<td>30</td>
<td>9</td>
<td>2,866</td>
</tr>
<tr>
<td>Residence</td>
<td>75</td>
<td>19</td>
<td>63</td>
<td>2,027</td>
</tr>
<tr>
<td>Contact</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>223</td>
</tr>
<tr>
<td>Prohibited steps</td>
<td>12</td>
<td>2</td>
<td>3</td>
<td>103</td>
</tr>
</tbody>
</table>

\textsuperscript{74} Some inconsequential applications have been excluded
\textsuperscript{75} Extracted from Judicial Statistics 2003
\textsuperscript{76} Figures in italics are weighted estimates based on data received from a number of family proceedings courts, and may not add up due to rounding
\textsuperscript{77} Contains imputed data for family proceedings courts
\textsuperscript{78} Judicial Statistics 2003
\textsuperscript{79} See 2.2.23
\textsuperscript{80} Contains imputed data for family proceedings courts
\textsuperscript{81} Judicial Statistics 2003
\textsuperscript{82} See 3.2.24
2.2.23 In private law proceedings, some applications are orders under Section 8 (see below). Either parent of a child may make an application to the court, irrespective of whether they are, or were, married. People who are not parents of a child may apply although generally they will first need to obtain the leave of the court to make the application.

- A father who is not married to the mother of his child may apply to the court for a Parental Responsibility Order. Parental responsibility is governed by sections 2–4 Children Act 1989. Essentially, parental responsibility confers legal status on a parent of a child. This means that people with parental responsibility should confer when making important decisions about the child’s upbringing. If agreement cannot be reached, one parent may apply to the court for a Specific Issue Order under section 8, to enable the judge to determine the issue. Mothers automatically have parental responsibility for their child, but unmarried fathers must acquire it. They may acquire it in a number of ways—for example, by court order, by entering into a parental responsibility agreement with the child’s mother, by jointly registering the child (if the child’s birth was registered on or after 1 December 2003), or by marrying the child’s mother.

- Orders under section 8 are as follows:
  
  (a) Residence Order. This determines with whom the child will live.
  
  (b) Contact Order. This sets out the contact that a child is to have with a given party. The Order may be as specific in terms of the time, duration and venue of contact, or as general as is required.
  
  (c) Specific Issue Order. This is an order made in respect of a particular aspect of the child’s upbringing, such as which school he or she should attend or whether he or she should receive certain medical treatment.
  
  (d) Prohibited Steps Order. This is an order prohibiting a party from acting in a certain way in respect of a child. For example, a party may be prohibited from removing a child from the jurisdiction without the consent of the other party.

2.2.24 The starting point of the court will be that it is in a child’s best interest to have a relationship with both of his or her parents (if it is safe to do so) wherever possible. Therefore it is rare for the court to order that no contact should take place between a child and the parent with whom it does not live. The courts make such orders in fewer than 1% of applications. Similarly, it is rare for a court to refuse an application by the father of a child for parental responsibility.

2.2.25 The court often utilises the services of CAFCASS by directing that a Child and Family Reporter prepare a report in which the factors under the statutory “welfare checklist” are addressed and a recommendation is made. Although the court is not bound by the recommendation of CAFCASS, the court will often follow the recommendation.

2.2.26 To enforce a section 8 order, usually where an order has been ignored, a party must apply for a penal notice to be attached to the order. The court will require evidence that a penal notice is necessary, for example that the other party has been in breach of the order recently or has a history of breaching orders. If the other party breaches the section 8 order once the penal notice is attached, the court then has the power to commit the other party to prison for contempt of court. The court rarely uses this power especially if using it would necessitate imprisoning the primary carer of a child.

2.2.27 The Children Act 1989[83] also sets out the law in relation to public law proceedings. The Act gives the local authority the ability to apply for an emergency protection order (EPO), which, if granted, allows the local authority to place a child in temporary care immediately. These orders are reserved for emergency situations. The court will order that the EPO last a number of days, the maximum being eight. The Act also gives the court the power to order a local authority to prepare a report and to consider whether care proceedings are necessary. The local authority commences care proceedings by applying for an interim care order, which gives it joint parental responsibility over the child with the child’s parents.

2.2.28 Care and Supervision Orders are made on application from a local authority in respect of children under 17 years of age, and the court must be satisfied that a child is suffering, or is likely to suffer, significant harm. The harm, or likelihood of harm, must be attributable to the care given to the child or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or attributable to the child being beyond parental control. The court may make an order placing the child in the care of a designated local authority or under the supervision of a designated local authority or probation officer.

2.2.29 The effect of a care order is to give parental responsibility to the local authority and recommend the extent to which a parent or guardian may meet their responsibility for the child. While a supervision order is in force, the supervisor must advise, assist and befriend the child and take necessary action to give effect to the order including whether or not to apply for its variation or discharge. Care orders and supervision orders may be made on an interim basis, so that local authority involvement with the child is ongoing throughout the proceedings.

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[83] Some parts of which have been amended by the Adoption and Children Act 2002
Exclusion orders

2.2.30 In October 1997, changes to the Children Act gave courts the power to order the exclusion of a suspected abuser from the child’s home in cases where ill-treatment is alleged, and either an Interim Care Order or Emergency Protection Order is made. Previous to this amendment, the child would usually have been removed. The court can add a power of arrest to the “exclusion requirement” where appropriate. Where exclusion is ordered, there must be a responsible person remaining in the property with the child. That person must both agree to care for the child and consent to the exclusion requirement. In practice, this power is rarely used, and it is usually up to the primary carer of a child to apply to exclude a violent member of the household under the Family Law Act 1996 (see 2.2.33).

Domestic violence

2.2.31 The Family Law Act 1996 gives the family courts the power to adjudicate over domestic violence cases. In order for the Family Law Act to apply, the parties must be “associated persons”. This includes family members and parties who are, or have been, involved in a relationship including a same-sex relationship.

2.2.32 A non-molestation order prohibits the respondent from using or threatening violence against the applicant or harassing, intimidating or pesterling the applicant or instructing or encouraging any other person to do so. The court must be satisfied that the applicant is likely to have suffered violence or threats of violence or harassment. The court is usually willing to grant non-molestation orders, where there is such evidence.

2.2.33 An occupation order regulates the occupation of a property. It may exclude the respondent from entering or attempting to enter a property. Alternatively, an occupation order may regulate the occupation of a property so that one party is forbidden to enter some of the rooms in the property. Occupation orders are harder to obtain than non-molestation orders as the court must be satisfied that the applicant (and/or any child) has suffered or is likely to suffer significant harm unless an occupation order is made. Case law has established that it is draconian to grant occupation orders without notice to the respondent and therefore the court rarely does so.

2.2.34 The court may attach a “power of arrest” to injunctions, which gives the police the power to arrest the respondent for the civil offence of being in contempt of court by breaching the injunction. The court has the power to commit the respondent to prison for up to two years.


<table>
<thead>
<tr>
<th>Nature of proceedings:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-molestation orders</td>
<td></td>
</tr>
<tr>
<td>Applications received without notice 85</td>
<td>12,414</td>
</tr>
<tr>
<td>Applications received on notice</td>
<td>4,612</td>
</tr>
<tr>
<td>Order with power of arrest attached</td>
<td>19,112</td>
</tr>
<tr>
<td>Order without power of arrest attached</td>
<td>2,706</td>
</tr>
<tr>
<td>Occupation orders</td>
<td></td>
</tr>
<tr>
<td>Applications received without notice</td>
<td>7,207</td>
</tr>
<tr>
<td>Applications received on notice</td>
<td>3,372</td>
</tr>
<tr>
<td>Order with power of arrest attached</td>
<td>7,826</td>
</tr>
<tr>
<td>Order without power of arrest attached</td>
<td>1,491</td>
</tr>
<tr>
<td>Number of cases where undertakings accepted</td>
<td>4,492</td>
</tr>
<tr>
<td>Warrants of arrest</td>
<td></td>
</tr>
<tr>
<td>Applications made</td>
<td>81</td>
</tr>
<tr>
<td>Warrants issued</td>
<td>133</td>
</tr>
<tr>
<td>Remands</td>
<td></td>
</tr>
<tr>
<td>Into custody</td>
<td>515</td>
</tr>
<tr>
<td>On bail</td>
<td>369</td>
</tr>
<tr>
<td>For medical report</td>
<td>19</td>
</tr>
</tbody>
</table>

84 Judicial Statistics 2003
85 An application made by one party to start court proceedings in the absence of the other party (often applied for under the Family Law Act 1996 because of the urgency of the application and the need to protect the applicant)
Wardship, special guardianship and inherent jurisdiction

2.2.35 Wardship is where the court assumes responsibility for the welfare of a child and exercises parental responsibility. Section 100 of the Children Act states that only the High Court can order that a child be made, or cease to be, a ward of court. Under section 100, the use of wardship by local authorities is severely limited and the local authority must seek the permission of the court to make application for any exercise of the court’s inherent jurisdiction. The Act does not affect applications made by private individuals although generally the same result could be achieved by obtaining a prohibited steps order or a specific issue order under section 8. Special Guardianship Proceedings are being introduced by way of the Children Act 1989, as amended by the Adoption and Children Act 2002, and will give long term carers of a child parental responsibility.

Adoption

2.2.36 An adoption order made by a court extinguishes the rights, duties and obligations of the natural parents or guardians and vests them in the adopters. Under the Adoption Act 1976, an adopted child is the child of its adoptive parents and has the same rights of inheritance as any biological child of the adoptive parents.

2.2.37 Before making an adoption order, the court must be satisfied that the adoptive parents are suitable, and that the agreement of either or both biological parents has been obtained. The court may dispense with the biological parents’ agreement where, for example, a parent lacks capacity to agree or is unreasonably withholding agreement. The court’s first consideration is to safeguard and promote the welfare of the child, taking into account the child’s views (as appropriate to their age and understanding), and the best interests of the child are paramount.

ADOPTION OF CHILDREN: SUMMARY OF PROCEEDINGS—2003

<table>
<thead>
<tr>
<th>Nature of proceedings:</th>
<th>Family proceedings courts</th>
<th>County courts</th>
<th>High Court</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applications:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>By step-parents</td>
<td>699</td>
<td>584</td>
<td>4</td>
<td>1,287</td>
</tr>
<tr>
<td>By others</td>
<td>752</td>
<td>2,793</td>
<td>38</td>
<td>3,583</td>
</tr>
<tr>
<td>Total</td>
<td>1,451</td>
<td>3,377</td>
<td>42</td>
<td>4,870</td>
</tr>
<tr>
<td>Orders made:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>To step-parents</td>
<td>568</td>
<td>601</td>
<td>3</td>
<td>1,172</td>
</tr>
<tr>
<td>To others</td>
<td>554</td>
<td>2,866</td>
<td>121</td>
<td>3,541</td>
</tr>
<tr>
<td>Total</td>
<td>1,122</td>
<td>3,467</td>
<td>124</td>
<td>4,713</td>
</tr>
</tbody>
</table>

2.2.38 The Adoption and Children Act 2002 aims to increase the use of adoption so that more children in care can find a secure and permanent home. The Act therefore aims to improve the process of adoption and to allow a greater number of people to adopt by removing the bar on unmarried couples (including same sex couples) adopting a child in their joint names. Local authorities are placed under a duty to maintain an adoption service including an adoption support service. The provisions of the Act are in accord with the principles of the Children Act 1989 and the best interests of the child remain paramount.

2.2.39 In addition to its provisions relating to adoption, the Act also alters the Children Act 1989 in relation to, among other things, parental responsibility. Unmarried fathers of children whose births were registered on or after 1 December 2003 can acquire parental responsibility by jointly registering the child. Fathers can acquire parental responsibility by marrying the mother of the child, and Step-parents can also acquire parental responsibility by agreement with both biological parents or order of the court.

86 Judicial Statistics 2003
87 Contains imputed data
88 This provision is not yet in force
2.3 Court and case costs

2.3.1 The estimated total cost of family work in the Court Service for 2004–05 is £117 million. This is broken down into the following main areas:

<table>
<thead>
<tr>
<th>Area of Expenditure</th>
<th>£m</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Costs</td>
<td>20</td>
</tr>
<tr>
<td>Accommodation</td>
<td>40</td>
</tr>
<tr>
<td>Staff and Other Running Costs</td>
<td>57</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>117</strong></td>
</tr>
</tbody>
</table>

2.3.2 Of this total, some £55 million is expected to be recovered in court fees. Although the Government’s policy is that fees should generally be set to meet the full cost, for certain types of family proceedings it has been agreed that it would be wrong to set fees purely on the basis of the cost of the service provided by the courts. The issues at stake in Children Act applications, adoption and domestic violence applications warrant an element of public subsidy. Following a public consultation during the summer, fees will be increased in December 2004. The table below sets out the main areas of family work, the average or unit cost to the Court Service, the current fee, the revised fee, and the percentage of cost that the revised fee will cover.

<table>
<thead>
<tr>
<th>Family Fees Court Service</th>
<th>Unit Cost</th>
<th>Current Fee</th>
<th>Revised Fee</th>
<th>Cost Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce (divorce, judicial separate and nullity)</td>
<td>241</td>
<td>210</td>
<td>240</td>
<td>99.6%</td>
</tr>
<tr>
<td>Domestic Violence Injunctions</td>
<td>234</td>
<td>60</td>
<td>60</td>
<td>25.6%</td>
</tr>
<tr>
<td>Other Originating Proceedings</td>
<td>164</td>
<td>130</td>
<td>130</td>
<td>79.3%</td>
</tr>
<tr>
<td>Adoption</td>
<td>390</td>
<td>120</td>
<td>140</td>
<td>35.9%</td>
</tr>
<tr>
<td>Ancillary Relief</td>
<td>379</td>
<td>120</td>
<td>210</td>
<td>55.4%</td>
</tr>
<tr>
<td>Children Act Applications—Private Law</td>
<td>521</td>
<td>90</td>
<td>120</td>
<td>23.0%</td>
</tr>
<tr>
<td>Children Act Applications—Public Law</td>
<td>1,171</td>
<td>90</td>
<td>150</td>
<td>12.8%</td>
</tr>
</tbody>
</table>

2.3.3 The effect of the fee increases will be to increase the proportion of costs recovered through fees from 45% to 55%.

2.3.4 The percentage of cost recovered through fees includes the allowance for fees that are exempted or remitted. Litigants in receipt of a range of state benefits are exempt from paying court fees. Litigants on low income who would suffer undue financial hardship from paying court fees can apply to have the fees remitted in whole or in part. Of the £55 million projected fee income for 2004–05 exemptions and remissions are likely to account for about £18 million.

2.3.5 The proportion of fees that are exempted or remitted for each of the main types of family work set out in the table above varies considerably. Approximately half of all fees for divorce are dealt with by way of exemption or remission. In subsequent proceedings for ancillary relief or Children Act applications the proportion fall considerably, mainly due to the availability of legal aid with court fees being met by the Legal Services Commission.

2.3.6 In magistrates’ courts the cost of family work is £51 million per annum. Funding for family work is included in the revenue grant made by the DCA to each of the 42 Magistrates Courts Committees. Fee income from magistrates courts amounts to some £5 million per annum exclusive of allowances for exemptions and remission.

2.3.7 The table below sets out the average or unit cost for each of the main areas of family work undertaken in the magistrates’ courts, the current fee level and the percentage of cost recovered through by fees.

<table>
<thead>
<tr>
<th>Family Fees Magistrates Courts</th>
<th>Unit Cost</th>
<th>Fee 2004–05</th>
<th>Cost Recovery</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic Violence Injunctions</td>
<td>No Fee</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adoption (section 21 Placement orders only)</td>
<td>446</td>
<td>20</td>
<td>4.5</td>
</tr>
<tr>
<td>Adoption</td>
<td>446</td>
<td>30</td>
<td>6.7</td>
</tr>
<tr>
<td>Applications for Financial Orders (excl. variation or discharge of orders and maintenance outside UK)</td>
<td>73</td>
<td>30</td>
<td>41.1</td>
</tr>
<tr>
<td>Children Act Applications—Private Law</td>
<td>206</td>
<td>30</td>
<td>14.6</td>
</tr>
<tr>
<td>Children Act Applications—Public Law</td>
<td>462</td>
<td>50</td>
<td>10.8</td>
</tr>
</tbody>
</table>

2.3.8 As part of harmonising family fees, the Department will shortly be issuing a consultation paper on fees in magistrate’s courts.
2.4 The role of the Legal Services Commission

2.4.1 The Legal Services Commission (LSC) is an executive Non Departmental Public Body sponsored by the Department for Constitutional Affairs. It is responsible for the delivery of the Community Legal Service (CLS), which provides legal advice and representation for people needing help on civil law matters, including family matters. The LSC replaced the former Legal Aid Board. During 2003–04, the LSC received a total of almost £2.1 billion in funding (which covers both criminal and civil) and provided almost one million “acts of help” within the CLS.

2.4.2 Tackling the legal and advice challenges affecting children and families is a high priority area for the LSC. The LSC established a Children and Families Programme Board during 2003–04 to provide a central focus within the LSC for children and family matters and oversee and direct the development of the CLS in this area.

2.4.3 The LSC maintains a system of paying guaranteed higher rates for members of the Law Society’s Advanced Family Panel and its Children’s Panel and to those accredited by the Solicitors Family Law Association (SFLA). The aim of the scheme is to provide additional remuneration to specialists who bring experience and expertise to legal aid work and to encourage other suppliers to develop and become accredited to these panels. The scheme provides for a guaranteed uplift of 15% for certificated work undertaken by these panel members.

2.4.4 The number of publicly funded family proceedings showed a marginal decline from 2002–03 to 2003–04. However, as can be seen from the table of certificates issued in family proceedings below, certificates issued for Help with Mediation grew by 14.8% and those for financial provision, including ancillary relief, grew by 3.4%. Non-means, non-merit tested certificates in Children Act care proceedings fell by 6.3%. Numbers of certificates issued for domestic violence proceedings fell by 4%, and have fallen by nearly 20% in the last four years. Private law Children Act certificates for residence and contact cases showed almost no change and have been stable at approximately 47,000 certificates annually for more than three years.

### LEGAL AID CERTIFICATES ISSUED IN FAMILY PROCEEDINGS: 2003–04

<table>
<thead>
<tr>
<th>Level of help authorised</th>
<th>Approved family help</th>
<th>Full representation</th>
<th>Total certificates issued 2003–04</th>
<th>Total certificates issued 2002–03</th>
</tr>
</thead>
<tbody>
<tr>
<td>Special Children Act proceedings</td>
<td>0</td>
<td>25,385</td>
<td>25,385</td>
<td>27,084</td>
</tr>
<tr>
<td>Other public law Children Act proceedings</td>
<td>24</td>
<td>8,673</td>
<td>8,697</td>
<td>8,804</td>
</tr>
<tr>
<td>Private law Children Act proceedings</td>
<td>468</td>
<td>47,157</td>
<td>47,625</td>
<td>47,606</td>
</tr>
<tr>
<td>Domestic violence</td>
<td>29</td>
<td>20,955</td>
<td>20,984</td>
<td>21,861</td>
</tr>
<tr>
<td>Financial provision</td>
<td>14,320</td>
<td>10,861</td>
<td>25,181</td>
<td>24,355</td>
</tr>
<tr>
<td>Combined family proceedings92</td>
<td>8</td>
<td>169</td>
<td>177</td>
<td>116</td>
</tr>
<tr>
<td>Other family proceedings</td>
<td>59</td>
<td>830</td>
<td>889</td>
<td>1,056</td>
</tr>
<tr>
<td>Help with Mediation</td>
<td>4,530</td>
<td>0</td>
<td>4,530</td>
<td>3,947</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>19,438</td>
<td>114,030</td>
<td>133,468</td>
<td>134,829</td>
</tr>
</tbody>
</table>

2.5 The role of CAFCASS in private law

2.5.1 For CAFCASS, the family courts proceedings relate principally to applications for parental responsibility, residence and contact, usually as a result of parental separation where the parents cannot agree arrangements for their children.

2.5.2 Where parents or families have to go to court to settle arrangements for their children, a judge or magistrates may appoint a CAFCASS Children and Family Reporter (previously called “Court Welfare Officer” or “Reporting Officer”).

2.5.3 A CAFCASS Children and Family Reporter will usually be involved at directions hearings in providing assistance to parties to reach agreement about arrangements for their children and avoid contested hearings. Where agreements are not reached there are various steps that the court can take depending on local arrangements. The court may agree to further meetings between the Children and Family Reporter and the family, usually away from the court. It may direct a privileged mediation appointment to be made or, it may order a full report and clarify the specific areas for the report writer to cover.

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92 May include two or more from: private law Children Act proceedings, domestic violence or financial provision.
2.5.4 The report will address specific issues such as with whom the child should live, or how much contact should take place with the non-resident parent. The Children and Family Reporter will meet the parties and the child. They will also decide what other enquiries they need to make and may see other family members and people involved in the child’s life such as teachers. The focus of their work is to make an assessment of what is in the child’s best interests, and to inform the court of the child’s wishes and feelings. Throughout their work with the family they will continue to seek resolutions and help the family to reach agreement about suitable arrangements for their child. The CAFCASS Children and Family Reporter will prepare a written report for the court and make recommendations about the best arrangements for the child, based on their enquiries and their work with the family. CAFCASS practitioners have a key role in ensuring that arrangements that are made for children are safe and in the child’s best interests.

2.5.5 Where mediation is ordered this can either be undertaken by a trained CAFCASS officer or, in some parts of the country the family may be referred to, an accredited mediator working for a mediation service in partnership with CAFCASS.

2.5.6 Where the court orders CAFCASS to report on the welfare of the child in private law proceedings it does so under section 7 of the Children Act 1989.

2.5.7 CAFCASS practitioners are also involved in post order work with families through family assistance orders. These orders are made at the end of the proceedings, in exceptional circumstances, usually following a recommendation in the Children and Family Reporter’s report. They provide the opportunity to do further work with the family. Where parents are having continued difficulty in reaching or sustaining agreement over arrangements for their children, it is the only court order available in private law proceedings through which social work assistance can be provided, as a family assistance order may be directed at a local authority or at CAFCASS.

2.5.8 For private law cases, CAFCASS has worked to a Government set Key Performance Indicator of at least 95% of private law requests to be allocated 10 weeks before the filing date. This ensures that the report preparation period starts on time. Nationally, CAFCASS has consistently achieved this but delay and extended filing dates remains an issue in some of the CAFCASS regions.

2.5.9 A revised Key Performance Indicator for 2004–05 is that the number of private law reports unallocated less than 10 weeks before court filing date for the month should be no more than 4% of the workload. This indicator is intended to better measure the number of cases where there is a delay in CAFCASS completing the report.

2.5.10 In 2003–04 the national average of private law cases unallocated at that date reduced from 4.7% in April 2003 to 3.2% in March 2004. At 31 August 2004 there were 369 unallocated cases requiring private law reports, representing 4.2% of the CAFCASS caseload. There has been a dip in performance over the summer of 2004, but the overall trend shows improvement. However, delay in private law is still an issue for CAFCASS to address, particularly in some parts of the country.

2.5.11 The total number of requests in private law for 2003–04 was 33,803 (and 13,470 public law reports). The range of requests in a month varied across the year from 3,213 in July to 2,493 in December, with the average requests per month being 2,817.

PRIVATE LAW DEMAND 2003–04: NUMBER OF REQUESTS

[chart showing data]

93 CAFCASS
Ev 181

2.5.12 CAFCASS has developed a convergence strategy which provides for its practitioners to be trained to undertake the full range of roles in both public and private law work. This is supported by a comprehensive training package of modular courses, which have been developed by a leading academic institution. The Royal Holloway College, University of London has designed the modular training, has an established track record and excellent reputation in social work training. The convergence strategy, which will take five years to complete, underlines the CAFCASS function as a single unified organisation serving the family courts.

2.6 Alternative Dispute Resolution (including mediation)

2.6.1 Alternative Dispute Resolution, usually referred to as ADR, but increasingly known as Effective Dispute Resolution (EDR), is the collective term for the ways that parties can settle disputes with the assistance of an independent third party away from a formal court arena. Some forms of ADR are well known and include methods such as the Parliamentary Ombudsman, Regulators such as Ofgen, arbitration such as the Association of British Travel Agents who intervene in travel disputes, and mediation (see 2.6.3).

2.6.2 For some time it has been Government policy that disputes should be resolved at a proportionate level and that, wherever possible, the courts should be the dispute method of last resort. Although ADR is independent of the court system, a judge can recommend that the parties involved in litigation enter into it. The court may also impose costs sanctions if it decides that one or more of the parties has been unreasonable in refusing to attempt ADR. The courts will take into account behaviour during the pre-litigation period, including whether or not an attempt has been made to use ADR. For some types of dispute, specific pre-action protocols exist to set out the steps parties are expected to take before issuing court proceedings.

2.6.3 Mediation has been used successfully to resolve a wide range of family disputes whether or not they involve money, including cases involving problems with child residence and contact. Mediation gives the party or parties in dispute the opportunity, with the assistance of an independent third party, the mediator, to reach a settlement outside of an adversarial court environment.

2.6.4 The mediator’s job is not to make a decision. Instead the parties explore the relative strengths and weaknesses of their cases, with the assistance of the mediator, and try to identify possible solutions, which in turn may help them to reach a solution between themselves. Agreeing to try mediation does not prevent the parties from being able to continue with court proceedings if they are unable to reach agreement. If parties refuse an offer to mediate without good reason then, even if they win their case, the judge can refuse to award them some or all of their legal costs.

2.6.5 Mediation can provide opportunities to resolve matters in such a way as to maintain as good a relationship between the parties, and any children involved, as is possible in the circumstances. The Government is encouraging the use of mediation where appropriate, but also recognises that not all family cases are suitable for mediation, particularly where there are domestic violence issues.

2.6.6 The Department’s third Public Service Agreement target is to reduce the proportion of disputes resolved by the courts. The purpose behind the target is to ensure that disputes are resolved quickly, effectively and in a manner and at a cost proportionate to the issue at stake, without compromising access to justice. Additionally, the Legal Services Commission is actively encouraging the use of mediation in resolving family cases and has a key target: “to secure a year on year increase in the number of disputes resolved with funding from the Community Legal Service Fund through Alternative Dispute Resolution, including mediation”.94

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Increase the proportion of contact and ancillary orders made by consent by 2.8% (from 70.6% to 73.4%)</td>
<td>71.4%</td>
<td>69.3%</td>
</tr>
<tr>
<td>Composite target made up of:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) Maintain Ancillary Relief Orders made by Consent at over 90% (90.7% in 2005–06) from a baseline of 91.2%</td>
<td>90.7%</td>
<td>90.3%</td>
</tr>
<tr>
<td>(b) Increase Contact Orders made by Consent by 1% to 32.2% from 31.2%</td>
<td>30.9%</td>
<td>31.2%</td>
</tr>
</tbody>
</table>

94 Legal Services Commission—SDA 13
2.6.7 225 mediation services have now concluded contracts with the Legal Services Commission via the Community Legal Service to provide, for those who qualify for public funding, quality assured family mediation services in all parts of England and Wales. Additionally, the requirements of the CLS Funding Code now state that people seeking public funding for family cases must first consider the suitability of ADR.

2.6.8 There are four key service providers, all of whom are affiliated to the UK College of Family Mediators, which assesses and registers mediators in the United Kingdom as well as producing post-qualifying training. Those service providers are the Solicitors’ Family Law Association, Family Mediators Association, the ADR Group and National Family Mediation. NFM in turn has about 50 independent mediation charities affiliated to it, some of which specialise in specific areas such as disputes relating to children.

2.6.9 The provision of publicly funded mediation through the CLS has been in force since 1997 and has now been implemented throughout England and Wales. This, together with the CLS Funding Code requirements (see 6.2.5) has meant that the number of cases going to mediation has increased dramatically since 1997:

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Volume of cases referred to Mediation</th>
<th>Annual cost to CLS of Mediation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997–98</td>
<td>406</td>
<td></td>
</tr>
<tr>
<td>1998–99</td>
<td>1,349</td>
<td></td>
</tr>
<tr>
<td>1999–2000</td>
<td>6,333</td>
<td>£16.9 million</td>
</tr>
<tr>
<td>2000–01</td>
<td>9,308</td>
<td></td>
</tr>
<tr>
<td>2001–02</td>
<td>12,335</td>
<td></td>
</tr>
<tr>
<td>2002–03</td>
<td>13,841</td>
<td>£14.8 million</td>
</tr>
<tr>
<td>2003–04</td>
<td>14,290</td>
<td></td>
</tr>
<tr>
<td>2004–05 (to date)</td>
<td>5,360</td>
<td>£5.9 million</td>
</tr>
</tbody>
</table>

Source: Legal Services Commission

2.6.10 Although the volumes of mediation continue to rise year-on-year, the number of mediations as a proportion of the number of Legal Representation Certificates issued each year remains low. In 2003–04 there were 94,865 certificates issued in cases that were eligible for mediation.

2.6.11 The average cost per eligible publicly funded mediation client was £733 in 2002–03 and £672 in 2003–04. These figures include the costs of all assessment meetings whether they led to mediation or not. There is a significant reduction on the average cost of a “legal aid” certificate. In 2003–04, the average bill paid for a private law children case was £2,635. This does not include the cost of “Help with Mediation,” the legal advice associated with mediation. In 2003–04, there were 4,530 “Help with Mediation” certificates issued with 3,020 bills paid at an average cost of £354.

2.6.12 Only legally aided parties are required to consider mediation as a way of resolving their disputes. There is no equal obligation on privately paying parties.

**RELATIONSHIP BREAKDOWN: FOCUSING ON THE NEEDS OF THE CHANGING SHAPE OF FAMILIES**

3.1 Introduction

Families

3.1.1 The shape of the family in England and Wales is a changing and complex one. The UK census found that, in 2001, 6.4 million (30%) of the 21.6 million households in England and Wales contained dependent children. Of the households with dependent children, 3.8 million (58%) were married couple households, 0.7 million (11%) were cohabiting couple households, 1.4 million (22%) were lone parent households and 0.5 million (8%) were “other households” (those with more than one family, where grandparents, lodgers etc. would be counted as additional to the main family).

3.1.2 Between 1991 and 2001, there was a fall in married couple households and a rise in cohabiting couple households. These changes were particularly marked for households containing dependent children; married couple households with dependent children fell by 13% while cohabiting couple households with dependent children rose by 102%. The number of lone parent households rose by 21%. The graph below illustrates these changes.

95 No figures available for 1997–2002
3.1.3 The 2001 census also shows that 23% of dependent children live in lone parent families, 65% of all dependent children live in married couple families and 11% live in co-habiting couple families. We are also told that 11% of dependent children live in either a married or cohabiting couple step-family. However the majority (65%) live in either married or cohabiting couple families with their birth parents.

3.1.4 We know from Court Service data that 148,000 decrees absolute were awarded in 2003, and that the number of divorces, after falling since the early 1990s, has risen in the past three years. We also know that around two thirds of divorces involve children, around 100,000 per year.

3.1.5 Our current best estimate for the number of cohabiting couples with dependent children who separate each year is between 50,000–100,000 (or 7%–14% of cohabiting couples with dependent children based on numbers from the British Household Panel Survey). This means that we estimate that between 150,000 and 200,000 relationships involving children break down each year.

3.1.6 Nine out of 10 separating parents do not seek the involvement of the courts about contact and residence issues. Of those who do, only a minority are involved in intractable disputes. We also know that the number of court applications relating to these disputes between parents is rising though up to half of these cases concern the variation or enforcement of orders.

3.1.7 Only around 10% of parents experiencing relationship breakdown choose to resolve their contact issues with the help of the courts every year. In 2003 this resulted in 67,000 contact orders being made by the courts. This figure continues the rising trend that has been seen over the previous 10 years, between 1992 and 2002, the number of private law contact orders made by courts in England and Wales more than tripled from 17,470 to 61,356.
3.1.8 There were 115,944 private law applications to all tiers of the courts in 2003. Data collected for the first six months of 2004 shows that the average duration of a private law contact case was around 45 weeks from initial application to final order. This is higher than the 36 weeks quoted in the Consultation Paper which came from the Family Justice Model, based on cases starting in 2001—this is likely to be because final orders had not been made in the longer cases when this analysis was done.

The legal framework for protecting children’s interests

3.1.9 In England and Wales if a question about the way a child is being looked after comes before a court, the Children Act 1989 requires that the welfare of the child is the most important issue. (Children Act 1989 “section 1 (1) When a court determines any question with respect to the upbringing of a child[... ] the child’s welfare shall be the court’s paramount consideration”). The Act sets out the framework within which parents meet their responsibilities to their children. The fact of parental separation does not of itself trigger court intervention, as the responsibilities of parents are not affected by where the parents live or the quality of their relationship. Those who have legal parental responsibility for the child(ren) continue to have that even after parental separation.

3.1.10 The court will only consider an order for contact (under Section 8 of the Children Act) when the parents have a dispute which they cannot manage for themselves, and they, or one of them, ask the court to intervene. It has a “no order” principle which means it will make no order if that is in the child’s best interests and only makes an order in those cases where those best interests indicate one is needed.

3.1.11 The President of the Family Division recently wrote:

The courts naturally start with the view that in most cases contact between the child and the non-resident parent is desirable both for the child and for the parent.

3.1.12 This is reinforced elsewhere in case law, thus establishing the assumption in law that contact with both parents is the best way to promote the child’s welfare, where it is safe to do so. While courts may refuse to allow contact between a parent and his or her child, this is rare in practice (Judicial Statistics shows less than 1% of cases each year). Sometimes, indirect contact may be ordered, or contact that is supervised or supported. However, the most common form of contact order is for direct contact.

3.2 What the ONS Omnibus Survey told us about contact arrangements

3.2.1 The ONS Omnibus Survey asked a sample of resident and non-resident parents about the contact arrangements decided on for their children. According to ONS Marriage and Divorce Statistics, in 2001, 203,598 children experienced the divorce of their parents of which 146,914 (72%) were aged 16 or under. 79,277 divorces (55%) involved children aged 16 or under.

3.2.2 The survey shows that around 10% of couples going through relationship breakdown resort to the courts to establish contact arrangements. The majority of children (around 85%) have the contact arrangements with their non-resident parent arranged informally. The other 5% of children have their contact arrangements negotiated formally either through mediators or lawyers.

96 Judicial Statistics 2003
97 Published January 2004
Frequency and satisfaction of contact arrangements

3.2.3 Results from the survey suggest that irrespective of whether they choose to agree contact arrangements between themselves or with the help of the courts, some parents end up dissatisfied with the outcomes they achieve. Greater satisfaction is, however, generally linked with out of court solutions, possibly because these allow parents greater control, thus enabling them to make their own decisions about what is best for the future of their family.

— 43% of children in the resident parent sample and 59% of children in the non-resident parent sample had direct (face-to-face) contact with their non-resident parent at least once a week.
— A further 9% of children in the resident parent sample and 18% of children in the non-resident parent sample had indirect contact at least once a week.
— A quarter (24%) of children in the resident parent sample and 10% of children in the non-resident parent sample have no direct or indirect contact with their non-resident parent.

Satisfaction with arrangements

— Overall, the parents of children in both sample groups were satisfied with the contact arrangements with almost half saying that they were “very satisfied”.
— On the whole, responding parents who had informally agreed the contact arrangements between themselves were mainly satisfied.
— Satisfaction with contact arrangements that had been ordered by a court was low.

Improvements to contact arrangements

— When asked how contact arrangements could be improved, the most popular contact improvement, in both sample groups, was that the non-resident parent should have more direct contact with their child.

A profile of applicants and respondents in contact cases

3.2.4 Research commissioned by the Department from Dr Trinder of the University of East Anglia to evaluate the In Court Conciliation Schemes at First Appointment in contact cases, found worryingly high levels of distress among parents and children. Equally worrying was the presence of multiple risk factors associated with poorer outcomes for children, including economic hardship, parental conflict, and reports of child protection and domestic violence concerns.

3.2.5 What the study suggests is that although involvement with the courts may exacerbate conflict and increase levels of stress, it is clear that the parents were already highly conflicted and polarised before they entered the court system. This may indicate, however, that the courts are only dealing with cases that do require external intervention. The report is being prepared by the Department for publication later this year, in the DCA Research Series.

3.3 What consumer research has told us about the needs of parents

3.3.1 The DCA, with DfES involvement, has recently undertaken an extensive body of work to establish what its “consumers” in this case (children, parents and others with wider interests involved in parental separation) want. This was called the “DCA Consumer Strategy” and focused on listening to the views of parents experiencing family change as a result of a breakdown in their relationship with a partner. We asked them to tell us whether the help and support made available to them at such times adequately met their needs and where this was not the case, sought their views about ways in which these services could be improved in the future.

3.3.2 Although evidence shows that some parents are happy with the help and support they receive at times of relationship breakdown, we know that the needs of many separating parents are not being adequately or consistently met.

3.3.3 Many parents have told us that at the point of breakdown they feel:
— Ill-equipped to overcome the conflict between themselves and their ex-partner, such that they can reach an agreement that is in the best interests of their children.
— Many said that they faced the situation ahead of them unprepared, without an understanding of their rights and responsibilities or a basic knowledge of where to go for help.

3.3.4 Limited emphasis is currently placed on educating parents prior to the point of relationship breakdown in order to prepare them for the emotional and practical issues associated with family change, although Sure Start and some Marriage and Relationship Support initiatives are now focused on addressing some of these issues.
3.3.5 Once relationship breakdown occurs, parents have told us that the services they access must be respectful and considerate of their feelings, whilst also being practical, flexible and responsive enough to suit their own family’s circumstances. No two families are exactly the same and therefore no two families require exactly the same help and support during the period of transition that follows a parental relationship breakdown.

3.3.6 Each family must therefore have the freedom to access the services that they consider are most appropriate and beneficial to them at this time.

3.3.7 Irrespective of their chosen resolution route, parents tell us that they want to:
- Reach agreement as quickly as possible and in a way that subjects both themselves and their family to the lowest possible levels of stress and upset.

3.3.8 In order to do this, parents may need to be provided with tailored information and advice, which is easily accessible in the places where they look for it and which supports them to deal with their own emotional and practical issues appropriately and adequately.

3.3.9 Our conversations with parents have made it clear to us that there is still much to be done in this area, since not everyone currently receives the advice and support they need at this difficult time.

3.3.10 One key issue for parents is, they tell us, that the information they receive is too focused on legal and factual issues, rather than on meeting their individual emotional and practical needs. This often leads to feelings of frustration and bitterness and pushes many parents into increasingly polarised and emotional positions than they might otherwise be. The danger is that the system actually exacerbates the acrimony between separating parents and ends up making things worse rather than better.

3.4 Continuing contact

3.4.1 There is good evidence that children continue to see both their parents when they no longer share a common home, though estimates of how much and how often vary. Most children live with their mothers after separation. The 2001 Census shows that 91% of the 2.7 million lone-parent families in England and Wales were headed by the mother. Resident parents (most often mothers) tend to report less contact than non-resident parents (usually fathers), and formerly married partners report more contact than formerly cohabiting parents. The Office for National Statistics (ONS) Omnibus survey indicates that between 10% and 23% of children whose parents were questioned have no direct or indirect contact with their non-resident parents. However, it is not clear if there ever was a meaningful parental relationship for those in this group. The Home Office Citizenship Survey found 9% had lost contact. Research on a cohort in Bristol found that for the 82% where contact was taking place, for a third it was at least weekly and 90% at least monthly.

How do children feel about seeing both parents?

3.4.2 Most children want contact with their parents and continue to see both parents as part of their family. How the children have that contact, how much and how often and the quality of that contact, seem to be the crucial determinants of the child’s experience of their contact. Their needs and wants may change over time and through circumstance. Frequency and regularity of contact are often important to younger children, while older children put greater value on flexibility as they have social activities of their own to accommodate. Children usually enjoy contact, particularly if they are consulted about arrangements, but it can sometimes be distressing. Problems include parents who fail to turn up as expected, being exposed to conflict and feeling torn loyalties, harassment or abuse, being used as a go-between, managing relationships with a parent’s new partner or children, and the stress of moving between two homes. Some children resist contact, and feel that their views are not taken into account.

Is contact with both parents good for children?

3.4.3 It is often assumed that research shows that contact with both parents is always good for children. In fact the research evidence is contradictory. One recent UK study reported unequivocally that more contact was associated with fewer adjustment problems for children. Another study found that contact with a non-resident parent had no impact on the child’s welfare and development, but that this could be predicted more accurately by the quality of relationships within the child’s home. The mere presence of contact is, another study suggests, not enough; it is the quality and nature of the parenting, monitoring, encouragement, love and warmth, which count.

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98 Maclean and Eekelaar, 1997
99 ONS Omnibus Survey
100 twood et al 2003
101 Dunn 2003
103 Dunn 2003
104 Smith et al, 2001
105 Pryor and Rodgers
3.4.4 Contact with both parents has potential value in developing the child’s sense of identity, preserving links with the wider family, and providing additional support. In ordinary circumstances, where a parent has an established relationship, it seems clear that time spent with their child is beneficial to the child. Yet contact as such is clearly not always beneficial. Where there is no pre-existing relationship or where there are known risks of abuse or neglect, exposure to domestic violence, or severe parental conflict, contact can be extremely damaging to children. 

3.4.5 The evidence therefore suggests that, whilst the ideal amount and type of contact for any given child will vary, a significant minority of children do not currently appear to be getting an optimal level of contact with their non-resident parent.

Encountering problems

3.4.6 Some parents may separate acrimoniously and have disagreements about parenting arrangements from the outset. Others may encounter them later, perhaps due to the changed circumstances of one parent such as one having a new partner or moving location. Some parents may have other unresolved issues and disputes or wider problems and difficulties about, for example, money. These can sometimes create an environment of conflict that could have a knock-on effect to complicate discussions about childcare and parenting. These other issues need to be cleared to focus on the children.

3.4.7 So whilst separating parents face similar problems their particular circumstances mean they have their own sets of issues to address. This suggests they may need different types and levels of help. No “one-size fits all” solution is likely to be effective.

3.5 The Government’s proposals

Background to the consultation paper

3.5.1 As part of the 2000 Spending Review, a Public Service Agreement target was set to “increase contact between children and the non-resident parent following family breakdown, where this is in the best interests of the child.” Initial scoping work was carried out with key stakeholders and in June 2002 a major conference for stakeholders was held to consider how to meet the target. Various work streams were identified, including:

— Safety.
— Developing Contact Centres.
— Facilitation of contact and enforcement.
— Communication and Information.

3.5.2 Officials worked closely with stakeholders assessing the issues and outlining the way forward. One of the first requirements was to understand more fully the nature and extent of contact arrangements (including establishing current levels of contact and satisfaction with those arrangements) since existing research focussed more on those who went to court. This led to the inclusion of relevant questions in the ONS Omnibus Survey. Data from that is used earlier in this memorandum.

3.5.3 In 2002 the Children Act Sub-Committee published a report Making Contact Work which set out various proposals for change where the court had determined that contact was in the best interests of the child but this failed to take place.

3.5.4 The Government published an initial response in August 2002 to Making Contact Work and a final response (in March 2004) which set out the action taken and identified those areas where further work was necessary. In addition, the Department built on all this earlier work, in one strand of its Consumer Strategy.

3.5.5 The Consultation Paper, Children’s Needs and Parents’ Responsibilities was published on 21 July 2004 and pulls all these various strands together. It sets out the Government’s proposals to address all the needs that this evidence suggested should be met. This evidence should be read in conjunction with the Consultation Paper.

3.5.6 The proposals in the Paper are aimed at:

— Minimising conflict and supporting good outcomes both for children and their parents, preferably without recourse to the courts.
— Improving parental access to those services which will enable them to reach agreements.
— Improving legal processes and service delivery for those who do go to court.

3.5.8 The proposals direct different help at different client needs. They are aimed at giving parents what they need to protect their child’s welfare when they separate. They provide something practical for all parents at different stages in the separation process. They recognise that parental separation is a process that needs to be managed over time rather than an event that needs a single response. Consultation continues until 1st
November 2004, following which the Government will publish its response. The consultation document made clear that this important agenda will be carried forward as quickly as possible, informed by the consultation.

Minimising conflict and supporting good outcomes both for children and their parents, preferably without recourse to the courts

3.5.9 Those who currently do not turn to courts for an intervention, and also perhaps for a significant minority of those that do, the evidence suggests that better practical and emotional help and advice is needed. This may enable all, or at least more, parents to resolve future parenting issues for themselves. We know that this kind of agreement produces outcomes, which are more durable, flexible, with which the parents are more satisfied. With better help more parents could be enabled to achieve this kind of outcome.

3.5.10 The Consultation Paper sets out the Government’s intention to make improvements in the provision of this help, both in terms of content, focus and accessibility.

3.5.11 One important specific example of proposed support to parents is the revision of the Parenting Plan material currently available. This will be revised to cover specific examples of contact arrangements that work. It will cover the various factors that might affect the best contact arrangements in different families—factors such as the different ages (and consequent needs of) the children involved; parents’ new living arrangements (for example, distance between homes). It will also illustrate how the courts might view their particular case.

3.5.12 Other measures include improvements in grant-aided help provision and piloting of new initiatives such as access to help and advice through dedicated, telephone helplines.

Improving parental access to those services which will enable them to reach agreements

3.5.13 The research evidence and discussions with stakeholders identified areas where action was needed. Where possible this has now been taken and further steps are proposed in the consultation document. This includes:

- With Parentline Plus, in early 2002 we published the Parenting Plan. This provides a checklist for parents to use in order to help them work out contact arrangements.
- With the help of children, we published leaflets aimed at helping children understand what might happen when their parents were splitting up.
- With Parentline Plus we provided a phone help line to help get the message across about the value of children having contact and the responsibility of both parents to help make it happen.
- The definition of harm has been expanded and new forms will be used from 31 January 2005. This will speed up the identification and resolution of these important cases.
- On 21 July 2004 the President of the Family Division wrote—as did CAFCASS and the Court Service—setting out plans to bring forward a Private Law Framework. This will set out best practice in case management in order to improve the delivery of services.

3.5.14 As has been said, mediation will be appropriate to a proportion of those involved in family conflicts. Considerable work has been undertaken by the Department, the Legal Services Commission and by the mediation profession itself to promote mediation more widely, to educate other professionals (including the judiciary) about the benefits of a mediated outcome for couples, parents and most particularly for children of the family.

3.5.15 For those seeking a third party intervention in their dispute, the Consultation Paper proposes a further range of measures to facilitate agreements and minimise conflict. These include changes to the legal aid system to promote and reward resolution before courts rather than in them and extended use of mediation for those who might benefit. It is already the case that to qualify for continued legal aid funding the claimant must have considered mediation. Work in FAINs will build on this. It is proposed that courts should be given a power to direct parents to such mediation.

3.5.16 For those who continue toward court some more direct interventions to avoid the conflicted court case are proposed: the Family Resolutions Pilot Project (FRPP); and nationwide availability of in-court conciliation services.

3.5.17 The FRPP is currently being tested in three court areas. It involves a series of targeted interventions. All potential court cases are referred to project unless fears over safety are alleged. The aim of these interventions is to promote agreements through improving understanding of the children’s point of view, and develop communications of the partners. This involves facilitated group work followed by a planning meeting involving the separated partners and a skilled CAFCASS officer.

3.5.18 In-court conciliation is a service of direct facilitation of agreements between the ex-partners and a CAFCASS officer. It currently operates in many local courts in different ways. The success of this in avoiding the need for conflicted hearings is good and the Government proposes to facilitate its greater use. We will also establish best practice so that all local schemes are built on the firmest footing.
Improving legal processes and service delivery for those who do go to court

3.5.19 For those that must or do pursue their case into court, the focus of the Government’s proposals is to improve the delivery of the service there. Improved case management by the judiciary, facilitated by HMCS and CAFCASS, is being developed through a practice framework. Key elements will be speeding up the process and promoting consistency through, for example, greater judicial continuity. Other changes, such as focussing CAFCASS on dispute resolution, will also assist.

3.5.20 Around 30% of contact cases that go to court involve issues of safety. It is vital that issues of domestic violence are fully and properly dealt with by the courts before contact cases are decided. From January 2005, section 120 of the Adoption and Children Act 2002 will be implemented, which means that courts will have to consider the harm a child might suffer by hearing or seeing the ill-treatment of another. From the same date, we will also be introducing new court forms known as “Gateway Forms” so that allegations of domestic violence can be raised at the outset of proceedings. This will mean that findings of fact will be made before the courts take decisions about contact. The Government will therefore put in place robust monitoring arrangements and will commission evaluation of the impact the changes have on the handling of cases where domestic violence or child abuse is an issue.

Collaborative law

3.5.21 The Consultation Paper explains that the LSC will be piloting collaborative law, which is another dispute resolution route for clients to promote negotiated outcomes away from court.

3.5.22 Collaborative law is a newly introduced ADR model for promoting resolution in family matters. It is currently growing in use and popularity in other international jurisdictions, notably Canada and the United States. Collaborative law is a process in which clients and their lawyers work together in “four-way” meetings to seek a resolution without recourse to litigation. A “participation agreement” is signed by all that commits all parties to a non-litigation route of resolution.

3.5.23 The LSC will be piloting this model of working from January 2005. The pilot will initially be run in Nottingham and Mansfield and then extended to include comparative areas and models. The pilot will be researched with a particular emphasis on the outcomes achieved for clients.

3.5.24 It is hoped that this model of working will be adopted by practitioners working in the private sphere, as well as for legally aided cases.

Public Funding

3.5.25 The Legal Services Research Centre (LSRC) has recently conducted a follow-up to the Family Case Profiling Study conducted in the late 1990s to determine whether the profile of legal aid certificated private law family cases has changed over recent years. Based on a sample of 400 cases (plus a booster sample of an additional 261 ancillary relief cases) the follow-up study’s findings indicate that legal aid certificated private law family cases are now longer, more likely to involve hearings, more likely to involve counsel and more likely to involve multiple issues. A univariate general linear costs model indicates that these four changes, along with remuneration increases, lie behind much or all of the increase in case costs since 1996–97.\footnote{Details of the models will be reported in Family Law, December 2004}

3.5.26 While some of the change in the profile of legal aid certificated private law family cases may stem from the expansion of the Legal Help scheme—intended to increase the proportion of less complex cases concluded under the Legal Help scheme—qualitative data collected as part of the follow-up study suggests that there are other causes.

3.5.27 There is evidence of supplier-induced demand within the family legal aid system, with some legal aid solicitors adopting strategies that prolong disputes. Disputes also seem to be being prolonged by increasing “juniorisation” within family legal aid. More junior staff are less likely to have the knowledge and skills to bring about early settlement.

3.5.28 The two tables show legal aid spend on family cases. The first shows actual net in-year expenditure on family. The second table, which shows the gross value Very High Cost Cases (VHCC) cases closed in each year, rather than actual spend, because the cases will span previous years and have been part—paid in those previous years. This extraction is possible only from December 1998 onwards. There may be a number of reasons for the variations in expenditure. Receipts from statutory charges may be higher in one year than the next (receipts can vary quite sharply), there have been changes in the mixture of cases between Children Act and other family cases and eligibility will have fallen over the years (which would have the effect of slowing expenditure) as incomes have risen faster than eligibility upratings.
3.5.29 One factor that is significant however, is the level of certificates issued. Trends in bills paid tend to lag about 18 months or more behind certificates issued and it is noticeable that between 1998–99 and 1999–2000, family certificates fell by 25,000 (as net expenditure between 2000–01 and 2001–02 fell by £44 million). Similarly certificates issued between 1999–2000 and 2000–01 increased by 8,000 (as expenditure between 2001–02 and 2002–03 increased by £51 million).

### NET EXPENDITURE ON FAMILY LEGAL AID

<table>
<thead>
<tr>
<th>Year</th>
<th>Expenditure (£m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996–97</td>
<td>392</td>
</tr>
<tr>
<td>1997–98</td>
<td>390</td>
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<td>1998–99</td>
<td>423</td>
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<td>2001–02</td>
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<tr>
<td>2002–03</td>
<td>450</td>
</tr>
<tr>
<td>2003–04</td>
<td>488</td>
</tr>
</tbody>
</table>

### GROSS VALUE OF CASES CLOSED IN YEAR

<table>
<thead>
<tr>
<th>Year</th>
<th>Non-VHCC Cases (£m)</th>
<th>Very High Cost Cases (£m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec 98–Mar 99</td>
<td>257</td>
<td>68</td>
</tr>
<tr>
<td>1999–2000</td>
<td>724</td>
<td>171</td>
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<tr>
<td>2000–01</td>
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<tr>
<td>2002–03</td>
<td>600</td>
<td>209</td>
</tr>
<tr>
<td>2003–04</td>
<td>584</td>
<td>200</td>
</tr>
</tbody>
</table>

3.5.30 The follow-up study has also identified evidence of “cherry picking”, with some legal aid solicitors now increasingly looking to move to certificates as quickly as possible to increase profitability. This seems to be countering the initial impact of the expansion of Legal Help. There is also evidence of cherry picking within certificated cases, which may be having the effect of making it difficult for clients to find solicitors to undertake certain family cases—such as those involving domestic violence.

3.5.31 The follow-up study also confirms that most legally aided family disputes are concluded through legal process, that the parties to the great majority of legal aid ancillary relief cases have dependent children and that changes of solicitor can greatly increase case costs.

3.5.32 In July 2004, in conjunction with the DCA, the LSC published its consultation paper entitled “A new focus for civil legal aid—encouraging early resolution; discouraging unnecessary litigation”.

3.5.33 Specifically, the proposals include:

- A restructure of the levels of service for private law family cases by replacing three existing levels with one new level of service, and stricter control of granting legal representation. The LSC proposes to commence a pilot of the new structure in January 2005, to research how cases are managed by solicitors under the new proposals, and the impact on costs and outcomes. This is closely linked with proposals set out in the Consultation Paper.

- In ancillary relief cases, it is proposed to give courts wider powers to refuse funding on the grounds that private funding measures may be available (the value of the assets in dispute, for example the matrimonial home or loans).

- Stricter controls over multiple and repeat applications in family cases, and to limit funding to one certificate per client.

- Removing some low priority categories of cases from scope, such as Legal Help for drafting divorce and judicial separation petitions, or for changes of name.

- Revising the eligibility limits to achieve uniform income limits across all levels of service; while it is proposed the rates are increased in line with inflation, the upper limit for qualifying for legal representation in court should be reduced.

- Removing the current rule which disregards £100k of equity in an applicant’s home in assessing financial eligibility for legal aid.

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108 Legal Services Commission
109 Legal Services Commission
3.5.34 The proposals aim to amend the LSC’s Funding Code, which sets out the merits and scope of the civil legal aid scheme. The consultation closed on 15 October 2004, and the DCA is currently analysing the responses. No decisions have yet been made.

3.6 The changing role of CAFCASS

3.6.1 It is important to remember that the cases which come to court represent the minority of separating parents, and that they are often those with intractable problems, including those which may place a child at risk. However it may be the case that conflict between mothers and fathers has increased for more positive reasons, in that fathers’ attitudes have changed so that they now want to spend more time with their children. Mothers, however, particularly in the case of younger children, sometimes have anxieties about the parenting skills of the father. In these areas, the services provided by the 400 contact centres up and down the country may be especially valuable, by providing a safe and neutral venue in which both confidence and competence can improve. The current Government investment (2003–05) of £3.25 million demonstrates the value placed on the contribution of these services.

3.6.2 CAFCASS Family Court Advisers provide welfare reports when requested to do so by a court. However, in many courts CAFCASS also provides a service at the first appointment with the court, when an officer sees the parents to explore the potential for reaching agreement.

3.6.3 In-court conciliation is a service of direct facilitation of agreements between the ex-partners and a CAFCASS officer. It currently operates in many local courts in different ways. The success of this in avoiding the need for conflicted hearings is good and the Government proposes to facilitate its greater use. We will also establish the principle of best practice of the service so that all local schemes are built on the best footing.

3.6.4 The proposals in the Consultation Paper will lead to changes in the current role of CAFCASS in contact and residence proceedings, away from report writing and towards a more problem-solving approach, creating capacity for CAFCASS to deliver conciliation and support services. The Court Service and the judiciary are committed to working with CAFCASS to deliver this aim.

3.6.5 This will mean extending in court conciliation to make it available to all families in dispute prior to court hearing. In order to achieve this CAFCASS will be working with Her Majesty’s Court Service and the judiciary to identify and evaluate existing arrangements and good practice in courts, and any gaps in provision. It is intended that improved arrangements, which meet criteria agreed in conjunction with the judiciary and the Court Service, will be rolled out thereafter.

3.6.6 CAFCASS will also have a greater role in post order follow-up—to ensure that orders are being properly implemented and met.

3.6.7 The extent and speed with which this programme of change is rolled out will be dependent upon CAFCASS’ readiness, both within its existing resource and that flowing from the changes in working practice made by the judiciary and the other agencies involved in taking the Consultation Paper forward.

3.7 Compliance

3.7.1 Where the resident parent disregards the terms of a contact order, an application may be made for the enforcement of the contact orders. Courts have measures available to them in response to non-compliance with contact order, which include imprisonment, fines or reversal of residence.

3.7.2 Courts use these measures with caution because of the possible detrimental effect on the child. The court will have the child’s welfare in mind when deciding what, if any, sanctions to impose.

3.7.3 For those that have been to court the focus of the Government’s proposals is on ensuring compliance with the court’s decision, through better monitoring, facilitation and enforcement. An active role in ensuring compliance is proposed for CAFCASS whereby checks will be made to see if the order is being carried through. If not, and linked to the improved case management proposal, those cases will be brought quickly back to court. A wide range of new enforcement and facilitative measures is proposed and the Government has made clear these will be legislated for at the earliest possible opportunity.

110 Buchanan et al 2001, Trinder 2004
111 Smart, May and Wade and Furniss 2003
112 Trinder, 2003
3.8 Disclosure and privacy

3.8.1 Proceedings in the family courts are normally held in private as this protects the children involved. The permission of the court is generally required if publication of information relating to such proceedings is contemplated. The restrictions on publication are set out in two pieces of legislation and supported by case law.

— 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 court proceedings (or the address or school of such a child) unless the court has decided that the welfare of the child requires disclosure.

— Section 12 (1) (a) 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.”

3.8.2 The judgment handed down in the high court by Mr Justice Munby on 19 March 2004 (Re B) has set out clearly the effect of these two pieces of legislation. The judgment confirmed that publication of any information about a children case whether or not it would identify the child concerned is almost always prohibited without the direct permission of the court. Munby J held that ‘publication’ covered almost all forms of communication whether by word of mouth or in writing.

3.8.3 This judgment raised a number of wider issues about disclosure of information. The judgment has implications for MPs dealing with constituency matters, the police, CPS, social services and others who are equally unclear about their ability to access, use and pass on information from family court proceedings and who, for example, may have day to day issues about the protection of children and vulnerable adults to consider.

3.8.4 The Government has tabled an amendment to the Children Bill to:

— Amend the law in respect of the criminal offence created by section 97(2) of the Children Act 1989.

— Amend section 12(4) of the Administration of Justice Act 1960 to clarify that where 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.

— Allow a series of amendments to current rule making powers to make clear that court rules can be made specifying the circumstances in which disclosure may be authorised.

3.8.5 The proposal would not allow the extension of disclosures of information from family proceedings to the media, nor are there proposals to alter courts’ existing powers to restrict or allow disclosure of information in individual cases.

3.8.6 In developing proposals for changes to the law relating to disclosure of information, policy development has been based on a primary principle of the welfare of the child, supported by four further subsidiary consideration, which are:

— The proper administration of justice in family law cases.

— The legitimacy of the law (the match between the law and what actually happens).

— Providing for the sharing of information between those with a legitimate need for that information.

— The proper functioning of Parliament and the facilitation of the discharge of MPs’ and Peers’ functions.

3.8.7 The Government’s main aim in considering amendments to court rules is that the welfare of the child must be the paramount concern. However, some parties to family proceedings and others may have a legitimate interest, in limited circumstances, in sharing information. Our broad policy intention is to permit the disclosure of information relating to 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.

3.8.8 These examples are not exhaustive and there will remain restrictions about what information can be disclosed in such circumstances; and what the recipient of such information is able to do with it.
3.8.9 There is, of course, a balance to be struck between competing interests, to ensure that those who may have a legitimate interest in the information (for example, the police, CPS, MPs) should have access to it, and those who may give evidence or statements (the parties, family members and experts) are not discouraged from full and frank disclosures. These changes will be consulted on.

Expert witnesses

3.8.10 Concern has been expressed about the quality and validity of evidence given by medical expert witnesses following recent appeals against convictions of mothers alleged to have been responsible for killing their children. Medical evidence from expert witnesses plays an important part in court proceedings.

3.8.11 Proceedings in the criminal and family courts are different and do not follow the same process. Requirements differ between them on standards of proof, rules of evidence and admissibility of material. In civil and family proceedings, evidence is assessed against a threshold of proof that is based on the balance of probabilities, and the input of expert witnesses may be tested by the parties to a case and by the court, before judicial determinations are made. An expert in family proceedings has an overriding duty to the court.

3.8.12 The expert must confine his/her opinion to questions that fall within their expertise (skill and experience). At the end of care and supervision proceedings, the solicitor who instructed the expert should provide feedback to the expert. This informs the expert of the outcome of the case and the use that the court made of the expert’s opinion.

3.8.13 If a party to any case believes that the expert evidence was flawed, and that this evidence was crucial to the decision of the court, it is open to them to take legal advice about the possibility of an appeal. It is also open to any party to make representations to the General Medical Council or other professional body, who may seek permission of the court for disclosures to enable them to investigate a complaint. If a judge is dissatisfied with the quality of medical evidence, the judge may also bring this to the attention of the professional bodies.

3.8.14 The concerns around the credibility of expert witnesses are both complex and substantial and are worsening the already acute problem which the family courts are experiencing in finding experts of high standing to give medical evidence in proceedings, particularly where child abuse is suspected.

3.8.15 In January 2004, the Attorney General commissioned a review of past criminal convictions where parents have been convicted of murder, manslaughter or infanticide of a child under two years of age. When the review is concluded, the findings will be published. In February 2004, the Minister for Children asked all local authorities to review the cases of children who are the subject of current care proceedings or where local authorities are exercising responsibility for children who are currently the subject of care and related orders. The results of the initial survey of this latter group, published on 17 June 2004, reveal that the number of cases in which disputed expert medical evidence features or is anticipated to feature is relatively small, arising in only 47 out of the 5,175 cases reported in the returns of 130 local authorities. The results of the second stage of the survey are expected to be published shortly.

3.9 The international dimension

3.9.1 All countries face issues of parental separation and encounter similar problems but often start from different positions. Whilst families may have a great deal in common the world over, the social and legal contexts in which people live differ greatly. Identification of particular aspects of other countries’ approaches and outcomes can often ignore crucial differences, including historical and cultural ones, that may materially affect any conclusions that can be drawn from the prospective application of those approaches here.

3.9.2 It is also important to be clear about what is meant by the terms used in other jurisdictions. Issues of current interest in other jurisdictions include support for shared parenting, for alternative ways of dealing with disputes outside courts, and if as a last resort a court order is made but a parent does not abide by its terms, what could be done to support the court’s decision. The paragraphs below review the approaches used elsewhere.

Shared parenting

3.9.3 Some confusion can arise from the terms used in different countries to describe arrangements. For example, shared, joint or co-parenting can have different meanings and practical implications in different countries. In Scandinavia, for example, “joint legal custody” is the norm, but this is different from, “joint parental decision making”, or “shared physical residence”. In Sweden joint decision-making is required, but shared physical residence is impossible, as a child cannot be registered at more than one address. In Finland a court cannot order shared residence, and in Norway it can be ordered but only where both parents agree. In Denmark neither joint legal custody nor shared residence can be ordered unless both parents agree.¹¹³

¹¹³ Ryrstadt 2003
Shared parenting is the term used in the Australian Family Law Act of 1995 Part VII which replaced the former division of roles into custody and access with a scheme designed to encourage parents who lived apart to raise their children collaboratively. This scheme closely resembles the provisions of our own Children Act.

3.9.4 Last year the Australian Government set up a commission to consider the proposal that equal time should be spent with each parent. The Commission’s report Every Picture tells a Story published in December 2003 rejected the idea of a joint custody presumption on the grounds that every family is different, and that the time a child spends with each parent should depend on the best interests of the child concerned. Instead the Commission recommended a rebuttable presumption of “equal shared parental responsibility” for separated parents which would require them to consult with each other about major decisions. But at the same time a presumption against such responsibility was recommended for families affected by entrenched conflict, family violence, substance abuse or established child abuse.

3.9.5 In Canada also there has been recent discussion of legislative reform. But in Bill 22, an Act to Amend the Divorce Act, the approach as described by the Minister of Justice is not to presume that any one parenting arrangement is better than others.

“We believe that such presumptions tend to focus on parental rights rather than on what is in the interests of the child”

3.9.6 Shared parenting, meaning for the child living in two places, has been studied in the UK. It was found that although such an arrangement can work well in the small group of parents where both parents are enthusiastic and put the children first, it was generally stressful for children particularly when there is conflict. The term collaborative parenting is becoming more widely used in the UK, where the Children Act gives responsibility to both parents after separation and the courts are only involved when there is a dispute, in which case they will guided by the best interests of the child.

International approaches to alternatives to court for conflict management and resolution

3.9.7 New Zealand is often perceived as a enjoying a low rate of court use in contact disputes. But it is important to note that in New Zealand the population is generally reluctant to use the court for civil and family matters. There seems a cultural instinct to avoid court-based interventions. Those who experienced highly-conflicted court cases were found to be characterised by characteristics such as untreated mental illness and lack of representation in court.

3.9.8 In Australia, Victoria Legal Aid is currently setting up a new dispute management service called Roundtable Dispute Management, which combines legal advice and representation with the aim of a less adversarial mediation style approach. The UK Government will continue to monitor this, and other international developments, to see what further lessons can be learned and applied here from experience elsewhere.

What happens when courts make orders?

3.9.9 A court order has a different meaning in different jurisdictions. In some countries the courts are required to make an order identifying responsibility for every child whose parents separate. In others, the making of an order may be a formal notice of an agreement worked out by the parents, or that a dispute between parents has proved intractable and required adjudication. It is the last group where problems may most likely continue after the making of the order if the child, mother or father is unhappy with the decision and unwilling to comply. All jurisdictions have provisions for dealing with those who fail to comply with the orders of the court and are in contempt of court, though approaches are different. These are commonly difficult to apply in the family setting, where attempts to intervene risk making matters worse for the child, whose welfare is the central concern.

3.9.10 In Australia judges were given the power to order parents who breached contact orders to attend a parenting support programme before resorting to the imposition of penalties. The early experience of this scheme suggests that its effectiveness has been hampered partly by the resources needed to implement this but also by the attempt to combine a disciplinary approach with a scheme designed to support parents who are struggling with their post separation parenting relationship and ongoing conflict. Perhaps the most successful scheme to date is, “Keeping Contact Going” by Unifam. This is based on making children’s views known to parents and providing individual sessions with a therapist for both parents and children. This accords with developments in Germany, where a child involved in a conflicted contact case is given individual support and parents receive counselling.

114 Rhoades and Nelson 2004
115 Martin Cauchon, 2002
116 Smart et al 2004
117 Barwick et al 2003
118 Rhoades 2004
119 Mueller Johnson and Maclean 2003, Johnson in press
3.9.11 The Australian Commission recommended a new system for dealing with parental disputes about children. This recommendation is for setting up a “Families Tribunal” staffed by lawyers and social welfare experts, which would have conciliation and decision making functions. All families where there were no issues of violence or abuse would use the Tribunal, and parents would be required to attempt mediation before applying. This proposal builds on recent developments in their family justice system which have attempted to move away from adversarial processes and practices, instead investigating and testing accounts of past events with reliance on expert reports, towards a more investigative approach. This approaches parental separation as being about relationships rather than the law. These new processes focus on the child, and the aim is to help parents manage their post separation parenting.\textsuperscript{120} It now seems unlikely that the tribunal recommendations will be followed, but a new initiative known as Family Relationship Centres to provide early and continuing advice in the community has begun.

Annex A

PROPORTION OF CONTACT ORDERS MADE BY CONSENT

![Graph showing the proportion of contact orders made by consent over time.]

Annex B

SUPPLEMENTARY QUESTIONS ON DOMESTIC VIOLENCE\textsuperscript{121}

1. In what proportion of divorce cases before the family courts is domestic violence cited?

Information is not collected on the number of divorce cases in which domestic violence is cited as an issue. In 2003, the reasons given for the breakdown of marriage were adultery (22\%), unreasonable behaviour (45\%), two years living apart (24\%), five years living apart (9\%) and desertion two years prior (0.4\%). Domestic violence could potentially be an issue in any of the grounds for divorce, but there is no evidence of proportions. It may be worth noting that nearly four times as many women (55,000) get divorces on the grounds of their husbands’ unreasonable behaviour as do men (14,000) on the grounds of their wives’ unreasonable behaviour. Clearly, however, unreasonable behaviour covers much more than domestic violence.


\textsuperscript{121} This note should be read in conjunction with the Department’s Memorandum of Evidence, in particular paragraphs 2.2.31–2.2.34 and 3.5.20
2. In what proportion of divorce cases where the custody of children is an issue, is domestic violence or abuse cited?

The Committee is referred to paragraph 3.5.20 of the Department’s Memorandum of Evidence where we indicate that about 30% of contact cases that go to court involve issues of safety, which includes domestic violence and other allegations of harm. The clarification of the definition of harm (paragraph 8 below) may lead to an increase in these figures and should certainly mean that allegations of domestic violence are considered and decided much earlier in the court process. The Committee should also note that contact cases include both married couples who separate and unmarried couples.

It is also worth noting that there is evidence that women and children are most at risk of violence post separation. Women are also at greater risk of homicide at the point of separation or after leaving a violent partner.122, 123

The Wade and Smart research reports that “mothers interviewed by Hester and Radford (1996) often felt coerced by court welfare officers into agreeing contact”. Other studies have found that mothers can feel pressurised to agree contact arrangements that they feel puts their own safety at risk (Aris et al., 2002).124

Following a six month public consultation on contact definitions and referrals by a DCA-led working group, new definitions on levels of contact services, making clear the minimum standards that contact centres should provide for supervised contact (in, for example, domestic violence cases) were launched in May 2003.

There are difficulties in standardising the definitions of domestic violence, and the variation in patterns of abuse ranging from short-term problems associated with separation to long-term instances of sustained abusive behaviour.

3. What follow-up mechanisms are there once domestic violence/abuse is cited? (ie does the court investigate? Are social services involved? Are the police and CPS involved at any stage?)

The Committee is referred to paragraph 3.5.20 of the Department’s Memorandum of Evidence. Where there are allegations of domestic violence, the courts must make a finding of fact regarding those allegations and then decide whether the findings should have any impact on decisions about contact.

If the court hearing family proceedings decide it is relevant, they can order disclosure of information held by the police, although certain undertakings of confidentiality and how the information can be used may need to be given.

On 1 December 2004 a new procedure is to be introduced in five areas of the country (Cumbria, Greater Manchester, Lancashire, Merseyside and the Metropolitan Police Area) for seeking disclosure, for the purpose of family proceedings, of material gathered by the police in connection with a criminal investigation or criminal proceedings.

The Protocol for the Disclosure of Police Information in Family Proceedings (“the Police and Family Disclosure Protocol”), which is to be operated as a pilot scheme in the five areas for a period of nine months from 1 December 2004, has been developed in extensive discussions between the Association of Chief Police Officers (ACPO), the Department for Constitutional Affairs (DCA), members of the judiciary and other interested parties, with the object of establishing a more effective and efficient way of dealing with the disclosure of relevant information held by the police.

4. What evidence is there as to the veracity of claims of domestic violence?

Data is not collected centrally on the number of cases where the courts make a finding of fact that domestic violence has occurred. Recent research undertaken for the DCA (Residence and Contact Disputes in Court, Smart, Wade and Furniss Research, Series 6/03) indicate that the key to whether domestic violence became a central issue in a case appeared to be whether or not the children had been either subject to, or witnesses to, violence. Allegations of violence between adults appeared to carry more weight if it could be proven that children had witnessed the violence between the parents and had been affected by this. Generally, this meant children being old enough to remember and recount their experiences. Where split findings of fact hearings were held the Wade and Smart research found that they usually concluded with findings in favour of the mother.

In the cases considered as part of the Smart, Wade and Furniss research (see 4.1 above), one in two cases involving allegations domestic violence resulted in an order for direct contact and in only nine out of 98 resulted in a final order for indirect contact.

122 Lees, S ‘Marital rape and marital murder’, in Hanmer J et al
124 The Lord Chancellor’s Department Research Programme Report: Safety and child contact: An analysis of the role of child contact centres in the context of domestic violence and child welfare concerns (December 2002, Research Series 10/02) contains further information on child contact where there has been a history of domestic violence
5. Are there any mechanisms in place to discourage false claims of domestic violence or abuse?

Findings of fact should be made as to whether or not any allegations are made out and those findings will be reflected in any decision made by the court regarding contact. The “Gateway Forms”, mentioned in paragraph 3.5.20 of our Memorandum of Evidence, will work against the late introduction of false claims of domestic violence for tactical reasons, should such a problem exist. The new forms will require both parties to state at the outset whether there are any issues of domestic violence. However, as mentioned at paragraph 3.5.20 of our Memorandum, these forms do not come into use until January 2005. Giving false evidence on oath is the criminal offence of perjury.

6. Parents are still currently entitled to see children, even where there have been claims of domestic violence. What safety mechanisms are there to protect parents and children, and monitor contact between them?

In considering contact applications, as in all matters relating to the upbringing of a child, the court’s paramount concern must be the welfare of the child. Case law has indicated that it is nearly always in the interests of the child to have contact with both parents. The Wade and Smart research says that “it is rare for a father to be refused all contact with his children”. In the research seven percent of contact cases initiated by fathers were dismissed and only one case ended with the court ordering no contact before the father withdrew his case. The Children Act Sub-Committee’s guidelines on contact say that the court should ensure that the safety of resident parents and children must be secured “before, during and after contact.” Additionally, the courts can order either supervised or indirect contact. (The Committee may wish to note that the Consultation Paper on Parental Separation (CM 6273, July 2004) clearly states that “after separation, both parents should have responsibility for, and a meaningful relationship with, their children, so long as it is safe”). Ten percent of finalised contact cases initiated by fathers in the Wade and Smart research resulted in an order for indirect contact. These cases usually involved allegations of domestic violence or child sex abuse.

A copy of the Children Act Sub-Committee “Guidelines for good practice on parental contact in cases where there is domestic violence” is attached.

7. Has there been any long-term funding put in place for contact centres?

The Department for Education and Skills has responsibility for contact centres, however the Committee’s attention is drawn to the Consultation Paper on Parental Separation (as in paragraph 6 above).

8. What evidence is there to demonstrate whether parents who commit domestic violence against each other also abuse children?

Section 120 of the Children and Adoption Act 2002 clarifies that the definition of harm includes harm suffered from witnessing abuse as well as being a victim of abuse. Linked procedural changes will assist in identifying cases of abuse at the earliest possible stage. It is intended that these changes will come into force on or about 31 January 2005.

It is known that women are more likely to be the victims of domestic violence and tend to be subjected to more sustained and severe violence. There is also evidence that children often witness domestic violence and are frequently victims of abuse where domestic violence takes place.

- In 90% of domestic violence incidents, the children are in the same or next room (Hughes, 1992).
- Nearly 75% of children on the “at risk register” live in households where domestic violence occurs (Department for Health, 2003).
- Reviews by Hughes et al (1989) of domestic violence studies have found child abuse and woman abuse occurring together in 40%–60% of cases.
- Domestic violence has the highest rate (44%) of repeat victimisation125 out of all violent crime.

Annex C

Letter from Baroness Ashton of Upholland, Parliamentary Under-Secretary of State, Department for Constitutional Affairs

I am writing to provide the additional information I offered during my recent appearance, accompanied by Margaret Hodge, before the Committee on 18 January.

However, I should like to start by re-iterating to you and your fellow Committee members how extremely sorry I am that, as a result of a communications failure, you were unaware of the change in venue for the press launch of the Government’s Report on the recent consultation exercise on parental separation. The decision to change the venue was taken late in the day as we were unable to obtain space of sufficient size in an area that could be considered secure other than in DIES’ premises. The alteration was communicated

to the invited members of the press by telephone but not, unfortunately, to yourself. Steps have now been taken by my officials to prevent this happening again. In particular, the Department’s team that liaises with your Secretariat will now automatically be notified of details of all Departmental announcements and key events, and will ensure that information is made available to you and the Secretariat as a matter of course.

Q403—Compulsory referral to education programmes

Ross Cranston raised the issue of referral of non-resident parents to specific education or perpetrator programmes. A draft Bill outlining plans to introduce new measures for enforcement of contact orders will be published for pre-legislative scrutiny shortly. The measures proposed in the Bill will include referral of a defaulting parent to a variety of relevant programmes designed to deal with contact disputes, including, where appropriate, perpetrator programmes.

Q406–Q408—Judicial resources

Ross Cranston also mentioned the figures provided to the Committee by this Department that show the increase in the number of High Court Judges for each Division of the High Court for the period 1979–2004. I omitted to point out to you although this was mentioned in our original submission to the Select Committee that the majority of family cases are heard either in the county courts or the Family Proceedings Courts rather than the High Court. In addition, we recently forwarded figures to your Secretariat, which I feel bear repeating, showing that in the 10 years from 1994 to 2003 inclusive, there has been a 56% increase in the number of sitting days in the High Court and county courts.

<table>
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<th>Year</th>
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<th>County Court</th>
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<td>14,965</td>
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<tr>
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<td>3,499</td>
<td>6,687</td>
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% Increase
1994–2003 12% 124% 37% 56%

I also mentioned that a review of judicial resources and needs is currently underway within the Department with the intention of advising the Lord Chancellor on what steps he may need to take on these issues. The matter of a possible increase in the number Family Division High Court Judges is part of the review and I will ensure that the Committee is advised of the outcome of that part of the review, along with any other decisions that might also be of interest.

Q421—Disclosure of information to MPs

Peter Bottomley raised the issue of constituents involved in family cases discussing matters with their Member of Parliament. As Margaret mentioned to you, this department is currently consulting on the “Disclosure of information in family proceedings cases involving children” and this consultation is due to end on 23 March 2005. We will publish details of the responses received as soon after that date as we are able to do so and proposed draft Rules of Court will follow with the aim of effecting the proposed changes during the Summer.

Currently, disclosure of such information by a constituent to a Member of Parliament is potentially a contempt of court and may, additionally, be a criminal offence. The Government tabled amendments to the Children Act 2004 to change the law surrounding disclosure, including by a constituent to their MP. However these amendments have not yet come into force.
I believe that the above information covers all outstanding issues for me as Margaret will be writing to you direct regarding the funding figures for CAFCASS that she mentioned in response to Q366 from Hilton Dawson.

As I mentioned above, I have asked my officials to ensure that you are kept informed of any developments on the issues surrounding the family court system. If we can be of any further assistance with this inquiry, please let me know. In the meantime, I understand that you anticipate publishing your report towards the end of February, and I look forward to reading what will, no doubt, be extremely constructive criticism of the current system.

Catherine Ashton
28 January 2005

Annex D

Letter from Margaret Hodge MP, Minister of State for Children, Young People and Families, to Ross Cranston MP

During my appearance before the Constitutional Affairs Select Committee on 18 January, I offered to write to you to clarify the position around the application to non-resident parents of the new disposals that our forthcoming draft Bill on contact will make available to the courts.

Specifically, you asked me about the proposal that was contained in the Making Contact Work report to refer a non-resident parent who was violent or in breach of an order to an education programme or perpetrator programme.

It remains our intent, as set out in paragraph 100 of the Parental Separation—Children’s Needs and Parents’ responsibilities: Next Steps document published on 18 January, that the Bill will offer the courts power to refer parties, including both resident and non-resident parents, to a range of relevant courses or programmes which could include perpetrator programmes where they would be appropriate.

It will be possible for a court to do this at any stage in proceedings, even before an order has been made, recognising that this power will be more a way of moving towards and facilitating positive contact arrangements than a sanction for breach of court orders.

I am copying this letter to all members of the Constitutional Affairs Select Committee.

Margaret Hodge MP
24 January 2005

Evidence submitted by Joshua Rozenberg, Legal Editor, The Daily Telegraph

As a legal journalist of 20 years’ standing, I would be happy to add my name to those supporting greater openness for family proceedings. 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.

In recent “right-to-life” cases, parties themselves have sometimes sought publicity. Although the interests of any affected child must be paramount, it would often be artificial to maintain secrecy if those most affected by a claim do not seek it.

On the whole, I think the press respect requests from the judiciary to preserve the anonymity of parties in family proceedings. These requests could easily be made mandatory. That might deter members of the public from putting information on the internet or foreign journalists from publishing information out of the jurisdiction.

If the courts are worried about the difficulty of enforcing reporting restrictions against members of the public, then judges should consider allowing only the press access to hearings or rulings. I believe this is still the position in youth courts and I don’t think there have been problems identifying bona fide journalists.

Occasionally, judges are more than willing for the press to publicise rulings made after private hearings. In the past, these tended to involve abducted children. Now, they are more likely to affect points of principle. In all such cases, it is essential to have a mechanism in place to ensure that all legal correspondents (and, ideally, all news media) have access to the judgment. The concordat with the Government envisages the long-overdue creation of a judges’ press officer. In the meantime, the DCA press office will offer its services.

At the moment, judges sometimes leave it to their clerks to alert the press. Clerks have no training in how to do this and I know of one incident this year where the judge’s clerk did not alert all those who would have wanted to know about a particularly newsworthy ruling. As a result, the judgment did not receive the coverage it deserved, at least initially.
In my view, the Family Division should be brought in line with other divisions of the High Court. The presumption should be that courts sit in public and their proceedings may be reported unless there is a ruling to the contrary, either in individual cases or in a class of cases. If information is restricted, misinformation will bubble up to fill the vacuum.

I would be happy to answer any specific questions the committee may have.

Joshua Rozenberg
Legal Editor
The Daily Telegraph
8 November 2004

Evidence submitted by John Sweeney, BBC Reporter

FAMILY JUSTICE: THE FAMILY COURTS

Since 2001 the BBC has investigated the possibility that the state has abused children by locking up their mothers or taking them away from their mothers on the basis of flawed evidence. The features of the Sally Clark case—she was freed in 2003 by the Appeal Court, at her second attempt—are typical: no hard evidence of abuse, no broken bones, no bruises, no history of abuse; no clear diagnosis of what went wrong; an assumption by an expert witness that it must have been foul play.

But what if the expert got it wrong?

In 2003 Sally Clark, Trupti Patel and Angela Cannings were all cleared of murdering their babies. The landmark judgment was made in December 2003, when Angela Cannings was freed by the Appeal Court thanks, in part, to fresh evidence provided by my colleagues Sarah Mole, Jim Booth and I. The criminal law was changed by Lord Justice Judge and others, so that no-one should go to prison again on the basis of expert witness evidence alone.

No such changes have taken place within the Family Court system.

I believe that the Family Court system is systemically unfair to parents accused of child abuse. This is because, firstly, the system is closed and takes places very much behind closed doors. Secondly, because the “primacy of the child” effectively over-rides and indeed reverses the presumption of innocence. Thirdly, because “expert” evidence outweighs that of lay people who know the family.

As a result of these three failures, my colleagues and I have been horrified to discover a series of what we believe have been a whole category of miscarriages of justice in the Family Courts.

1. 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 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. In the case of Child U, the mother was accused by an expert witness, Dr X, of trying to kill her child four times. He did not meet the family, the mother or the child nor did he take a family history—“could this be genetic?”—before coming to his conclusion. This appears to be a breach of guidance by the Royal College of Paediatrics. However, thanks to a Court Order by Mrs Justice Butler-Sloss we are prevented, “to protect the identity of the child”, from naming the doctor, his hospital, the city name of the social services department or the region in England where it lies. This has nothing to do with protecting the child but everything to do with protecting an “expert” and a social services department from public scrutiny.

2. “The primacy of the child” over-rides and reverses the presumption of innocence. Parents are placed in the appalling position of having to prove their innocence; if they do not know why their child is sick, they cannot and therefore they must be guilty.

3. “Experts” who don’t know the family count double over inarticulate relatives who do. The most dangerous kinds of experts are those who trumpet criminalising diagnoses without giving the benefit of the doubt to innocent explanations. Shaken Baby Syndrome and Munchausens Syndrome By Proxy are two such diagnoses. Munchausens is a criminalising diagnosis with no scientific validity. It is not in either the World Health Organisation or the US standard diagnostic bibles. The man who first identified it, Professor Sir Roy Meadow, comes before the General Medical Council next year for ramping evidence against cot death mothers like Sally Clark and seven cases in the Family Courts.

I would be more than happy to expand on these points in person if the committee thought that might be useful.

John Sweeney
8 November 2004