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Justice Committee

Pre-legislative scrutiny of the Children and Families Bill

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Volume II

Additional written evidence

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The Justice Committee

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The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Nick Walker (Clerk), Sarah Petit (Second Clerk), Gemma Buckland (Senior Committee Specialist), Helen Kinghorn (Committee Legal Specialist), Ana Ferreira (Senior Committee Assistant), Miguel Boo Fraga (Committee Assistant), Greta Piacquadio (Committee Support Assistant), George Margereson (Sandwich student), and Nick Davies (Committee Media Officer).

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List of additional written evidence

Written evidence

Written evidence from ADCS (CFB 01)

1. Introduction

1.1 ADCS is the national leadership organisation in England for directors of children's services appointed under the provisions of the Children Act 2004 and for other children's services professionals in leadership roles. The statutory role of director of children's services (DCS) was created by the Children Act 2004 to establish a single point of leadership and accountability for services for children and young people.

1.2 The roles of directors of children's services and ADCS are of particular significance in the light of this scrutiny. Directors of children's services are responsible for the work of local authorities in identifying children in need and at risk and making application to the courts in care proceedings. Moreover, directors are the lead accountable officers in the local authority role as "corporate parent" for all children within the public care system.

2. Summary of key points

2.1 ADCS welcomes the draft legislation on family justice, which we believe is a good reflection of the recommendations of the Family Justice Review. We welcome the focus on increasing understanding, cohesion, professionalism and trust across the system, which will reduce delays that exacerbate the difficult circumstances children live in and have a detrimental impact on their outcomes. To work towards the system-wide transformational change aspired to, we believe the provisions of this legislation should be adopted in full.

2.2 ADCS is committed to working with Government, CAFCASS and our partners to help facilitate changes in practice that will give courts confidence in social workers' representations and enable local family justice boards to effectively monitor and improve local performance of courts and local authorities.

3. Limiting Expert Evidence and Equipping Social Workers for Their Increased Court Role

3.1 We welcome the draft provisions to limit the use of experts where appropriate. Experts can, in exceptional circumstances, make effective contributions to the outcome of these cases but we fully concur with the evidence outlined in the Family Justice Review that the use of experts has become excessive and indiscriminate, and that there is no coherent evidence base to support the current pattern of use, the costs expended and the delays incurred. Reducing the use of experts will significantly reduce delays in proceedings that exacerbate the difficult circumstances children live in and have a detrimental impact on their outcomes. We welcome the work Government has undertaken with partners to revise the Family Procedure Rules with respect to the use of experts in proceedings in advance of the legislation.

3.2 We particularly welcome the focus in the draft provisions on greater clarity of expectations of evidence when a court does give permission for an expert to be instructed, including setting out the issues to which expert evidence will relate and the specific questions the expert evidence should answer. We believe the provisions on the use of experts could be further strengthened by greater clarity on what constitutes an "expert" and an "exceptional circumstance" and would welcome urgent work to create a register of experts, which would give courts confidence in the knowledge base and reliability of those they instruct.

3.3 We acknowledge that, in practice, reducing court reliance on experts will require skilled and highly trained social work practitioners to give courts confidence in their assessment and recommendations. We acknowledge that although many elements of good practice have been identified, the on-going reforms of the social work profession are welcome and necessary in order to improve the consistency and quality of new entrants to the profession and boost the professional confidence and expertise of the existing workforce. We are already working hard with the Children's Improvement Board and our partners to achieve this.

3.4 ADCS is working with CAFCASS to develop a sector-wide model of family court social work in which all social workers could practice to a high standard. We will work closely with colleagues in adult social care through the Association of Directors of Adult Social Services (ADASS) to ensure appropriate alignment between children and adults social care in this work, for example in terms of input from care managers where parents have mental health problems.

3.5 Work is also underway to develop and make available evidence resources to social workers and courts to improve practice and help inform decisions:

- New materials are now available to social workers to support professional development and to build inter-professional understanding of social worker expertise and role in the family court, such as the Research in Practice "Evidence Matters" resource suite.
- We are offering support to Justice Ryder to develop his suggestion for an "evidence bank" of research that will become a resource used by family court judges, drawing on the high quality C4EO Validated Local Practice Model and brokering involvement of Research in Practice in order to develop the evidence bank of academic research.

4. Time Limits: Progress to Achieving the 26 Week Time Limit

4.1 We welcome the renewed focus on reducing the time taken to complete proceedings. We are mindful of the history of continuing and increasing delays in these cases which represents a crisis for the system and for individual children. We share the view that because the system has not achieved change despite many attempts over many years, this intervention through primary legislation is welcome and essential. We recognise and welcome the additional pressure it will place on local authorities as well as the courts in the short term to improve performance.

4.2 Our members are reporting that since the Family Justice Review and the Government's supportive response, progress is already evident in some areas, led by strong local judicial management, closer working between senior judges and local authorities and enhanced performance management within local authorities in anticipation of the legislative change. We believe that if the legislative changes were not to follow that would represent a serious detriment to children. We are aware that the move to introduce, informally, the norm of listing final hearings at 26 weeks has caused concern that courts might be making decisions without the weight of evidence previously available to them as the supporting information from local authorities may not yet be presented to the new, higher standard. We have no evidence to support these fears and note that courts are setting appropriate timetables when expert opinion is needed. The following examples may assist.

4.3 In the Tees-side Courts Centre, the senior judge implemented a 26 week timescale for all family proceedings cases from January 2012. Feedback to local authorities in August 2012 indicated that as a result of commitment from all parties, the 26 week timescale was being supported and met in the majority of cases. The senior judge is demonstrating leadership across the county courts and is trying to influence magistrates to reduce delay by identifying at an early stage where experts are required and for what reason. This avoids experts being requested simply to challenge the local authority position. Representatives of the group of local experts have been invited to meet with the judiciary. Progress is being made towards applying much greater clarity than previously existed to the specific areas that experts are being asked to address and comment on, within clearer timescales.

4.4 This close working is showing benefits in other aspects of cases, for example the judiciary has engaged with local authorities to discuss and focus on key issues that affect the wellbeing of children subject to proceedings such as contact. The senior judge was a recent keynote speaker at a regional conference in which the expectations of local authorities on contact were clarified, in order to assist the judiciary in their assessment of appropriate levels of contact.

4.5 The Tri-borough local authorities (Hammersmith and Fulham, Kensington and Chelsea and Westminster) are working with the judiciary, the court services, CAFCASS and other key stakeholders through the Care Proceedings Pilot to minimise unnecessary delay and meet the 26 week target for duration of proceedings. The Care Proceedings Pilot commenced on 1st April 2012 and will last for 12 months during which time it is estimated up to 100 cases will be heard.

4.6 Key stakeholders including the local authority social work and legal departments, CAFCASS, the court staff and judiciary, have all made commitments to change the way they operate with a shared goal of:

- improving the quality of local authority evidence presented to the court;
- ensuring early allocation and case analysis from CAFCASS guardians;
- providing judicial continuity and social worker continuity for every case;
- reducing the delay caused by additional assessments; and
- tracking cases and creating a feedback loop to enable stakeholders to learn and adapt as the pilot progresses.

4.7 By the end of September 2012, the half-way point of the pilot, promising indicators of success were already apparent. A number of the early cases have completed within the target 26 weeks and there has been a reduction in numbers of hearings and additional assessments. Lessons from the pilot are already being disseminated to other London boroughs and with funds from Capital Ambition, project resource time is being provided to help agencies across London implement similar models in their areas. An independent evaluation of the pilot will be commissioned and is expected to report its findings by the end of June 2013.

4.8 ADCS is supporting the work of the Family Justice Board in developing the role and effectiveness of Local Family Justice Boards in monitoring and improving local practice. We fully support the clear and comprehensive role of the Family Justice Board and the need for strong, consistent local arrangements to reflect that role. For example, we have convened a sample group of local authorities to produce an outline of the information local systems can collect for themselves to supplement national Key Performance Indicators so that they may identify and unpick variation in performance and approach of local authorities, CAFCASS and different local family courts. We are also contributing to the development of proposals that ask Local Family Justice Boards to future forecast for 18 months ahead to identify local scheduling pressures and plan to mitigate them.

5. Care Plans: Restricting the Judge's Role to Considering Only the Permanence Provisions of Care Plans

5.1 We strongly support the provisions aimed at refocusing the work of the courts on the fundamental question of whether care is in the child's best interest, and less on the local authority care plan. We agree that the Judge's role should be restricted to considering only the permanence provisions of care plans. We do not believe this is will fetter judicial discretion or independence and we fully accept and welcome the critical role of the courts in testing and challenging the key aspects of the local authority's application for a care order and the broad parameters of a care plan. We accept the analysis from the Family Justice Review that the incremental involvement over time of the courts in the close detail of care planning is beyond the terms and principles of the Children Act 1989 and is an inevitable and significant contributor to damaging delay. Again we see no alternative to tackle this other than through primary legislation.

5.2 Care plans and what is in a child's bests interests must emerge over time and be flexible to changing circumstances. Local authorities will still be expected to produce care plans and there is a specific role for directors of children's services and lead members in monitoring the delivery of plan.

5.3 We believe that alongside these proposals, Professor Munro's recommendations on the specific capabilities required for child protection social work, in particular her emphasis on a child-focussed approach that is flexible and reached through reliance on greater professional judgement over prescriptive procedures, will help local authorities in effectively preparing for court.

6. Private Law

6.1. While the principal focus of the Association's interests is on the public law elements of reforms, we believe elements of the private law provisions could carry implications for local authority social work teams and public law caseload:

— We are concerned that the draft provisions on reducing the publicity of mediation services if resulting in a decreased use of mediation could lead to parties taking increasingly adversarial positions which in turn could potentially lead to more allegations and more Section 37 investigations into a child's circumstances.

— We are concerned by the potential impact of changes in qualifying criteria for legal aid, particularly the potential increase in allegations of domestic violence in order to unlock legal aid resources.

— We are concerned that the massive increase (currently being experienced) in the numbers of private law cases in which neither party has legal representation could exacerbate both the problems outlined above and result in courts seeking greater involvement of local authorities to address safeguarding concerns.

6.2. We also remain concerned that proposals for a new presumption of equal parenting may constitute a move away from decision making focussed on the centrality of the individual child's needs.

October 2012

Written evidence from the Magistrates' Association (CFB 02)

Attached are two additional documents for your detailed information, which we have referred to within our evidence:

(1) MA response to consultation on changes to the Family Procedure Rules on Experts (paper 12/55).

(2) MA response to consultation on co-operative parenting (paper 12/46).

— The evidence below has been considered by the Family Courts Committee (FCC) of the Magistrates' Association, which represents family magistrates sitting in Family Proceedings Courts (FPCs) in England and Wales. There are over 5,000 family magistrates selected from all backgrounds, age groups and ethnic groups. They are unpaid but receive special training and are regularly appraised. They are assisted in court by a qualified legal adviser.

— Sitting as a bench of three, family magistrates, with their legal adviser, conduct case management. The magistrates make final decisions and orders for both public and private law applications. In the decision-making process, they scrutinise the papers, hear evidence and representations and order reports. The welfare of the child is paramount and they are always mindful of avoiding delay. They are, however, dependent on the parties and agencies and, where appropriate, experts filing statements and reports as directed.

— FPCs usually hear matters lasting up to five days duration. Longer and more legally complex matters are transferred to the County Court.

— Addressing directly the terms of reference of the Select Committee, we would like to submit the following evidence.

1. Mediation

1.1 The MA supports the overall objective of promoting the resolution of disputes away from court wherever possible. We are therefore in favour of the new provision requiring the person who proposes to make the application to first attend a meeting to receive information about mediation and other means of resolving a dispute without going to court. We believe this compulsory attendance should apply to all family cases including those which are privately funded (with limited exemptions).

1.2 However we do have serious concerns about the possible adverse impact of the restrictions on legal aid in Private Law cases that are due to come into effect in April 2013. While the Government seems to assume that the change will result in parties being more willing to move to mediation, we are not so certain. Our experience in many cases is that the parties we see in court have had the opportunity to access mediation and have refused that chance. If fewer parties have the benefit of legal advice even more of them may go down the adversarial route. If that is the case, then further delays in the legal process are likely to occur as the courts are obliged to deal with increasing numbers of self-represented litigants.

1.3 A related issue is whether or not there is likely to be an increased call on Cafcass resources by the courts when dealing with self-represented litigants eg in seeking the views of child(ren). The Select Committee may wish to pursue this line with Cafcass.

(a) *The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the MIAM (Mediation, Information and Assessment Meetings) system and whether they will be effective.*

1.4 The use of the C100 application form in identifying potential risks to the child(ren) and the professionalism of the Cafcass officers are the key early filters in assessing risk in the MIAM system. The C100 form may need to be looked at again.

1.5 Equally the availability in domestic violence cases of legal aid will impact on highlighting these cases. However, respondents at risk may well require help in writing their initial responses. Who will provide this help? There may well be cases where respondents are unaware that their cases should be filtered out and for them to "slip through the net" and go for mediation. In such circumstances it will rely on the expertise and training of the MIAM officers to be able to identify such "at risk" cases. Have they got the appropriate training to be able to identify these at risk cases which slip through the net? If not, what are the plans to ensure such training is delivered and that this is part of the accreditation process?

(b) *The role of officers of the court in the MIAM process*

1.6 The role of the court starts at the first hearing. It is for the Cafcass officer to make it clear what risk assessments have taken place and what their initial position is, backed up by the evidence. The court should ask whether the parties are aware of the MIAM process, whether they have been offered an appointment and what their responses have been.

1.7 The experience on Merseyside, for example, is that a leaflet goes out with the application form. There is a very poor uptake. The First Hearing is a lot more productive. The initial stage is for the legal advisor sitting with Cafcass officer to attempt to resolve the issues. Files on unresolved cases are marked up by the Legal Adviser and the matter put before a bench. The bench knows the issues from the file before meeting the parties.

(c) *Are there any gaps in the process and if so who will fall through and what safeguards are needed?*

1.8 The MA is particularly concerned about the possible impact of the severe restrictions on legal aid in private law cases that are due to come into effect in April 2013. These restrictions could cause further delays due to the need to assist unrepresented parties through the court process. This may lead to some parents being placed in a difficult position and more cases being fully contested in court. This is particularly the case for cases that are not deemed suitable for mediation but do not fall into the categories that are eligible for legal aid. The organisation Gingerbread refers to these cases as "in-betweeners" who fail to get legal aid for private law proceedings but who are found to be unsuitable by mediators due to the level of conflict or lack of participation by the parties. In these cases CAFCASS should become involved.

2. Child Arrangement Orders

(d) *What is the effect of the amendments to section 11A to 11P, is it simply a shift in focus to remove the perception of winners and losers?*

2.1 The MA, in our response to the FJR, advocated the replacement of residence and contact orders by a new order—the child arrangements order—to help focus attention on children's needs and reflect the paramountcy principle and lessen the perception of "winners and losers" in court cases.

3. Expert Evidence

(e) *Does the new test adequately safeguard against miscarriages of justice?*

3.1 We have already stated on our response to the consultation on use of experts—Family Procedure Rules—(attached for information, paper 12/55) that the use of expert witnesses has to be *necessary* to assist the court in resolving the proceedings. If the local authority pre-proceedings work and its application is well prepared then the need for expert evidence is clearer.

(f) *Are social workers receiving the support and training they need to meet this increased court role?*

3.2 No comment. We would hope that the Munro reforms will deal with this issue.

4. Time Limits

4.1 When matters are brought to court, hearings should be focused on the issues, comprehensive information should be available, a timetable for the child be made and adhered to and a final decision made in accordance with the PLO guidelines. Issues should be identified early on and positions clarified.

4.2 Further to this, the view of the MA is that there should be far more "front loading" before cases come to court and that protocols should be developed with all interested parties.

(g) *What progress has been made to achieve the 26 week limit?*

4.3 Most courts and local authorities are endeavouring to move towards the 26 week time limit but some local authorities still have some way to go to get their pre-proceedings work in sufficient order to make it happen, including family group conferences and parallel planning (especially an issue of import with pregnant women when there is very little hope of them keeping their children). Protocols are being developed between the courts, local authorities and relevant agencies in some areas, eg in Nottingham, this has to be encouraged. There are still a lot of differences between local authorities in terms of their practices.

It is encouraging that Cafcass figures from January 2012 to August 2012 show a fall in duration of cases from application to completion from 53.4 to 35.1 average weeks.

4.4 In London the tri-borough project appears to be making some progress towards streamlining this with regard to documentation but it is still early days and it is likely to take some time before pre-proceedings work by local authorities is at a level and consistency where 26 week limits can be the norm.

4.5 As magistrates we support the 26 week limit in principle for the majority of public law cases and we are committed to do all that we can to make it effective by effective case management. The judiciary has to be vigilant not to allow drift for example where an application is made for an adjourned CMC where it is not clear from all the parties what further evidence is required.

5. Care Plans

(h) *Should the judge's role be restricted to considering only the permanence provisions of care plans?*

5.1 In many cases the care plan or one or more aspects of it are crucial issues as to whether parents with agree (or at least not oppose) orders or fully contest them. If we are excluded from any significant consideration of care plans it could actually end up with more cases being fully contested and therefore add to delay rather than shortening proceedings. Therefore there needs to be a balance between courts not trying to micro-manage care plans, while taking into consideration aspects that go to the heart of the local authority application. The issue is the materiality and impact of changes on the child/ren. Every case is different and should be treated on its merits with regard to the paramountcy principle.

5.2 As the court is making a final welfare decision for the child it is incumbent on the court when doing so to form a view on what is in the best interests of that child. If the case involves siblings, it will almost invariably be the case that it is in their best interests to share the same permanent placement. If the court is to be restricted to considering only the permanence provisions, the MA would wish it to be made clear that this includes it being able to consider the issue of sibling placement in the relevant care plans and to make recommendations.

6. Divorce

(i) *Do the suggested provisions remove an important safeguard for children?*

6.1 No comment.

7. Enforcement and Shared Parenting

7.1 The MA has already put in a submission to the Department for Education consultation on this matter (attached for information, paper 12/46).

October 2012

Annex A

The following is the response of the Family Courts Committee of the MA to the proposed changes on Family Procedure Rules concerning experts.

1. *Do you agree that active case management should explicitly include controlling expert evidence in family proceedings other than those relating to children?*

We agree with this statement. Our view is that the case management role should be more robust in the instruction of experts in the interests of the child.

2. *Do you agree that the criterion that expert evidence must be "necessary" rather than "reasonably required" should apply to family proceedings other than those relating to children?*

We agree and think it is key that "reasonably required" should be changed to "necessary" in family proceedings other than those relating to children.

3. *Do you agree that the court should explicitly consider the factors set out in new draft Rule 25.5 (3) when determining whether to give permission for expert evidence to be used in family proceedings other than those relating to children?*

Yes, we agree that the courts should explicitly consider the factors as set out in draft Rule 25.5 (3)—as below. The courts must be able to take the case further, responding to the court's need for specific information.

4. *Do you have any other comments on the proposed amendments?*

(a) To promote robust case management in respect of experts, we feel training for all those involved will be important in giving magistrates the confidence in weighing up submissions of the use of experts and would ask for this to be included in any forthcoming training under the new family justice system.

(b) We suggest that if one party calls for an expert report then all parties should present their views, by submissions, prior to the hearing.

(c) What will be crucial for the courts is having sight in due course of the Family Court Guide "How and when to use an expert" which is proposed in Mr Justice Ryder's report (at page 10 in this consultation document) which will support the pathways to assist courts in achieving quality case management decisions which will start with the proposed rule changes.

Annex B

Introduction

1.1 The Family Courts Committee (FCC) of the Magistrates Association (MA) welcomes the opportunity to respond to the Government Consultation on proposed legislation on Co-operative Parenting Following Family Separation.

1.2 We represent magistrates sitting in Family Proceedings Courts (FPCs) across England and Wales that regularly hear s.8. Children Act Private Law Cases involving disputes between separated parents regarding their children.

1.3 Most separated parents reach amicable solutions on the care and upbringing of their children. Sadly, some 10% of these families are unable to do so and resort to the courts to resolve their differences regarding their children. We support Government initiatives to promote alternatives to legal action, such as mediation, so that fewer parents rely on courts as the final arbiter.

Background

2.1 In its written and oral submission to the Family Justice Review (FJR), the FCC confirmed the commitment of all FPCs to the paramountcy of the welfare of the child as set out in S 1 of the Children Act 1989. All decisions made in the FPC are supported by written reasons.

2.2 In considering the welfare of the child, the court has to consider the evidence of both parents, look for areas of agreement between them and consider the wishes and feelings of the child. Parents often become entrenched and bitter towards each other and the hearings are sometimes difficult. In accordance with the Act magistrates always focus the welfare of the child in reaching decisions and there is no evidence to suggest that is not the case.

2.3 If appropriate, current legislation expects that a shared order should be made, its form depending on the circumstances. The FCC welcomed the FJR's support for this view in its recommendations.

2.4 In its conclusions the Justice Select Committee also supports this view.

2.5 The FCC agrees that compliance with the court order could be strengthened. Progress has been made following the introduction of contact activities, and the strengthening of the warning given to parents when the order is made.

Other Government Initiatives

3.1 We welcome the Government's proposals to make attendance at a Mediation Information and Assessment Meeting a prerequisite for making an application to court—with appropriate safeguards built in for cases of genuine urgency and/or where there is a risk to the child or other family member.

3.2 For cases that do go to court, we support the Government's intention to replace the existing contact and residence orders with a Child Arrangements Order. This change focuses attention clearly on the child's needs and moves away from the perception of parents as winners and losers.

3.3 However, the FCC does not accept the Government's assertion that currently courts do not fully recognise the important role that both parents play in a child's life. Our duty under the Children Act involves the protection of children against abuse, neglect, domestic violence as well as deciding on conflicting claims and applications by separated parents. Many children in families have different fathers, with different family structures evolving during their childhood often leading to complex family dynamics. Rather than children's needs being overlooked, the court considers their welfare is paramount. Each case is different and decided on its own merits. The large majority of decisions on parenting involve a continuing role for both parents, depending on the circumstances and practicalities in each case. Courts do not begin with any presumptions in favour of either parent.

4.1 We do not accept that a change in primary legislation is required. Under existing legislation in s. 8 of the Children Act a Shared Parenting Order can be made if that is in the best interests of the child. Indeed, the guiding principle of the Children Act is the paramountcy of the welfare of the child and not the rights of the parents. Parental Responsibility is now automatic for fathers, whose name appears on the child's Birth Certificate.

4.2 The consultation is vague regarding the detail of what a shared parenting order would involve that is different from what is in the existing legislation. The consultation states that it is "categorically not about equality in the time that a child spends with each parent after separation. There is no intention that equal time, or indeed any prescribed notion of an "appropriate" division of time, should be the starting point of the court's considerations. The quality of time a child spends with each parent, the need for stability in a child's life, and the sustainability of arrangements are the most important factors". Where cases require a court decision it is because a prescriptive order is needed to resolve a dispute and to promote compliance. An order that is not prescriptive would be difficult to enforce.

4.3 A legislative amendment as proposed could lead to increased litigation and be counterproductive in resolving conflict. In addition, following the implementation of the Legal Aid Sentencing and Punishment Act 2010 it could give rise to an increase in litigants in person.

Other Jurisdictions

5.1 We consider that the evidence from other jurisdictions cautions against following a similar approach. We agree with the representations made in the letter of the Chairman of the Justice Committee: "We do not consider that the current draft clauses avoid the pitfalls of the Australian experience. It appears that the Department for Education considers that avoiding words such as 'equal time' or 'meaningful relationship' is enough in itself; we disagree."

5.2 In addition, we understand that in Denmark, consideration is being given to repealing similar legislation.

Enforcement

6.1 We agree that enforcement measures require strengthening.

6.2 Increased compliance has occurred following the introduction of the warning notice given when an order is being made. In some instances parents are also ordered to take part in contact activities. In particular, the introduction of Parenting Information Programmes has been successful in promoting parental involvement in the interests of the child.

6.3 We are concerned that the level of fee payable by the father to bring enforcement proceedings is too high and may prevent fathers from bringing further court action.

6.4 Proposals to adopt sanctions similar to those available for child maintenance defaulters are too draconian. We consider that the payment of maintenance is a different issue to promoting parental involvement with the child. Consideration should be given to the impact of sanctions on the child. For example, the withdrawal of Passports and/or Driving Licences could be disadvantageous to the child and make shared parenting more difficult instead of promoting it.

Draft Clauses Outlined in the Proposal

Option 1—Although this clause relies heavily on "presumption", there is no explanation on what this means. It would appear to rely heavily on risk assessment for the child where there may be a concern over the welfare issues.

Option 2—This clause does not explain the meaning of "involvement of the parent". This is likely to vary case by case and could lead to long arguments over details as many applicants could well require a prescriptive order.

Option 3—The concept of a "starting point" is confusing. Each case is decided on its merits.

Option 4—We consider this is covered by the Welfare Checklist already.

Summary

The MA welcomes involvement and responsibility exercised by both parents in the interests of their child. It is concerned however that the proposal to build it into primary legislation undermines the current duty under the Children Act 1989 that in the Family Court the welfare of the child is paramount. Under the Children Act 1989 the court has a duty to hear the voice of the child and assess the impact that any order is likely to have on the child. There is a danger that this proposal could result in inappropriate arrangements in some cases that would not be in the best interests of the child. We therefore argue that courts should retain discretion to make decisions in each case on the basis of evidence and representations and not be restricted by any apparent legislative presumption.

Written evidence from Other Spaces Ltd (CFB 04)

I only had chance to whiz through the practice direction linked here *[viz. Practice Direction 12A]* and wondered whose responsibility it might be to identify potential kinship carers that the birth parent(s) *don't* want. I may have missed a more substantive reference, but found this at 13.3 (6) that leaves it ambiguous as to which body must make the necessary inquiries beyond simply asking the birth parent(s):

(d) the identification of family and friends as proposed carers and any overseas, immigration, jurisdiction and paternity issues;

Sometimes parents will not identify family members they have fallen out with, perhaps recently as a result of their having raised the alarm about the parenting shortfall in the first place—or some other reason that lacks focus on the child(ren). Is there any compunction on the applicant to seek out such family members, who might potentially offer the best plan for the child regardless of the birth parents' wishes? I realise the lack of support from the birth parents provides for a disadvantage from the start (promoting contact, etc) but this may prove to be outweighed by other factors as the case progresses.

October 2012

Written evidence from the Legal Committee of the National Council of HM District Judges (Magistrates' Courts) (CFB 06)

This response to the draft family justice clauses of the proposed Family Justice Bill is submitted by the Legal Committee of the Council of Her Majesty's District Judges (Magistrates' Courts). There are presently some 150 District Judges (Magistrates' Courts) in England and Wales, the majority of whom exercise a jurisdiction in public and private law children work in the Family Proceedings Court. We share our jurisdiction with almost 26,000 magistrates. Our response is intended to be limited to legal and procedural issues; we make no comment on matters of policy.

1. Summary

1.1 Encouraging parents to explore alternative ways to resolve disputes prior to the commencement of court proceedings is to be welcomed. There should be no easy opting out of a Mediation Information and Assessment Meeting (MIAM). Any gate keeping preventing court applications before participation in a MIAM needs to be judicially managed to protect proper and free access to justice.

1.2 The proposed introduction of child arrangement orders is largely cosmetic and will make the existing legislation in the Children Act 1989 more complex, for little or no overall benefit. In anticipation of the expected increase in unrepresented parents in family proceedings, the aim should be to simplify the law.

1.3 The proposals to enable the court to regulate and restrict expert witnesses will encourage the parties to concentrate on the core issues, save public money and enable the courts more easily to achieve the 26 week target for conclusion of care proceedings. However, where the court determines that an expert is necessary, proper public funding arrangements need to be in place to enable the expert to be instructed, prepare a report and, if necessary, attend court, if potential miscarriages of justice are to be avoided.

1.4 The courts are already working towards achieving the 26 week time limit. The proposals for controlling experts and restricting scrutiny of care plans, together with the case management tools already available to the courts, will further assist progress. Properly resourcing and funding those involved in the process is necessary to avoid backlogs and delays outside the control of the court.

1.5 Restriction of the scope of the court's scrutiny of the Care Plan will enable the court to concentrate on the key issues.

2. Mediation

2.1 The limited circumstances in which parents might be eligible for Public Funding, brought about by changes in the funding arrangements, means that the court can expect ever increasing numbers of parents coming before the courts to resolve issues concerning the welfare of their children without the benefit of legal advice and representation. The courtroom is ill-suited to resolve family issues between non-represented parties who are likely to harbour strong feelings left over from the breakdown of their relationship. Accordingly, any measures that seek to encourage mediation or other forms of resolution are to be commended.

2.2 The essence of mediation and compromise is that the parties are able to meet and express views on an equal basis. It is entirely proper to identify those cases that do not lend themselves to mediation, such as those where domestic abuse has taken place. However, the regulations need to be sufficiently robust that a party is not able to avoid a MIAM simply by ticking the "domestic abuse" box on the form. Similarly those assessing cases need to be mindful of other pressures that might make mediation inappropriate. An example would be cultural pressures such as those sometimes imposed on women in Asian families.

2.3 Equally, parties must not be denied access to the court. Where an officer of the court refuses to deal with an application without the applicant first attending a MIAM or where there is an issue whether the requirement to attend a MIAM has been complied with, there must be a process of review by a judge. Any such review should be undertaken swiftly and this is of particular importance where the application is said to be urgent. It is essential that any refusal to allow access to a court is a judicial rather than an administrative decision.

3. Child Arrangement Orders

3.1 The purpose of the reforms suggested in the Family Justice Review by the removal of the concepts of residence and contact from the Children Act is to move away from the idea of winners and losers.

3.2 The Children Act 1989 made a significant change to the law relating to children by separating the responsibilities of parents towards their children concerning their welfare and upbringing (parental responsibility) on the one hand and where the child should live and visit (residence and contact) on the other. Although the old idea of "custody" seems to have prevailed in press reports and the minds of the public and a new word "residency" has appeared in court vocabulary, the changes in the Children Act brought a sea change in the way courts and practitioners approached family cases.

3.3 The idea of winners and losers remains. It will never go. The parent who manages to secure a child to live with them will always be regarded as the winner whatever terminology might be used by the courts.

3.4 Whilst the draft proposals do abolish "residence" and "contact", they do so by substituting "an order regulating with whom a child will live" for residence order and " an order to spend time or otherwise have contact with a child" for contact order. The distinctions between residence and contact orders and the consequences that follow the making of the respective orders remain identical. However, the consequential amendments to the Children Act to accommodate the new terms make it considerably more "wordy" and significantly more difficult to understand.

3.5 It is increasingly becoming the case that parents in family proceedings are unrepresented. The Children Act 1989 is a difficult Act for lay people to follow as it stands, without complicating the language in the way proposed in the Bill. Unless real benefits can be identified, the price to be paid in complicating the legislation will be too high and needlessly make the task of the courts and CAFCASS more difficult.

3.6. It must be acknowledged that more needs to be done. Often parents are heard to be arguing about whether the order should be "joint residency" or "residence and contact" when the terminology has no practical effect other than the perception of whether a parent has won or lost. This can be addressed within the present regime by the careful use of language by the courts in the orders made.

3.7 The reforms proposed in the Bill will do nothing to address these issues. The phrases "live with" and "have contact with" will continue to appear in court orders as now, even with the proposed new legislation. Laudable though the aims of the Bill may be in this part, the proposed reforms will be purely cosmetic and will substitute for the existing, clearly defined and understood terms wordy phrases which are likely to hinder rather than help.

3.8 The only significant change appears to be the power to give parental responsibility to a non-parent where a contact order is made in the new section 12(2A) to the Children Act inserted by clause 21(4) of Schedule 1 to the Bill.

3.9 The notes indicate that circumstances in which a court might exercise this power are rare, but it is in fact difficult, if not impossible, to envisage any circumstances in which a court might think it appropriate to make an order for parental responsibility to a non-parent with whom the child will not live. The fact that it appears on the statute book is likely to encourage such applications to be made and might thereby encourage fruitless litigation. Unless a practical application can be identified, the better option would be to omit this clause.

4. Expert Evidence

4.1 The fashion has developed over the years whereby it is thought necessary to seek expert evidence to deal with almost all issues that arise in public law cases. The ability of the court to limit expert evidence to that necessary to enable the court to make its decision will be an important tool to ensure that time (and public money) is not wasted on experts who do not really advance the case and do no more than confirm what the court already knows or that which a competent social worker could assess in any event.

4.2 As it will ultimately be for the court to assess whether an expert is necessary, if the court feels that a particular piece of work needs to be done by an expert it will be authorised. In that way, any potential miscarriage of justice should be avoided. However, as experts' reports are usually funded at least partly from the publicly funded parties' certificates, safeguards need to put in place such that should the court determine that a particular expert is necessary to enable the court properly to decide the issues, the instruction of the expert is not frustrated by the Legal Services Commission refusing to pay, or by offering such low rates of remuneration that it is impossible to find an expert who is competent and able to report within a reasonable timescale consistent with the timetable for the child.

5. Time Limits

5.1 Much has already been achieved within the current regime to reduce the time taken to finalise care proceedings, although 26 weeks is still the exception rather than the rule. The court's ability to restrict the use of experts and the narrowing of matters to which the court should have regard in the Care Plan will further assist the court to achieve this goal.

5.2 However, the reality faced by the courts is that budgets of Local Authorities are very tight and as a result resources are spread very thinly. Social workers' caseloads are typically heavier that they can properly manage and those involved in assessments are encumbered with backlogs. The result is that even the most straightforward assessment of a parent or a potential family carer can take 16 weeks or more. Those holding the purse strings need to appreciate that unless these difficulties are addressed, no amount of court case management will bring a resolution of a case within 26 weeks.

6. Care Plans

6.1 Historically the courts have considered it part of their remit in assessing the welfare of a child to consider all aspects of the Care Plan to ensure the best opportunities for that child. It is not uncommon for parents to concede that they are not in a position to care for a child but nevertheless want to have a significant input into future planning and use the court process for that purpose. Similarly, the child's guardian might have proper concerns about the way in which the Local Authority plans to care for the child and will raise them as reasons for the court not to approve the Care Plan. As the role of the children's guardian is restricted to the time court proceedings are ongoing, it is not surprising that the court is the venue in which such concerns are raised.

6.2 It has to be recognised that the Care Plan cannot cater for every eventuality in a child's life. A Local Authority must and currently does review regularly the Care Plan for each child in its care. In that sense it can properly be argued that spending time in the court process arguing about the fine detail of the Care Plan, such as whether a child should have therapy and who should provide it, is fruitless since it might change in any event, once a Care Order is in place, in response to the child's changing needs.

6.3 However, if the scope of the court's enquiry into the merits of the Care Plan is to be restricted to the "permanence provisions", clarity is required as to precisely the areas the court might properly review. The definition of "permanence provisions" in the new section 31(3B) is unclear. It does not indicate clearly how wide the enquiry might be. A list similar to that in paragraph 3.18 of the Family Justice Review would be much clearer.

6.4 It is fair to say that restricting the court's consideration to whether there are proper grounds to remove a child and, if so, whether the child should be reunited with a parent, cared for by extended family, placed in

long-term foster care or placed for adoption, will be a significant factor to enable the court to conclude cases within 26 weeks since it will restrict exploring peripheral matters in the court process and require the court to focus on the core issues.

October 2012

Written evidence from Sally Simon JP (CFB 07)

I am a recently retired magistrate who has sat in the adult court and was a member of the bench youth panel and of the London Family Panel.

I am very concerned about the draft legislation on Family Justice. In particular:

1. The imposition of a 26 week time limit
2. The proposal to remove the duty of the court to scrutinise Care Plans.

1. Imposition of 26 Week Time Limit

As a magistrate, I am quite clear from my experience with sentencing guidelines in the adult court that the imposition of stringent guidelines has had a significant impact on our decision making. In my experience (over 36 years) we are much less likely nowadays to sentence outside the current sentencing guidelines even when a bench may feel a particular case warrants this. The guidelines affect the whole ethos of the court and it becomes much harder to go against the grain.

In the adult criminal court the fettering of judicial discretion by the imposition of strict guidelines has been used as a way to reduce the wide variation in sentencing between benches, which, it has often been argued, contribute to a lack of confidence in the courts. The effect, as seen by someone who has been part of the system, is that there is an increasing pressure to conform and "rubber stamp " by imposing the guidelines without too much question. This it may be argued, is beneficial given the huge pressure on courts, for example, in dealing with motoring offences despite some loss of justice in individual cases.

However, the introduction of a much more stringent 26 week time limit in the family courts, is potentially dangerous as it could lead to individual children being ill served by the system ostensibly set up to assist them. It has been well argued in other submissions why the majority of cases cannot be easily pigeonholed into a strict time limit and that to do so may well act against the best interests of children. If a 26 week time limit becomes the statutory norm, the subliminal pressure to conform will be ever present and the ethos will change so that it will become increasingly more difficult for family courts to challenge the norm and label a case as "exceptional ". The outcome will be that the interests of the child may be damaged because its access to "due process " will have been curtailed by an arbitrary time limit, if they are not deemed sufficiently exceptional.

Whenever, judicial discretion is fettered by legislation a balancing act is involved between a greater good of some improvement (eg consistency or financial savings) for the majority against a loss (eg "due process " or poorer long term outcome) for the minority. In this instance, when it is questionable whether the 26 week term actually serves the "majority " of cases (as argued in the submission by David Jockelson) and that the damage in individual cases will be to children's lives, then this becomes a serious challenge to the introduction of an imposed time limit.

2. The Proposal to Remove the Duty of the Court to Scrutinise Care Plans.

Evidence from other submissions highlights the essential nature of the Care Plan in helping to ensure a better outcome for any child taken into care. The danger of reducing court scrutiny of Care Plans, particularly in the current climate of financial stringency, opens the doors to insufficient care taken when planning a child's future. It is arguably better practice to maintain the current external scrutiny of the Care Plan by the child's Guardian and the Court before a child is taken into care, than to rely on the hindsight scrutiny of an formal Inquiry after a disaster or series of scandals have occurred with a local authority that is subsequently found to have failed its Looked After children.

October 2012

Written evidence from Rights of Women (CFB 08)

Established in 1975 to promote the legal rights of women throughout England and Wales, Rights of Women aims to increase women's understanding of their legal rights and improve their access to justice so that they can live free from violence, oppression and discrimination and are able to make their own safe choices about the lives they and their families lead. Working from a rights-based approach to increase women's legal literacy, we offer a range of services including legal advice telephone helplines, legal guides and handbooks and training courses and other events, equipping individuals and organisations with the knowledge and skills to assert women's legal and human rights.

Since 1975 Rights of Women has been providing a critical analysis of the law and its impact on women, identifying gaps and omissions in the protection available to women and highlighting areas of discrimination in legislation and the application of the law. Rights of Women has lobbied and campaigned to improve women's equality in the law and their ability to attain safety and justice.

As a grassroots organisation providing a range of legal advice and information services to women throughout England and Wales,[1] we hear women's experience of the law and legal systems on a daily basis. Through our training courses, conferences and other events we have regular contact with other professionals from the statutory, community and voluntary sectors providing services to women. This also gives us a broad picture of women's access to justice and equality. It is this experience, alongside our experience as lawyers which we use in our policy work.

Mediation

(a) *The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the mediation information and assessment meeting ("MIAM") system, and whether they will be effective.*

The proposed amended legislation will make it compulsory, with limited exceptions, for all parties seeking to resolve a family law matter to attend a mediation information and assessment meeting (MIAM).

The domestic violence exception to attending MIAMs, as set out in the Family Procedure Rules 2011 provides that:

> Any party has, to the applicant's knowledge, made an allegation of domestic Violence against another party and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months.

We propose that the exception should be broadened, to include a full range of statutory and non-statutory evidence.

According to the British Crime Survey just 16% of victims of domestic violence report to the police and most women will experience an average of 35 incidents of violence before making a report.

Research published by Rights of Women and Welsh Women's Aid indicated that just 29.9% of the sample of 324 women who were receiving specialist support as victims of domestic violence had obtained a non-molestation order, occupation order, forced marriage protection order or other protective injunction.[2]

The limited nature of the exceptions mean that many victim/survivors of domestic violence whose allegations are not being investigated by the police or who do not have a domestic violence injunction, or have one or both of these, but do not meet the strict 12 month time limit, will be in a vulnerable position. For example, a woman may have fled to a refuge but there is no criminal investigation and she does not have a domestic violence injunction, will not be fast tracked through the MIAM stage.

It is important to point out that the domestic violence exception for MIAMs does not match up with the gateways for legal aid[3] and the concessions made by the Government[4] in extending the time limit to 24 months and widening the range of evidence to include medical evidence and admission to a refuge.

If a woman does not fulfill the strict criteria for avoiding a MIAM, then it will fall on mediators to act as gatekeepers and assess whether there are risks of domestic violence, imbalance between the parties or child protection issues that require immediate diversion to the court process. Mediators are not specifically trained to deal with this and we are advised that many mediators are uncomfortable with this role.

We agree that mediation can be effective in family law. However, we stress that any case involving domestic violence poses serious welfare concerns both to the adult parties to the proceedings and the children, owing to the strong links between domestic violence and child abuse.[5] Because of these concerns, which are set out in more detail below, we firmly believe that in cases where domestic violence is an issue a MIAM is not appropriate. We propose that the exceptions to the requirement to attend a MIAM are extended and broadened, and that a self-declaration process as adopted by the DWP in the "Supporting separated families; securing children's futures"—Consultation on Child Maintenance[6] is used. This would involve parties to family law proceedings being asked if they had experienced domestic violence and being able to avoid attendance at the MIAM if they have previously reported domestic violence to a list of agencies including the police, social services, medical practitioners and court.

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1 For more information about Rights of Women's services visit: www.rightsofwomen.org.uk.

2 Rights of Women and Welsh Women's Aid, *Evidencing domestic violence: the facts*, January 2012, online: http://www.rightsofwomen.org.uk/pdfs/Policy/Evidencing_dv_the_facts.pdf.

3 For the Act see http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted

4 The Government agreed to extend the 12 month time limit to 24 months and also extended the range of evidence to include medical evidence and admission to a refuge.

5 For a discussion of the links between domestic violence and child abuse, please see Dwyer, F. (ed.) *Safe and Sound*, Bristol: Women's Aid.

6 For full details of the consultation. The self declaration scheme for domestic violence is outlined at page 34 http://www.dwp.gov.uk/consultations/2012/childrens-futures.shtml

We recommend that any case where there is a real risk to a child or to an adult party to the proceedings should be immediately routed to court. It is potentially fatal to attempt to distinguish between "priority" and "non-priority" domestic violence and all cases of domestic violence should be treated as a strong concern.

We propose that the Family Procedure Rules are amended to include a self declaration process for victims of domestic violence, which provides that survivors will not have to attend a MIAM if they have previously reported the incident to a statutory or voluntary agency including—the police, a court, a medical professional, social services, a MARAC, an employer, a school, a domestic violence service/refuge etc. Alternatively, we propose that the Family Procedure Rules mirror the gateway criteria to accessing legal aid in the LASPO Act 2012.

We would also recommend that women who have experienced domestic violence should not be required to attend any mediation or conciliation through the court process including First Hearing Dispute Resolution Appointments and Conciliation hearings.

Mediation and Domestic Violence

It is important that the real and potentially fatal dangers present in bringing the victim and perpetrator together are recognised. A relationship defined by violence, control, threats and an imbalance of power must not be subject to mediation. Domestic violence is not usually caused by a problem with anger, or a loss of control. It is most often chosen intentional behaviour designed to exert power and control over another.

Mediation or other dispute resolution interventions imply a position of equality and of equal bargaining power between two parties and supports the abuser's view that he is not entirely responsible for stopping his violence. It also creates the illusion of a safe space. Yet fear is a significant factor influencing the behaviour and decisions made by women experiencing domestic violence.

Domestic violence is characterised by an imbalance of power so any intervention that encourages mediation or seeks to deny the abuser's responsibility for their violence may result in further attempts to manipulate, dominate and threaten the woman experiencing domestic violence. Women will inevitably not be able to participate or speak freely and may be subject to very subtle signals (such as a particular look or gesture) that serve as a threat, which often go unnoticed by a third party. There is a very real danger that perpetrators might use these processes to maintain power and control over their victims, divert themselves from criminal justice sanctions and avoid taking responsibility for their own actions.

The conclusions made by Lord Justice Wall in his response to Women's Aid's publication, *Twenty-Nine Child Homicides*[7] are also relevant here. In his review, Lord Justice Wall emphasised that judges should decline to approve agreed orders where issues of domestic violence or harm have been raised until evidence has been heard and findings of fact made.[8] We strongly support this proposal as a necessary safeguard and urge the Review Panel to consider it.

We propose that disclosure of domestic violence should automatically preclude the requirement to attend a mediation information and assessment meeting and any mediation or conciliation throughout the entire family court process. We believe that mediation, conciliation and other forms of ADR are not appropriate in any case involving domestic violence because:

- It will place the victim at further risk of violence or abuse;
- It gives the perpetrator the opportunity to continue to have contact with the victim;
- It causes re-victimisation;
- For mediation to work successfully, both parties should enjoy an equal balance of power, which is not present in a domestic violence situation.
- Victims may feel unable to take part fully in mediation because they still fear the perpetrator; and,
- Victims may be put under pressure by the perpetrator to agree to an arrangement or settlement that is not in their or their children's best interests; the likelihood of reaching an outcome that is safe and fair is very limited.

Child Arrangement Orders

(d) *What is the effect of the amendments to section 11A to 11P, is it simply a "a shift in focus" to remove the perception of "winners and losers."*

The amendments to 11A—11P and the replacement of residence and contact orders with child arrangement orders will serve to increase the complexity of legislation that is already incredibly complicated.

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7 Saunders, H, *29 Child Homicides: Lessons still to be learnt on Domestic Violence and Child Protection,* Women's Aid Federation of England, 2004, online: http://www.familieslink.co.uk/download/jan07/twenty_nine_child_homicides.pdf.

8 Lord Justice Wall, Report to the President of the Family Division on the publication 'Twenty-nine child homicides', March 2006, online: http://www.judiciary.gov.uk/Resources/JCO/Documents/report_childhomicides.pdf.

The Family Justice Interim Report stated that "[t]his is intended to reduce both the likelihood of long and unfocused hearings, and to move from a sense of a "winner" in terms of "awarding" residence and contact".[9]

Whilst we welcome the move away from an adversarial approach to proceedings, we do not feel that changing the terms will achieve this aim. In our experience, it is the process, rather than the terms used, that influence how the parties feel about proceedings.

We are concerned that a change to the terms used to describe orders is likely to introduce further confusion into what is already a complicated area of law for both litigants and the statutory and non-statutory agencies that they and their children come into contact with. There is already some confusion around terms and what they mean. It is not uncommon to hear litigants and professionals using the terms "custody" and "access" in place of residence and contact. We anticipate that the same will happen with changing the terms once more. Rather than ceasing to use the terms residence and contact, litigants and the professionals they engage with in the statutory and voluntary sector are likely to continue to use those terms alongside the terms custody and access, and lack clarity on what a "child arrangement order" actually means. For example, we anticipate that there could be confusion within schools about a child arrangement order being used in place of a residence order. Currently, a woman who has experienced violence can inform the school that they should not release the children to an abusive parent and provide a copy of the residence order to the school in support of that request. School staff are familiar with what a residence order is, and are able to respond appropriately. Similarly, when a child has been abducted within the UK by a non-resident parent who has parental responsibility, the police will not return the child to the parent with care, unless she has a residence order in her favour. We are concerned that considerable work will need to be done to ensure that these professionals and others such as health-care professionals understand the content of a child arrangement order and their obligations with respect to children and non-resident parents.

It is important to remember that only 10% of disputes concerning contact go to court and that of those cases which are contested, most people do not dispute residence or contact in principal. So calling an order a contact order, when less than 1% of applications are refused, is likely to have a limited impact, as there are so few people who could be regarded as "losers" if achieving a contact order makes you a "winner". It is more what the order actually states and the impact it will have rather than the name that it is given. In most cases residence is not disputed and the "no order" principal of CA 1989 (Section 1 (5)) exists to ensure that contact and, particularly, residence orders are not made unless they are necessary, to avoid litigation between parents and a winner/loser culture.[10]

The amended Sections 11A—11P are unclear, for example, the description of a residence order in subsection 6B as follows—

"this subsection applies to a child arrangements order if the arrangements regulated by the order relate only to either or both the following-

(a) with whom the child concerned is to live, and

(b) when the child is to live with any person"

The amendments and removal of the terms contact and residence result in the legislation becoming less accessible, more longwinded and less concise.

The new wording is confusing and unhelpful and is unlikely to reduce the highly stressful and adversarial nature of court contact and residence disputes. The impact of the complexity of the new wording will be compounded by the fact that many more people will be representing themselves in contact proceedings, come April 2013, when the Legal Aid Sentencing and Punishment of Offenders Act comes into force. Family legal aid will be removed from scope with limited exceptions. The change of terms will make the application process more difficult and there will be more people who will complete the C100 and other forms incorrectly, as they will be unsure exactly what they are applying for. Court staff will have to be re-trained, as well as judges and other professionals for example CAFCASS, the police and schools.

We recommend that no change to terms is needed and that this change will introduce confusion amongst litigants and the professionals that they and their children come into contact with. However, if the terms are to be changed, we recommend that considerable work will need to be done to raise awareness amongst litigants, as well as statutory and voluntary organisations, about the new terms and how to understand the content of the child arrangement order.

[9] Interim Report, para 112, page 22.

[10] Children Act 1989 Section 1(5) "Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than not making no order at all". Thus the court will not make an order just to confirm the contact arrangements or that a child lives with one parent.

Expert Evidence

(e) *Does the new test adequately protect against miscarriages of justice?*

No.

Expert evidence plays a vital role in care proceedings and in private law children proceedings on a variety of different issues. Expert evidence can resolve factual disputes about what has happened to a child, or argument about the capacity of a mother or a father to provide adequate parenting. It may be necessary to obtain evidence from a variety of medical, psychiatric or other expert witnesses.

The expert's role in the court process is to conduct an assessment and express an opinion within their particular area of expertise. Experts are instructed to provide an independent and objective assessment and play a vital role in ensuring that the appropriate outcome is reached by the court.

We do not think the proposed changes are necessary as it is already the case that any party to the proceedings wishing to seek the opinion of an expert must receive permission of the court. There are already rules that provide that a child should not be examined by an expert for the purpose of preparing expert evidence without permission of the court.

Judges are experts in the law and not in any other areas such as mental health or abuse, similarly social workers are not experts on these issues. Only experts should make assertions that carry any weight about issues for which they are trained in. It is, therefore, essential to have expert evidence used when necessary in children matters in order to ensure that the child's welfare needs are met.

Care Plans

(h) *Should the Judge's role be restricted to considering only the permanence provisions of care plans?*

We do not agree with this proposal as it removes an important safeguard for children. The Judges adjudicative role in care cases is vital. This will remove an important check on social services and the opportunity for the judge to scrutinise decisions made and ensure that the correct conclusion is reached in these very difficult cases. We do not think that there should be a change to the current provisions. We would suggest that this will increase the likelihood of bad decisions, appeals and reduce the motivation of social services to take care in writing the reports as they will not be subject to the same scrutiny.

(j) *Enforcement and Shared Parenting*

Please see the Women's Aid Federation of England's response to *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* which Rights of Women contributed to and endorsed.

October 2012

Written evidence from Resolution (CFB 10)

Executive Summary

1. Resolution is an association of 6,500 family lawyers, mediators and other family professionals, committed to a non-adversarial approach to family law and resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, and the best interests of any children in particular. Where possible, members seek to solve problems outside of court, through negotiation, mediation or collaborative law and now arbitration.

2. We also campaign for better laws and improved support and facilities for families and children undergoing family change.

3. The proposed family justice legislation presents some missed opportunities. In particular, a move to a simplified divorce process must, in our view, be accompanied by legislative change on the grounds for divorce. Otherwise, conflict and distress will still not be minimised for those completing and responding to the documentation. A fault-based divorce system is out of step with many other jurisdictions and with the objective of diverting parties away from conflict, enabling them to focus on making arrangements for the future that put the interests of any children first, hopefully more often through mediation or collaborative law. With the removal of most divorce work from the scope of legal aid, parties will not have the benefit of explanation and advice from family lawyers to the effect that the ground for divorce is almost always irrelevant to the financial and children's issues that need to be resolved. There is a risk that more cases will be defended, at least initially.

4. Another missed opportunity is the failure of Clause 1 to address the attendance of respondents at family MIAMs.

5. The MIAM system should be properly and consistently applied by officers of the court and across the family courts.

6. Resolution is concerned about the position of those who are assessed as unsuitable for mediation, but may not have future access to safe advice.

7. A move to child arrangements orders should assist in focusing parents on co-operative parenting and making parenting time arrangements in the interests of their children, without introducing other risky legislative change on "shared parenting".

8. There should be a positive duty for the court to consider at an early stage whether expert evidence is necessary in order to avoid delay at a later stage in the proceedings.

9. There is system focus on achieving a currently non statutory 26 week time limit, but the proposed legislation should not seek to restrict extensions to the time limit where those are in the interests of the child in the individual case.

10. The court should be required to scrutinise the care plan for the purposes of the child knowing exactly where and with whom he or she is to live and what contact he or she is to have. The permanence provisions as set out in the draft legislation do not adequately reflect the core or essential components of a child's plan to be considered by the court as identified in the Family Justice Review Final Report, November 2011 including contact with the birth family.

Mediation

The safeguards in place to ensure that domestic violence and other welfare issue cases are filtered out from the MIAM system, and whether they will be effective

11. Clause 1 effectively reflects the current MIAM system in use since April 2011 and what should be happening now. Pre-legislative revisions to the Form FM1 and guidance for HMCTS are currently being considered. We are largely content that the exemptions from the assessment processes covered in the revised FM1 are right. We are more concerned about the position of some of those who are rightly filtered out of the system as set out in paragraph 12 below.

The role of officers of the court in the MIAM process

12. It is important that whatever the MIAM process prescribed by the court rules, it is properly and consistently applied across the family courts so that the process works. We carried out a membership survey in March 2012 after almost one year of operation of MIAMs which showed inconsistency in the way in which the courts applied the Protocol. The survey responses covered over 100 courts in England and Wales revealed that over 40% of those courts were not requiring an FM1 at the point of issue and over 75% of judges were not raising with the parties in proceedings whether a non-court based method to resolve their dispute might be appropriate. Revised guidance being prepared for HMCTS is seeking to raise awareness of the system and the court's role in order to address some of those concerns, although we fear that in practice this may be little more than a "sticking plaster" solution.

13. We welcome Clause 1(2)(d) although would welcome clarification of the type of evidence to be considered as to whether Clause 1(1) applies and has been complied with, and what would be required to be disclosed by the MIAM provider.

14. The same issues as above are likely to arise in relation to the operation of the power to refuse to permit an application to be issued. Officers of the court (who do not appear to be defined for the purposes of the legislation) would need appropriate training and judicial oversight and support. The circumstances in which the court could overrule an officer's determination will need to be addressed.

Are there any gaps in the process, and if so, who will fall through and what safeguards are needed?

15. It is unfortunate that the title of the information and assessment meetings still refers to mediation only rather than family options. Separating couples are potentially unclear from the outset about the purpose of the meeting which is to provide information on mediation and other ways of resolving disputes.

16. Respondents will not be required to attend a family MIAMs. Our concern is simply that without both parties (who may be self-represented and without options advice from a family lawyer) being given the opportunity and being under some obligation in appropriate circumstances to receive information on options and their suitability for them, fewer couples will benefit from the range of options available and be diverted from the court process where that is safe.

17. At present there is a gap in the MIAM system in that an applicant can indicate the unwillingness of the other party to attend when in fact they would actually do so. The other party might be served with the court application and the completed FM1 to enable the other party to respond and the court to test resistance to an alternative process at the FHDRA or first appointment.

18. We estimate that over 40% of our members' current legal aid cases would not be suitable for mediation.[i] It is possible that a mediator may assess a case as unsuitable for mediation or other non-court dispute resolution due to domestic abuse issues that fall outside the circumstances seen by the government as evidence justifying private family legal aid from April 2013. In any event, legal help will not be available to investigate and gather

evidence of domestic abuse in support of an application. In addition, the financial eligibility criteria for mediation are being tightened, limiting the number of people who will benefit.

Child Arrangement Orders

What is the effect of the amendments to section 11A to 11P? Is it simply a "shift in focus" to remove the perception of "winners and losers"?

19. We support the proposal to replace orders for residence and contact under section 8 Children Act 1989 with child arrangements orders. We believe that it is right for the orders available, including the name of the order, to be clearly focused on the child. A move to child arrangements orders, encompassing the practical arrangements for children in private law, should support the objective of encouraging the involvement of both parents in the child's life after separation, and without other risky legislative change.

20. We are aware of concerns about replacing the current concepts of residence and contact, which in reality will only be relevant to the minority of parents who do not make their own arrangements, with the equivalent of the current orders. But removing the current emphasis on the emotive labels of residence and contact, in some cases implying a winner and a loser, should help many children as part of a wider and sustained effort to change attitudes and culture. Both residence and contact are about parenting time. Our members report advising clients to forget the labels and that matters are often easier to resolve if discussions or negotiations are about co-operative parenting and parenting time in the interests of the child. Otherwise some cases have been known to fight around the label when there is in fact agreement on parenting time and the arrangements for the child. Where the issue of parenting time is disputed, a child arrangements order should be able to deal with that.

21. However, the provisions of the new orders will need to be sufficiently precise and clear to ensure both understanding and enforceability, including across other jurisdictions.

22. There will also be a need to guard against the potential lack of clarity following the redefinition of orders, for example, in relation to the relevance of the existing body of case law, enforcing orders formerly known as contact orders, and use of change of where the child is to live where this is an appropriate remedy in the interests of the child.

23. The draft legislation does not appear to include other consequential amendments in addition to those required to the Children Act 1989, which we assume will be addressed as necessary.

Expert Evidence

Does the new test adequately safeguard against miscarriages of justice?

24. We would prefer to see reference to the positive reasons for obtaining expert evidence, not only the focus on factors or reasons not to obtain evidence. There should be a positive duty, perhaps inserted in subsection 6, for the court to consider at an early stage whether expert evidence is necessary to assist the court in obtaining information without which it cannot consider and make final decisions in relation to the child's welfare, applying the criteria in subsection 7 as part of the judge's case management powers. This would also avoid the risk of a litigant producing expert evidence at the last minute and without leave, causing delay, or parties without the benefit of representation at early hearings in private proceedings realising at a late stage that expert evidence is required.

25. Regarding the question of whether social workers receive the support they need to meet an increased court role, our members note that specific expertise in permanence planning is rarely readily available to the court. Separate local authority teams will focus on child protection or adoption and fostering; this gap in relevant and up to date expertise is not really filled by children's guardians or other experts. Multi-disciplinary training in permanence planning would be in the interests of children.

Time Limits

What progress has been made to achieve the 26 week time limit?

26. Resolution believes that the making of a decision for the child and the communication of that decision to the child within six months is likely to be in the interests of most children. The Committee will be aware of the Judicial proposals for the modernisation of family justice, July 2012 which Resolution broadly supports. Those proposals will however need time to be developed, bed down and have their impact on delay and outcomes for children evaluated.

27. There is a risk of focus being on achieving the time limit more than on the needs of the child. Certain factors will have to be in place to ensure cases are completed without delay, that a six month time frame can generally be met and be in the child's interests. The system is not yet ready to support the 26 week time limit. For example, we are particularly concerned about the provision of necessary expert evidence within a timescale allowing for completion of the case within six months, including the need for a workable, consistent and speedy system for the authorising of publicly funded experts' fees so that necessary expert evidence can proceed.

28. Our members report that the 26 week time limit is now raised and noted on orders in most care cases, but it is too early for the impact on the length of cases to be assessed.

29. The guidance in Clause 4(6) needs to reflect extensions of the time limit consistent with the needs of the child.

30. We are concerned that the draft provisions would allow the Lord Chancellor to reduce the 26 week statutory time limit in the future without adequate parliamentary scrutiny. This issue cannot be considered in isolation from the welfare of the child and other factors.

Care Plans

Should the Judge's role be restricted to considering only the permanence provisions of care plans?

31. The core issue is really if and when the quality of social work will be consistently sufficient to support reducing the level of court scrutiny in fulfilling the court's obligations under the welfare checklist. If the quality of social work and the independent reviewing officer system develop, and judicial discretion is robustly and appropriately applied, the level of court scrutiny should naturally reduce.

32. Whilst the draft provisions do not preclude the judge being able to consider other aspects of the care plan, we believe that the court must be required to scrutinise the care plan for the purposes of the child knowing exactly where or with whom he or she is to live and what contact he or she is to have, particularly where that scrutiny is in the context of a tighter judicial case management regime. It would be totally unacceptable to tell a child that s/he would not be returning to live with his/her family, but not be able to tell the child about what the other arrangements are.

33. The draft legislation provides that where the child will live, including whether that might be with family or friends, is required to be considered by the judge. It seems that whether residential or foster care is planned could be considered as part of the permanence provisions. The plans for sibling placement and with what siblings the child is to live are also of fundamental importance to the child and their future. We seek clarification of whether Clause 5 is intended to limit the judge's role in this regard.

34. In particular, the judge will not be required to consider contact, either parental or sibling, or the therapeutic care for the child. Contact and whether or not the contact proposals should be improved will be of significant importance to the child. Whilst there is a tension in the system in that the level of future contact in care plans impacts on the decisions made by prospective adopters, the issues of contact and placement are often inextricably linked or there may be real issues on contact where placement is conceded. Future arguments that contact plans should be excluded from the care plan's scrutiny should be avoided. We also believe that more parents or indeed children will apply for contact within the care proceedings if this provision is introduced without amendment of Clause 5(1).

35. The Committee may wish to consider whether future alterations to the meaning of the permanence provisions for the purposes of Clause 5 would be made with adequate parliamentary scrutiny.

Divorce

36. We do not disagree with the proposed repeal of uncommenced provisions of Part 2 of the Family Law Act 1996, but the core feature of Part 2 of no fault divorce will be lost. Resolution supports the retention of the underlying principles of Part 1 and proposes a new, more conciliatory, divorce procedure (known as "no fault divorce") to remove the apportionment of blame from the legal process for the benefit of couples and their children. It is to be noted that at no stage was the principle of no fault divorce said to be the problem in relation to the then government's decision to abandon Part 2 in 2001. It is not raised as a concern by this government in the Explanatory Notes accompanying the draft provisions.

Do the suggested provisions remove an important safeguard for children?

37. Given the "tick box nature" of consideration of the arrangements for children as part of the current divorce process, we are not unduly concerned by the proposed repeal of section 41 Matrimonial Causes Act 1973 and section 63 Civil Partnership Act 2004. We are however concerned that amending the Children Act 1989 to make specific reference to shared parenting, risks harming rather than promoting arrangements that are in the best interests of children as outlined in our response to the recent consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life.

38. The government intends that where a person seeks a divorce they should go first to an online information hub, where they will be able to access an online divorce portal. It will be vital for initial information on the current or any new children legislation to be presented to parents accurately and consistently with no mixed, ambiguous or misleading messages. There must be clear reference to all options to help them make the arrangements for their children and on how to access the family courts and dispute resolution services.

Shared Parenting

39. We note that the Committee will be receiving responses made to the consultation referred to in paragraph 37 above. Our key points are set out by way of introduction in our response to question 1 of that consultation.

Reference

[i] Survey of Resolution members, December 2011.

October 2012

Written evidence from Professor Patrick Parkinson, University of Sydney (CFB 12)

I have been asked by the Secretariat of the Justice Committee to make a submission in relation to the Committee's pre-legislative scrutiny of the Children and Families Bill, given the contribution I made earlier this year to discussion of these issues in England and Wales. I hope I can be of some assistance to the Committee.

I am aware that in its 2011 report the Committee took a strong position against amendment of the Children Act in relation to parenting after separation. It considered some evidence from Australian experts in reaching that view. I am aware also that you have reiterated the case against change in a recent letter to the Prime Minister, David Cameron.

It is not my intention to side with one point of view or another in the various debates. These are matters for the British government, Parliament and people. I hope nonetheless than I can offer some perspective—and perhaps some fresh ideas—from my international experience in this field.

Overview

I would like to offer five general observations on the issues which the Committee, and eventually the Parliament, is considering concerning the law on parenting after separation.

1. None of the options proposed by the Government will create any greater legislative support for shared parenting than does the existing law, so the anxiety about these options is, in my view, largely misplaced.
2. Nothing proposed either in the Interim Report of the Norgrove Committee, or by the Government in its 2012 Consultation Paper, has anything to do with "shared care" as understood around the world.
3. It is best now to move on from the debates about the Australian experience: it appears to be accepted now that the Norgrove Committee's relatively brief comments on the Australian legislation made a series of claims that had no little or no factual foundation. I considered it was my duty to point out those errors in a paper I delivered in London in May 2012 (Parkinson, 2012) but there is no need to go over these issues further. The Government is not proposing anything remotely similar to the Australian legislation, and in any event the Norgrove Committee only proposed, in its Interim Report, to replicate one small, and relatively trouble-free, aspect of it.
4. Legislation that emphasizes the importance of both parents in children's lives other than in cases of violence, abuse or high conflict is commonplace around the world and operates without any difficulty. I do not know anywhere that such formulations have been misunderstood as giving rise to some kind of presumption of equal time, but jurisdictions where this has been a concern have dealt with it by making an explicit statement that no particular time-sharing arrangement is to be preferred.
5. The Government and Parliament ought to consider whether legislation could give more guidance to the vast majority of people who seek to resolve their parenting disputes without, ultimately, requiring a judge to decide the matter for them.

My Background

Something needs to be said briefly about my own background and qualifications. I am originally from England and began my career teaching at the University of Wales, Cardiff. I left the UK in 1986 to move to the University of Sydney where I am now a professor. I am the President of the International Society of Family Law. This Society has members in more than 60 countries. I am also a practising lawyer. I act as Special Counsel at Watts McCray Lawyers, a specialist firm of family lawyers located in Sydney and Canberra, and am a Consultant to the International Family Law Group LLP in London.

I served from 2004–2007 as Chairperson of the Family Law Council, an advisory body to the federal Attorney- General, and also chaired a review of the Child Support Scheme in 2004–05 which led to the enactment of major changes to the Child Support Scheme. I also had a major role in the development of Australia's Family Relationship Centres (FRCs), proposing the concept in a paper for the former Prime Minister, John Howard, in 2004.

My books include *Australian Family Law in Context (5th ed, 2012), Family Law and the Indissolubility of Parenthood (2011), The Voice of a Child in Family Law Disputes* (with Judy Cashmore, 2008), and *Child Sexual Abuse and the Churches (2nd ed, 2003).*

Observations on the Debates Concerning Reforms to the Children Act

1. *The Government is not proposing any changes to the law that remotely encourage equal time arrangements*

Neither the Government, nor indeed, the Norgrove Committee, have put forward any proposals that even mention shared care (equal or near equal time between parents) as an option that a court needs to consider. The proposal in the Norgrove Committee's Interim Report merely reflected the existing position in the English case law. McFarlane LJ, who was a member of the Norgrove Committee, said in *Re H (A Child)* [2012] EWCA Civ 281 said at para 18: "It is of course a given, and a starting point for these courts, that children will normally benefit from having a full and meaningful relationship with both of their parents as they grow up." Stephen Cobb QC said something very similar in evidence to your Committee.

The proposals in the June 2012 Consultation Paper were very modest indeed. None of them require more than minor amendment to the Children Act. Some options are perhaps preferable to others for various reasons. I myself am not keen on legislative presumptions in this area, although they are less problematic if they are only operative when a judge is determining the case on a final basis. They do not (and of course must not) conflict with the paramountcy of the child's best interests in decision-making. Nonetheless, I would counsel against the creation of a presumption. Statements of principle are in my view more appropriate. Be that as it may, I would be surprised if the courts interpreted any of the options proposed as requiring a substantially different starting point from the existing case law. In my view, the proposals made by the Centre for Social Justice would represent more substantial and positive reform.

2. *The debate in England and Wales confuses the term "shared parenting" with shared care*

In the Consultation Paper, the term "shared parenting" is used merely to describe the continuing involvement of both parents in children's lives after separation. In this usage, it may mean nothing more than joint parental responsibility (a fundamental feature of the Children Act 1989 from its inception) and some regular contact. However, in the debates occurring in England and Wales, "shared parenting" sometimes seems to be used very loosely as being synonymous with shared care. The consequence is that even when two people on opposite sides of this debate use the same language, they seem to mean quite different things by it.

Around the world, the term "shared care" generally means that the children spend equal time or near equal time with each parent. A minimum definition of shared care in the international literature is 30% of nights with each parent (Fehlberg et al, 2011; Melli & Brown, 2008). The definition which was adopted in Australia as a result of the review of the Child Support Scheme that I chaired is 35% of nights with each parent. When Dr Kaspiew and Dr McIntosh gave evidence to the Justice Committee in 2011, they were talking about the difficulties involved in court-ordered shared care.

The odd thing is that people seem to be opposed to any explicit recognition of the importance of what the Government calls "shared parenting" because they have issues with court-ordered shared care. The fear which has been expressed is that any language even mentioning the involvement of both parents will encourage shared care between parents who are not able to cooperate in jointly parenting their children, and will involve a shift away from the principle that the best interests of the child should be the paramount consideration. With the greatest of respect, there is simply no evidential foundation for this.

There is a massive difference between legislation that indicates a preferred arrangement for the sharing of children's time between parents, and legislation that merely emphasises the importance of both parents remaining involved in children's lives after separation in the absence of issues of abuse and violence. Examples of legislation that encourage shared care are France and Belgium.

In France, legislation on parental authority was passed in 2002. This legislation was intended to promote alternating residence—that is equal time—arrangements. Mme Ségolène Royal, then the Minister for Family Affairs, indicated in the legislative debates that the reform's purpose was to encourage the parents to reach agreement on the principle of alternating residence. However, in the Senate, concerns were expressed about the imposition of an alternating residence arrangement on parents without their agreement. In the result, a compromise position was adopted. Article 373–2–9 of the Civil Code now provides, as a result of the 2002 amendments, that the residence of a child may be fixed alternately at the domicile of each of the parents or at the domicile of one of them. The listing of alternating residence first, before sole residence, was intended to indicate encouragement of this option.

In Belgium, the law was amended in 2006 to provide encouragement for alternating residence—indeed that emphasis was expressed in the title of the legislation ("*Loi tendant à privilégier l'hébergement égalitaire de l'enfant dont les parents sont séparés et réglementant l'exécution forcée en matière d'hébergement d'enfant*"). The law of 18 July 2006 provides that when parents are in dispute about residency, the court is required to examine "as a matter of priority", the possibility of ordering equal residency if one of the parents requests it to do so. The proviso is that if the court considers that equal residency is not the most appropriate arrangement, it may decide to order unequal residency. This is not the same as saying that there is a *presumption* in favour of equal time. An equal time arrangement is not presumed to be in the best interests of the child; nonetheless, according to Belgian law, it is the first option that ought to be considered when parents cannot agree on the arrangements.

The Australian legislation did not go as the Belgian law. However, it requires judges at least to consider equal time if they consider shared parental responsibility is in the best interests of the child. If the judge considers that equal time is not appropriate, then he or she must consider at least "substantial and significant" time—that is, time with the non-resident parent other than just at weekends and in the school holidays. The effect of a regular midweek overnight stay, together with weekend time from Friday afternoon to Monday morning, and sharing of school holidays is very often to take the amount of time spent with a non-resident parent over 35% of nights per year.

There are examples in the United States also, of jurisdictions that require active consideration of arrangements which involve children spending time with both parents, but without being as prescriptive as, for example, the law in Belgium. An example is the law in Iowa which states as a legislative principle:

> "The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent."

Another example is Florida. In Florida, the law states the public policy of the State as being "to encourage parents to share the rights and responsibilities, and joys, of childrearing" despite parental separation. Amendments to the law in 2008 provide that the court must approve a parenting plan which includes provisions about "how the parents will share and be responsible for the daily tasks associated with the upbringing of the child" and "the time-sharing schedule arrangements that specify the time that the minor child will spend with each parent". While the statute uses the language of "time-sharing", it also provides that there "is no presumption for or against...any specific time-sharing schedule when creating or modifying the parenting plan of the child" and in cases of violence or abuse, the court may make an order for sole parental responsibility.

These are examples of legislation that encourage consideration of shared care, or at least encourage arrangements involving significant sharing of children's time between the parents. It will be seen by way of contrast, that the four options under consideration by the Government do nothing of the sort, for none of them suggest that any particular level of time-sharing between the parents is either a preferred option or is even specifically to be considered.

3. *It is best now to move on from the debates about the Australian experience*

The Norgrove Committee's discussion of the position in Australia as a result of the 2006 reforms was very unfortunate. When I was asked to give a paper on the Norgrove Committee's work in London, I had to read the report very carefully. Greatly surprised by the various claims that were made, I checked the footnotes and went back to the sources cited, both in the main body of the report and in Annex G (on which, it appears, the Committee may have placed some reliance). I also checked my concerns with other academics before making any public comment. However, finding no foundation for most of the claims made, it was my duty, in these circumstances, to point out these errors and to correct the record even if that involved causing some anger and embarrassment.

In doing so, I did not wish to detract from the excellent work that the Committee did overall. The law of parenting after separation is a difficult, sensitive and contested area of public policy, and there is no shortage of advocates for different policy positions. Sometimes even well-respected researchers and commentators with strong opinions get carried away with their advocacy and put forward propositions that cannot be substantiated by the evidence that they cite. Sometimes, in the rush to meet deadlines, civil servants may not adequately check their facts when finalising reports as fully as they would have done if time had allowed.

The main points I made in my paper in London (Parkinson, 2012) were as follows:

(a) The 2006 legislation had not increased litigation, as claimed. In fact there has been a reduction of 32% in filings, due to the systemic reforms that were introduced, notably mandatory mediation and the FRCs. The 2006 reforms did not even increase litigation rates in the 12 months *before* those systemic reforms came in.

(b) There is absolutely no evidence that the requirement for courts to consider a meaningful relationship with both parents had, *on its own*, "contributed to damage to children because the term "meaningful" has come to be measured in terms of the quantity of time spent with each parent", as the Norgrove Committee claimed (Family Justice Review, Final Report, 2011, at p.140). The problems with the legislation that have been identified in Australia could only be attributed to the legislative provisions *as a whole*. The most problematic aspect was the requirement for courts to consider equal time (s.65DAA), leading to much misunderstanding in the community that there was a starting point of equal time. The claim that the "meaningful relationship" provision in isolation from the rest of the legislation was responsible for creating expectations about the amount of time to which non-resident parents are "entitled", has no foundation.

(c) There are troubling findings in the AIFS report about the number of families sharing care where there are safety concerns. The majority of those with such concerns who had a shared care arrangement were fathers. Around one in four fathers and one in ten mothers with shared care-time

arrangements indicated that they held safety concerns for themselves or the children as a result of ongoing contact with the other parent (Kaspiew et al, 2009, p.233); but contrary to the extraordinary and unreferenced claim in the Norgrove Report that one quarter of all the judicially determined shared care cases involved parents with safety concerns, it is likely that almost none of these arrangements were made by courts (extrapolating from the data published in the AIFS Report).

(d) There is absolutely no evidence that the courts have been jeopardising the safety of children because of their focus on the importance of a meaningful relationship with both parents. The one case which is cited in support of that proposition in Annex G does not support it at all. Nor does the Chisholm Report, which is also cited in that submission.

(e) Although there has been a substantial increase in orders for shared care in judicially determined cases, the percentage of all children's cases in which there was an order for shared care was under 13%. The 33% figure quoted by the AIFS needs to be taken in context. As I explained, it is from a sub-sample of cases picked out for analysis based upon a particular criterion. The cases where there was shared care ordered amounted to only about 32 cases out of 253 in total. Since judges retain a wide discretion to make whatever decision they think is in the best interests of the child, and most family law judges have very long experience as specialists in the field, it must be assumed that they had good reason to award shared care in these cases, based upon the paramountcy of the child's best interests.

Although my paper in May initially encountered a rather hostile response from some academics, no-one has since contradicted any of these propositions. Belinda Fehlberg, a very fine scholar who holds a Chair at the University of Melbourne, wrote an article in June 2012 entitled "Legislating for shared parenting: how the Family Justice Review got it right". However, her support for the Family Justice Review's final report was only in general terms. She did not challenge these propositions in my paper. Assoc. Prof. Helen Rhoades, perhaps with the benefit of my comments, and that of the Chief Justice of the Family Court of Australia, delivered in London the day before my own, published an article in the July issue of the Child and Family Law Quarterly which did not seek to repeat the factual claims about the impact of the "meaningful relationship provision" that she had made in her submission to the Norgrove Committee. She continued to express the view that it had caused some difficulties of interpretation, and of course she is entitled to that view.

Given this apparent acceptance of the problems I identified, in my opinion it is time now to draw a line under the issues in the Norgrove Report and to move on.

None of this is to say that the Australian family law system is without problems, any more than the English system is. The AIFS Report indicated overall that the 2006 reforms, taken as a whole, are working well, but the Norgrove Committee was right to recommend avoiding any legislative presumption that children should spend equal or near equal time with both parents. It was the requirement on courts to consider the option of equal time that led some parents in Australia to think there was a presumption or starting point of equal time. I recommended against this requirement to consider equal time before the 2006 *Family Law Amendment (Shared Parental Responsibility) Bill* was enacted.

The Family Law Act in Australia is also very complex, and the simplicity of the Children Act 1989 is much to be preferred. Like the English courts, Australian courts do not necessarily deal well with issues of violence and abuse. The Australian Parliament in 2011 sought to make some amendments to the legislation to improve that response, while leaving the substance of the 2006 reforms intact. However, it is very doubtful that the problems in our system are legislative in origin and so there is no real reason to believe that the solutions will be. The biggest problems in dealing with issues of violence and abuse are a lack of independent investigation and assessment early in the process, delays in the court system, the massive expense of going to trial, and problems of proof. No doubt those problems are familiar to English lawyers. Changing the legislation will not address any of these issues. No doubt the Australian Government felt unable to commit any additional resources to the family law system to bring about substantial improvements in the protection of women and children, and changing the legislation in the hope that this will make a difference was the most it could do within current resource constraints.

The point to reiterate (see (2) above) is that neither the Norgrove Committee nor the Government has proposed anything remotely similar to the Australian legislation. The Norgrove Committee only proposed, in its Interim Report, to replicate one small, and relatively trouble-free, aspect of it—the two primary considerations for determining what is in the best interests of the child. The Australian experience is irrelevant to an assessment of the likely effect of any of the four options now proposed by the Government, for none of them bear any resemblance to the law in Australia.

4. *Legislation that emphasizes the importance of both parents in children's lives other than in cases of violence, abuse or high conflict is commonplace around the world*

If comparative analysis is seen to be desirable, then it would be better to examine the jurisdictions all over the world that have enacted legislative principles or presumptions of the kind under consideration by the British Government. Many such provisions have been in existence—without problems—since the 1980s. Numerous US jurisdictions, for example, have long had legislative statements encouraging "frequent and continuing contact with both parents", or words to that effect: see eg California Family Code §3020. Typically, also, such

legislative encouragement for joint parenting after separation does not apply in cases of proven violence or abuse.

One strategy for encouraging the involvement of both parents after separation is to give content to the notion of the "best interests of the child" by legislative findings or directions, or the statement of principles. An example is the legislation in Colorado. The legislature's declaration provides:

> "The general assembly finds and declares that it is in the best interest of all parties to encourage frequent and continuing contact between each parent and the minor children of the marriage after the parents have separated or dissolved their marriage. In order to effectuate this goal, the general assembly urges parents to share the rights and responsibilities of child-rearing and to encourage the love, affection, and contact between the children and the parents."

Colorado utilizes the generic language of "parenting time" to refer to the time the child spends living with each parent.

Canada is another example. For many years, Canada's Divorce Act has contained a provision that in making orders for custody and access, "the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child" (*Divorce Act* 1985 s.16(10)).

I do not know anywhere in the world that such formulations have been popularly misunderstood as giving rise to some kind of presumption of equal time. However, in a few jurisdictions, where there has been a concern about misunderstanding of the law, the legislature has enacted a clarifying statement to the effect that there is no presumption in favour of, or against equal time. Florida's provision is quoted on page 5 above. Another example is the California Family Code (§ 3040(b)).

Looking at these examples from other jurisdictions, it is very difficult to understand the anxiety that has been generated within the English legal profession and some advocacy groups by the very minor and modest proposals being advanced first by the Norgrove Committee in its Interim Report and then by the British Government.

I am aware of course that the Children Act 1989 is much loved within the legal profession and was much admired elsewhere in its time. Indeed, it provided the basic architecture for some reforms made to Australian law in 1995. There may be a case for making no change at all to the law. However, in my view, members of Parliament need to listen to their constituents as well as the judges, lawyers and academic specialists. Perceptions about the fairness of the law are important.

5. *The Government and Parliament ought to consider whether legislation could give more guidance*

As I indicated in the paper I gave in May, most family law statutes in common law jurisdictions are drafted by giving guidance to judges about how to decide cases. The assumption is that the vast majority of the population who do not need (or more realistically, cannot afford) a judicial determination will be influenced by what lawyers tell them the judge is likely to do in their situation. All this of course, assumes that people have access to affordable and sufficiently expert legal advice and that it is the advice of a lawyer, rather than a child psychologist or relationship counsellor, that they really need.

However, it may be time now to move away from a court-centric approach to family justice in favour of a community-centric approach to family relationships. That is, the courts that decide so very few cases (and moreover, atypical cases) at such great expense, should no longer be placed at the centre of the universe of family justice. That has many implications, but one is for the drafting of legislation. The Australian law was drafted to speak beyond the courts, and through voices other than judges and lawyers. In my view, that is the way of the future, even if the Family Law Act in Australia is not a good example of coherent messaging.

I respectfully suggest that the research evidence is that there is a need for more guidance and assistance with dispute resolution about parenting arrangements in England and Wales. One of the other inaccuracies that I identified in the Norgrove Report was the much repeated claim that 90% of people resolve parenting arrangements for themselves without litigation. The Report cited one study to the effect that "only 10% of separating couples go to court to settle their disputes about contact" and concluded therefore that "most separating couples" make their own arrangements (Family Justice Review, Final Report, 2011, p.133). However, the study the Committee cited does not actually support that 10% figure and nor does it indicate that the remainder, or even "most" couples, make their own arrangements. The Office of National Statistics study did indeed find that in 2007, only 8% of the sample of resident parents (weighted to population) had court-ordered arrangements; but the corresponding figure for non-resident parents was 17%. A further group of 7% of resident parents and 8% of non-resident parents reported that arrangements had been made with the assistance of mediators or lawyers. What about the remainder? Surprisingly, an additional 43% of resident parents and 20% of non-resident parents reported that there was no agreement at all (Lader, 2008, Table 2.9 p.23). This suggests a significant level of unmet need for assistance in relation to post-separation parenting arrangements.

I suggested in my London paper, that the Government might consider enacting a set of principles in legislation to guide the consensual settlement of disputes. The proposal I made is as follows:

Counsellors, mediators, lawyers and other professionals should have regard to the following principles in assisting parents to develop parenting agreements when they do not live together:

(1) Children have a right to maintain relationships with parents and other family members who are important to them, unless this is detrimental to their wellbeing.

(2) Children have a right to protection from harm.

(3) Children who have formed a close relationship with both parents prior to the parents' separation will ordinarily benefit from having the substantial involvement of both parents in their lives, except when restrictions on contact are needed to protect them from abuse, violence or continuing high conflict.

(4) Parenting arrangements for children ought to be appropriate to their age and stage of development.

(5) Parenting arrangements for children should not expose a parent or other family member to an unacceptable risk of family violence.

(6) Arrangements for substantially shared care should not be made unless they are reasonably practicable and likely to benefit the child, taking account of the distance between the parents' homes, the level of conflict between the parents, the ability of the parents to communicate and to cooperate, and the age and developmental needs of the child.

This would leave the welfare checklist used by judges to decide cases unchanged, although judges should also be directed to have regard to these principles in deciding whether to make orders under s.8 or 13 of the Children Act.

Judges ought to be comfortable with this. The welfare checklist and the paramountcy principle would remain unchanged.

The messages being given through these principles are more detailed and nuanced than in the Government's current options. The principles could be stated in handouts used by mediators, flashed up on Powerpoints in community education meetings, and expounded by psychologists in booklets or DVDs.

Arrangements for parenting after separation are not, in essence, legal issues. They may become so, but what people really need is relational advice, not legal advice about what judges might do in the very small number of (atypical) cases that come before them. My respectful suggestion would be to consider changes to the law that will make a real difference to the community in guiding the consensual resolution of parenting disputes.

September 2012

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Written evidence from Dr Julie Doughty and Professor Mervyn Murch, Cardiff Law School, Cardiff University (CFB 15)

We have concerns about the feasibility of these clauses in the context of the new Family Court structures. As we explained in a recently published article, "Judicial independence and the restructuring of family courts and their support services" (Doughty and Murch, 2012), there is inherent confusion in the parallel systems now being put in place with the Family Business Authority and the Family Justice Board. Consequently, the extent to which the responsibility for family justice lies with the executive or the judiciary has become uncertain. This may be a consequence of the expanded role of the Lord Chancellor (HL Constitution Committee, 2007) and requires clarification as soon as possible.

With regard to the Committee's Specific Questions

Mediation

We are longstanding supporters of mediation services. However, we agree with the serious questions raised by Baroness Hale in her recent speech to National Family Mediation (18 September 2012) regarding the capacity of mediators to cope with their imminent change in role.

(a) As we note in our article (Doughty and Murch, 2012), once legal aid has been withdrawn in 2013, mediators will be placed in a far more powerful position than at present as they will act as gatekeepers to decision-making processes in family disputes. This will require specialised training and regulation in identifying and dealing with risk. Practice in alternative dispute resolution services in Australia has been found to be worryingly inconsistent in this regard (Kaspiew at al. 2009).

(b) Through our work with local mediation organisations we are aware of varying practice amongst courts as to whether parties are referred to a MIAM, mediation or a parenting programme. In some courts, it is rare for the judiciary, legal advisers to the magistrates , or Cafcass (and Cafcass Cymru) to make a referral to any such form of alternative dispute resolution. Furthermore, it is confusing for litigants that the in-court conciliation appointment process involving Cafcass is referred to in the court forms as "mediation". Overall, this suggests that those involved in the courts have not been given sufficient information about MIAMs and other mediation services.

(c) Once a MIAM becomes compulsory for an applicant, there will be a greatly increased workload for mediators by way of referral and intake meetings. However, when one party is now referred by a solicitor or self-refers, it is very common for the other party not to respond to the invitation to a mediation session. We see no reason why the willingness of the respondent to take up mediation will increase as envisaged by Government just because the applicant is referred to a MIAM. When legal aid is removed in April 2013, there may be an increase in the number of those who feel compelled to attend a mediation session because they have no access to legal representation (even if the latter is what they would prefer). However, there is no evidence as to how many more parties than now will agree a memorandum of understanding (which is required for the LSC to make the higher payment). Already stretched mediation services will therefore have to able to cope with increases in workload with no guaranteed associated rise in income.

It appears from the proposed legislation that all applications for residence orders or special guardianship orders by extended family members (often supported by the local authority as an alternative to the child being taken into care) will require a MIAM. This may be inappropriate and a waste of mediators' and the parties' time. Mediators are not trained to work in dispute resolution between family members where the issue is one of child protection and the local authority is supporting a kinship care placement within the private law provisions of the Act. Clear new Rules will need to clarify exactly when a MIAM is compulsory.

Child arrangement orders

(d)When the legal concept of parental responsibility (PR) was introduced in the Children Act 1989, the intention was to remove the labels "custody" and "access" and instead to emphasise that PR lasts throughout childhood, with "residence" and "contact" describing where the child lives and contact arrangements in neutral terms. As the Committee is well aware, this has not succeeded in removing a "winner-loser" perception held by some pressure groups. The terms "custody" and "access" are still constantly used in the media.

We see no rationale for further re-labelling of section 8 orders. Indeed the legislation will become very complex to read and understand. Instead, energy and resources would be more effectively directed toward programmes that support parents in times of relationship difficulties.

Expert evidence

(e) The phrasing in cl. 3 makes no effective change to the current law and the 2010 Practice Direction 25 which currently regulates expert evidence. If a miscarriage of justice might potentially occur because of lack of access to expert evidence (as suggested in the question), this is more likely to be as result of restrictions on legal aid being available to pay expert witnesses than the legislation proposed in cl. 3 (see *A local authority v DS and others* [2012] EWHC 1442 (Fam))

Although the *Family Justice Review* refers to "duplication" of evidence when a court takes evidence from the local authority and Cafcass and an independent social worker, research suggests that the expert evidence of independent social workers is of added value to judicial decision making (Brophy et al. 2012).

(f)This question can best be answered by social work professional bodies.

Time limits

(g) We have heard from judges and practitioners across England and Wales that the introduction of the Case Management System was accompanied by an expectation that all courts would, from April 2012, limit case duration to 26 weeks other than in exceptional circumstances. Some courts have achieved this to a greater extent than others.

However on 15 October, Mr Justice Ryder gave a speech at a conference in London organised by Nagalro, in which he stated that no time limit on care proceedings had yet been introduced and that the timetable in each case must depend on the advice given to the court by the child's social worker and the children's guardian. Requests were made by members of the audience for a Practice Direction on this matter because practitioners had thought that the 26-week limit was already "set in stone". We fear this may be an early example of

miscommunication arising out of the overlapping responsibilities of the executive and judicial agencies in taking forward the *Family Justice Review* (Doughty and Murch, 2012).

In any event, the current list of delay factors in the Case Management System is skewed toward delays attributed to the local authority in a way which is unhelpful in analysing the contributory factors. There are some delays out of the control of the parties, such as caused by the LSC (*A local authority v DS and others* [2012] EWHC 1442 (Fam)). Another factor is there is, in many cases, an issue about the capacity of a parent to conduct proceedings which has to be referred to the Official Solicitor, who at present does not look at papers until three months after receipt.

Care plans

(h)The definition of "permanence provisions" in cl 3B will not, in itself, exclude the court from scrutinising the plan as it does at present. Under s 34(11) Children Act 1989, the court will still be required to consider contact and invite the parties to comment on the arrangements. Contact between the child and his/her birth family and the placing of siblings together or apart are inextricable from permanence.

It is doubtful that the court will feel able to rely in the independent reviewing officer (IRO) to monitor the care plan. In *A v S v Lancashire County Council* [2012] EWHC 1689 (Fam), the IRO admitted to an unmanageable workload and the children's maltreatment was compounded by the failure of the local authority to promote contact with their birth family.

Where children are made subject to residence or special guardianship orders the parties may need an associated contact order to support and maintain the appropriate relationships to keep the placement stable (Hunt et al 2008).

Divorce

(i)A comprehensive study on s41 Matrimonial Causes Act 1973 for the Lord Chancellor's Department (Murch at al 1998)revealed that it was not an effective safeguard for children. It is disappointing that the new clauses do not attempt to address this by better promoting the interests of the child involved in divorce proceedings, rather than merely repealing the section, especially in the light of the emphasis placed by the *Family Justice Review* on the rights and welfare of the child.

It is evident that Cafcass does not expect its practitioners to see children in every case (see, for example, Thiara and Gill, 2012) and we understand that Cafcass is resisting calls by the Interdisciplinary Alliance for Children to introduce a key performance indicator that children subject to court applications referred to Cafcass should be visited by a Cafcass officer. Nor, it appears, does Cafcass expect practitioners to use the s 1(3) Children Act 1989 welfare checklist in their reports (see *Re M (Children)* [2012] EWHC 1948 (Fam))

Enforcement and shared parenting

(j) Please refer to the submission by Julie Doughty to the DfE consultation.

Conclusion

In conclusion, we suggest that the Committee give careful consideration to the implications of this legislation being debated before the remit and responsibility for managing the reformed family justice system have been made public and transparent.

October 2012

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Written evidence from Professor Judith Masson (CFB 16)

This evidence focuses on:

- the drafting of the children arrangements clauses noting that they make the law far more difficult for lay people to understand (d).
- Expert evidence and miscarriages of justice noting that excessive delay for children who wait for a permanent home also involves miscarriage of justice (e).
- The time limits for care proceedings noting that simple time limits are unlikely to be effective without more fundamental change(g).

I have also contributed to the DfE/MoJ consultation on these clauses, providing some suggestions for changes to the drafting of the clauses relating to care proceedings.

Child Arrangements Provisions

1. The redrafting of the Children Act 1989 replaces the concepts of contact and residence with child arrangements orders regulating where a child lives or with whom a child is to spend time or otherwise have contact. The aim is to remove labels (contact and residence) which have been the focus of dispute. It is unlikely that the phrase will enter common parlance, and thus replace the concepts of contact and residence. Indeed, the old terms access and especially custody are regularly used in the media.

2. There is no evidence that a recasting of the language will reduce disputes—indeed the focus will be on arrangements for children, which are infinitely variable and thus allow even more room for dispute than the issues of contact and residence.

3. Changing the wording in this way adds to the complexity of the legislation. Although child arrangements orders are intended to deal with the same issues—where the child lives and who the child visits etc—the language is far less clear. For example, the readability index for s.10(5)(c)(i) increases from an average grade level of 10.1 for the original (current) text to 19.00 for the proposed amendment. Looking at the text, I would expect some provisions to be even higher.

4. Making the legislation clear was a key aim of the government when the Children Act was legislated. *"A lack of clarity is perhaps the most striking defect in the present law…"* (1987 Cm 62, para 7). Clear law is even more important given the withdrawal of most family legal aid. Parents will be far more dependent on lay advisers and on their own ability to understand the law. The withdrawal of legal aid creates a stronger not a weaker obligation on government and on Parliament to enact clear laws. The amendments to the whole of parts 1 and 2 of the Children Act 1989 are completely contrary to this.

Expert evidence: *Does the new test adequately safeguard against miscarriages of justice?*

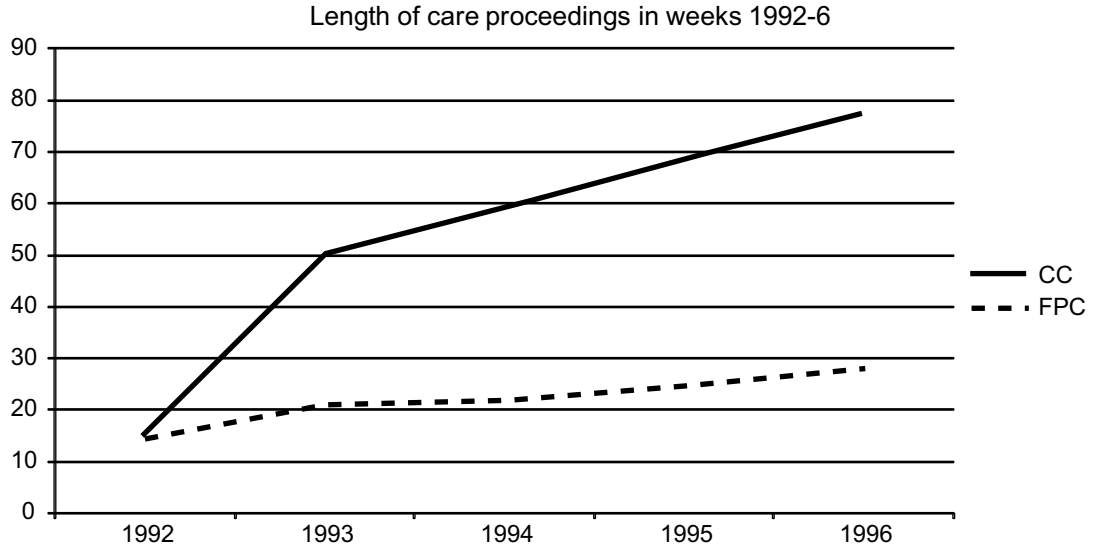
5. It is not possible to have a system which provides 100% correct answers all the time. The recent cases which have causes concern have for the most part involved complex medical evidence where there has been disagreement about whether the child's symptoms were the result of ill-treatment, accident or a natural cause. Such cases form only a very small minority of care proceedings, which largely focus on children suffering serious neglect. Issues of the conditions in which the child is being brought up and the responsibility for them are largely not at issue in these cases. It is these cases where the length of time taken by the legal process produces injustice for children, who wait too long for decisions to be made, and lose the chance of a secure placement at a time when this would be most beneficial to them (Ward et al 2006, 2012)

6. Courts considering cases where the concerns arise from out of injuries and/or conditions will continue to need and seek expert evidence. The tests in the Bill should not prevent such evidence being obtained. However, issues around the supply of experts etc identified in the Chief Medical Officer's Report, *Bearing Good Witness* (2006) have not been addressed.

Time limits: (g) *What progress has been made to achieve the 26 week limit*?

7. The courts are currently trying to operate the 26 week time limit and have been doing so since around April 2012. There can be no data on progress at this time—even though there will be applications made since then where the cases have completed this will not be as a result of judicial case management or closer co-operation. Of a sample of 173 cases commenced in 2010 which formed part of an ESRC funded study: *Families on the Edge of Care: The operation and effectiveness of the pre-proceedings process* (ESRC RES 062–23–2226) 11% of applications were completed within 26 weeks. In none of these cases was swift completion the result of robust judicial case management. Rather, they were cases where the parents co-operated fully and agreed the course of action or took no part in the proceedings.

8. It should be noted that county courts have always taken far longer to complete cases. Data from shortly after the implementation of the Children Act 1989 shows that the average length of completed cases rapidly rose. Targets set by HMCS following the introduction of the Judicial Protocol in 2003 and in the PLO were not achieved.



9. Whilst there are many factors contributing to the length of care proceedings in individual cases, there is an overarching issue about the court approach to decision-making in these cases. Prior to the Children Act 1989, judges (as opposed to magistrates') only had jurisdiction over child protection matters in wardship or under the inherent jurisdiction of the High Court. This gave the judge wide discretion to determine the case on the basis of the child's welfare. Judges saw their role as achieving welfare based resolution of the case. This has continued; rather than deciding whether the Children Act 1989, s.31(2) test of significant harm is met and the local authority's application for an order is made out on the evidence presented, the courts use the proceedings for a *"a legally protected framework for welfare investigation, assessment and the promotion and management of change"*. (Hunt 1998). This is supported by research undertaken at Bristol (Pearce, Masson and Bader 2011) but not merely an academic view; at a recent conference on the Children Act 1989 a trial judge described his role as providing a "workable solution" for the case in front of me. This is incompatible with rules for case completion within 26 weeks.

10. When the PLO was introduced new obligations were placed on local authorities to operate a pre proceedings process (Children Act 1989 Guidance Vol 1). The intention was that cases should be better prepared at application so that it was not necessary for additional assessments to take place during the proceedings. Research conducted by Bristol University and the University of East Anglia, *Families on the Edge of Care: The operation and effectiveness of the pre-proceedings process* (ESRC RES 062–23–2226) established that the use of the pre-proceedings process by local authorities made no difference to the way cases were handled by the courts. These cases took as long as others where the process had not been used (but took longer to come to court). Judges continued to allow further evidence to be obtained because they were unwilling to decide cases on the basis of the local authority's evidence if parents did not agree. Their notions of what hearing a care case required were not changed by the additional work by the local authority to establish the need for a care order.

11. The 26 week provision is unlikely to be effectively implemented unless the approach of the courts is changed. There is no provision in the Children and Families Bill which signals that courts should make a fundamental change to their approach, only a process with exceptions. Unless there is a more substantial statutory change it is most likely that the legislation will be interpreted as requiring the same approach but quicker. This is not feasible within the current (and increasing constrained) resources of courts and local authorities. If cases are to be decided more quickly they have to be smaller—and this means refocusing the role of the court on evaluating the presented evidence and applying the statute.

October 2012

Written evidence from Janet Ollier (CFB 17)

SUMMARY

— This draft Bill dismantles many of the safeguards gained for children since the 1989 Children Act.

— It was the result of deliberations by a Committee with skewed membership, and specifically little or no evidence from those who have independently represented children in the Courts for many years, as practioners.

— The provisions regarding resolution of divorce, and removal of legal aid for almost all families in Private law is dangerous, and will produce the reverse to the aim of the Bill; clog up the courts with litigants in person; increase delay, remove safeguards for children; remove safeguards for women who have suffered chronic abuse in the relationship but who do not qualify under the terms of the legislation for legal help; result in huge costs for families who cannot afford to pay privately for legal fees.

— The tandem model for children in Public Law proceedings is being steadily dismantled and bowdlerised by Cafcass' "proportionate working" arrangements and over-managed service, losing hundreds of the most experienced Childrens' Guardians in the process. Guardians no longer routinely see the children they are there to protect and represent. One has to ask what does Cafcass see as their role? It is certainly not to advocate for the best outcomes for children as did the former *Guardians ad Litem.*

— This Bill will further remove the safeguards for these families and children, through the 26 week time limit; the reduction (almost cessation) in expert independent social work input to the Courts to balance the local Authority's actions, which can never be solely focused on the "best" welfare of the individual child due to time and financial pressures, managerial target-setting, and severe lack of experience, expertise and confidence in their own opinions, amongst front-line social workers.

— The removal of judicial scrutiny of the detail of Care Plans is a further serious blow to the best outcomes for children and will lead to seriously flawed decision-making by Local Authorities.

— This Bill returns the law and statute for children and families to that which existed pre-1989; a largely untrammelled administrative system operated by Local Authorities without independent scrutiny. This was the system under which I worked in the 1970's and was a travesty of justice.

1 As a social worker since 1975, who has worked independently since 1983 focussing on children's rights and independent representation of children and an expert witness with a large caseload until last May, (when the statute altered to advise the judiciary against appointing us, and our rates were summarily capped at one lower than that of similar professionals, despite our expertise in these cases), I am extremely saddened and dismayed by what I see as a loss of the world class system we had built since the creation of *Guardians ad Litem* in 1984 in the English and Welsh Courts to protect those children and families who are the most disadvantaged in the country.

2 Delay is inimical to the welfare of children, but so is losing the chance of remaining in one's birth or extended family for the want of time or inclination to pursue thorough and timely assessments of parents, and of relatives willing to come forward as alternative carers.

3. The debate about Independent Social Workers causing delay is a fiction, as shown in the research of Brophy, J et al, (012).. This showed the need for these assessments in the light of a dearth of adequate social work assessment by the Local Authority, or refusal to reassess when parents' are demonstrating progress already or spurious reasoning for dismissing applications for assessment by extended family members as alternative carers; that most reports can be turned around by ISW's in six to eight weeks, that their recommendations are rarely exactly the same as those of the social worker, and that they are cost-efficient. With the current cap, a typical report would cost the LSC only £2,500. That could be the price of a child remaining within its' family.

4 In the last 10 years since I left Guardian work and undertook independent assessments for the Courts, I have rarely concurred with the social work assessment and recommendation and have consequently been instrumental in keeping many children within their families of origin. Many of these reports are poorly executed, lack rigour and most importantly, independence of thought. Many children, despite the PLO, arrive in proceedings without Initial or Core Assessments having been undertaken by the Local Authority or enquiries made of the wider family. Fathers are routinely ignored or overlooked.

5 The climate of "rush" and "panic" over "children who wait" to be adopted (a false echo of the book which changed the approach of permanence work in the 1970's) has been exaggerated by the Adoption Tsar with erroneous conclusions about the causes for this. He has never been an adoption practitioner. The simple fact is that which has pertained for decades now: the supply of adopters does not "match" the profile of the damaged, disturbed children and sibling groups awaiting placement. Rushing through adoption assessments and speeding up Placement Orders for children will have no effect on this imbalance. Generally, the majority of adopters still come forward because they are childless and wish to create a family; they take on children who are challenging and difficult to raise, because there are few young babies to adopt and sadly, these placements often fail. Figures for adoption breakdown are still hard to come by, but range from 30 to 50 % over years of studies. That can hardly be a good outcome for already disadvantaged children. Figures for relative placements can sometimes be as poor, but practice suggests that birth families retain a bond which encourages them to

struggle through the hard times. The consequences of removing a child from their family of origin are life-long and should never be underestimated. Need for services continues long into placement and into adulthood. It is not a cheap alternative. There is a reason for careful assessment, at all stages of the passage of a child through Care Proceedings and Care, and that is, to ensure that mistakes are minimised and their ultimate welfare enhanced.

6. The real cause of delay in the system has always been, in my long experience, the lack of Court space, sufficient Judges, and a propensity to adjourn *ad nauseum* even when decisions could be made on sufficient information, for example in the "no-hope" cases. These most certainly can be concluded within 26 weeks but very rarely are. That suggests a lack of robustness by Judges in setting appropriate timetables.

7. The proposals will undermine any opportunity for parents to demonstrate effective change. A parent with drink, drug or lifestyle problems sometimes begins to make changes during the proceedings, but 26 weeks will never be enough to show sufficient change. In effect, the impact of these proposals will be to increase the numbers of Care and Placement Orders being made, and potentially adequate parents being judged adversely. The balance is, can a child wait a little longer if the outcome for reunification in their family is likely to be positive; not a blank "delay is a bad thing" slogan.

October 2012

Written evidence from the Solicitors in Local Government Child Care Lawyers Group (CFB 19)

Thank you for the opportunity to comment on the provisions of the proposed Children and Families Bill.

Our comments are confined to the public law clauses as these relate to our principal area of work.

1. We represent the interests of local government lawyers who specialise in working in the field of child protection and child care law (see attached at Appendix 1 the terms of reference of the Group).

2. As local authority lawyers, we are heavily involved in case preparation and management much of which falls upon the local authority representatives in care proceedings. We also present many of the cases and if not presenting them, we are involved in instructing counsel and communication with legal representatives for other parties. We liaise with the courts through the Family Justice Boards (previously the Family Justice Councils) and we are required to have an understanding of the workings of local government and local authority policies and procedures. Along with the obvious requirement to know the law and statutory guidance in this area of work, we believe that this gives us a unique insight into the operation of the care proceedings process and the means by which it seeks to safeguard the interests of children.

3. We welcome the recommendations of the Family Justice Review (FJR) and consider it to be, as one commentator described it, "a sensitive, thoughtful and intelligent document".

4. We have been concerned for many years by the increasing delays in public law cases and welcome the recommendations of the Family Justice Review (FJR) for a 26 week limit on the length of care cases and more targeted scrutiny of care plans.

THE 26 WEEK TIME LIMIT

1. Delay is endemic in the family justice system. Delay is damaging to the interests of children who futures fall to be determined via the court process and those delays have been steadily increasing.

2. When the Children Act 1989 came into force in 1991, it was envisaged that care proceedings cases would be concluded within 12 weeks. Delays have increased substantially since then. In its report (November 2011), the Family Justice Review (FJR) noted that care cases were taking an average of 61 weeks in care centres and 48 weeks in the Family Proceedings Court (see HMCTS FamilyMan data for 2011). The FJR noted that the length of cases was "likely to rise further".

3. In our experience, it is not uncommon for care cases to last two, three or even four years. These are, in our view, unacceptably long periods for the lives of children to be subject to such uncertainty. Older children are well aware of the delays and younger children can suffer attachment difficulties.

4. Delay is often caused by:

- — Lack of robust judicial case management.
- — Over reliance on experts.
- — Shortages of key personnel—social workers, Children's Guardians.
- — Lack of judges and court time.
- — Excessive consideration of care plans.
- — Lack of timely assessments of family members as potential carers for children who cannot remain with their parents.

5. The FJR quoted Her Honour Judge Lesley Newton on the subject:

> "...Too many of us have become inured, desensitised, to the nature and extent of delay within the system. We have to challenge the inaccurate and complacent belief that much of this delay within care proceedings is 'planned and purposeful'. It isn't... most delay is unintended and harmful". (see page 93 of the FPR report).

6. Consequently we welcome the FJR recommendation to introduce a 26 week time limit on the length of care cases.

7. Already many (but not all) courts are focusing on the 26 week limit at the outset of care proceedings and making strenuous efforts to keep cases within that timescale. We have received indications from some areas that this is having a positive effect in reducing delay and improving practice, including the practice of local authorities. That is to be welcomed and we believe that enshrining the limit in legislation will maintain a focus on the time limit albeit that we recognise that compliance will not be achieved overnight and in some cases it may not be achievable. An example of the latter could be a case involving serious non-accidental injury where complex medical evidence has to be considered, some of which may be conflicting.

8. Consequently we were somewhat dismayed to see the detail of the proposed new clauses as we consider that they will not achieve the objectives set by the FJR.

9. The clause on the 26 week time limit provides for extensions of the time limit for up to 8 weeks at a time. There appears to be no upper limit to the number of extensions that could be made. Such provision for extensions did not appear in the FJR report. Further the grounds for extension, to "enable the court to resolve the proceedings justly" are so vague that our fear is that they will be interpreted in such a way as to "drive a coach and horses" through the 26 week limit thus rendering it meaningless and making no impact upon the delays that are so damaging to the interests of children.

Care Plans

1. When a court is considering whether or not to make a care order, it must consider the care plan presented to the court by the local authority. If it is not happy with the contents of the plan, the court may refuse to make a care order.

2. The case law makes it clear that where a care plan is sufficiently certain and clear, the court, if it approves the plan, should make a care order and leave the implementation of the plan to the local authority. Inevitably where the line is drawn can be a source of tension between the court and the local authority and those representing other parties frequently press the court to retain cases before the court until issues arising from the plan are resolved to their satisfaction. Sometimes this process is used to extract concessions from the local authority and courts may be sympathetic to the representations being made thus placing local authorities under further pressure to make changes.

3. Issues are raised which are justifiably within the remit of the court e.g whether the basis of the plan should be adoption, long term fostering, placement with relatives or rehabilitation. Contact is also a matter which the court should consider. However, in our experience, other matters have undergone scrutiny which have simply added to delay. These have included the provision of house extensions and people carriers to family members who are to undertake the care of children and provision of therapy to parents when such provision falls with the remit of the health services who are not parties to the proceedings.

4. We therefore support the FJR recommendation for a more targeted and focused scrutiny of the care plan, concentrating on the "core" issues which we have identified.

5. The clause relating to care plans provides that the permanence provisions of the plan must be considered by the court (that is accepted) but that the court is "not required" to examine the other aspects of the plan. We can foresee that the courts will be urged by other parties to proceedings to consider those other aspects despite not being "required" to do and therefore, in reality, little will change.

6. We consider that these clauses need to be re-examined otherwise they will simply not achieve the desired objectives of the reforms.

7. We believe that the definition of the permanence (or we suggest "core") provisions of the care plan—within which we would include contact—should not only be set out in primary legislation, but should be capable of amendment only by further primary legislation.

8. We also consider that with the enhanced role given to local authority independent reviewing officers (IRO's) under the Care Planning, Placement and Case Review (England) Regulations 2010 and the accompanying guidance, the courts should be able to have greater confidence in the ability of local authorities to implement care plans.

Renewal of Interim Care Orders

We are supportive of the clauses dealing with the renewal of interim care and supervision orders. A lot of administrative time is wasted both in local authorities and the courts with the present system of renewal which is of no benefit to the child in any event. The court will still have to safeguard the position of the child when considering the renewal of interim orders and the proposed renewal process should be easier to administer.

EXPERTS

1. The clauses on expert evidence do not substantially change the current position and we consider that a culture change is what is needed to reduce the reliance on expert evidence. Over reliance on expert evidence is a significant cause of delay and it is our experience that it rarely leads to conclusions which differ from those presented to the court by local authorities through its often extensive work and its own assessments of families. What is required is for courts to have greater confidence in the assessments of social workers. In turn, local authorities must ensure that social workers improve the quality of their work through improved education and training and that there is greater analytical content to their assessments.

2. It is common practice for single joint instructions of experts to take place with the instructing parties each having the opportunity to contribute to the contents of the letters of instruction. The new rules on experts will not alter this practice and we are not aware of any evidence of miscarriages of justices arising from current practice and consider that the new rules will maintain the safeguards against such concerns.

We hope that this submission is of assistance. We are happy to comment further and would welcome the opportunity to give oral evidence to the Committee.

October 2012

Appendix

TERMS OF REFERENCE AND OBJECTIVES

LOCAL AUTHORITY CHILD CARE LAWYERS GROUP (REFERRED TO AS "THE GROUP")

NAME: LOCAL AUTHORITY CHILD CARE LAWYERS GROUP

1. *Nomination of member*

Members of the Group will be existing members together with SIG convenors nominated or approved by AcSeS and the SLG. Other members may be co-opted as and when necessary.

2. *Aims and Objectives*

— to represent local government solicitors, legal executives and barristers who undertake child care law work;

— to ensure that the views of local government lawyers are fairly represented in the development of practice and policy in child care law work;

— to promote good practice within local government legal departments;

— to consult with colleagues in local government who specialise in this area of work;

— to consult with agencies, authorities, government departments, groups, etc;

— to provide feedback and input on legislation, policies, guidance, regulations, etc;

— to represent the Group and local government colleagues on bodies, groups, societies, etc and at meetings set up to improve and consider changes to child care law; and

— To act as lead professional for SLG in matters relating to children's services.

3. *Membership of Group*

There will be a maximum of 12 members of this Group at any one time. It is intended that the Group will represent the interests of local authorities throughout England and Wales. When new members are required, in so far as is possible, individuals will be nominated to ensure the Group is representative of different regions.

4. *Term of Office*

Membership of the Group will be reviewed by the Group every three years.

6. *Minimum requirements/experience for membership*

— Qualified solicitor, Fellow of the Institute of Legal Executives or barrister.

— Work for a Local Authority.

— At least 4 years experience specialising in public childcare law proceedings with the Local Authority, preferably with a strategic or management role.

— Preferably a member of the Law Society Children Panel.

— Commitment to attending meetings and undertaking work outside of meetings in own time.

— Support of employer in becoming a member of the Group.

7. *Meetings*

There will be four meetings per year. Meetings take place from 10.30am—1pm.

The venue for these meetings will be at an agreed office of one of the members of the Group.

There may be additional meetings members are required to attend when co-opted onto other groups.

8. *CPD*

Attendance at meetings attracts 2 ½ CPD hours.

Useful website addresses:

slgov.org.uk

acses.org.uk

January 2008

Written evidence from Hertfordshire County Council Children's and Legal Services(CFB 20)

MEDIATION

1. No submission

CHILD ARRANGEMENT ORDERS

2. No submission

EXPERT EVIDENCE

(e) Does the new test adequately safeguard against miscarriages of justice?

3. Yes as if there is a cogent argument for an expert this can still be made. There is a role for experts rather than a body of research in certain types of cases, in particular non-accidental injury cases.

(f) Are social workers receiving the support and training they need to meet this increased court role?

4. Social workers have an ongoing training programme of professional development. In addition to the training already available we are focussing on identifying areas on which additional training would be beneficial and looking at how this can be provided. As a local authority once the detail and timescales for the changes are known we will provide training both for social work and legal professionals to ensure that social workers receive the support and training they need to meet the increased court role.

TIME LIMITS

(g) What progress has been made to achieve the 26 week limit?

5. Since 1 April 2012 consideration has been given by the Court to allocating all new cases to a 26 week timetable unless there are considered exceptional and progress is being measured to see whether or not the cases adhere to this 26 week track. The reasons for non-compliance with the 26 week track are being monitored. In some cases this has aided a speedy disposal of the application. In other cases expert assessments and availability of court time have impacted on progress towards a 26 week time limit.

CARE PLANS

(h) Should the Judge's role be restricted to considering only the permanence provisions of care plans?

6. Yes. However, if the detail of the care plan is not sufficiently clear or contradicts the long term plans for the child then the Judge should be able to raise their concerns about the care plan to ensure that the final court care plan for the child is robust and clear. Such care plan will then be reviewed by the Independent Reviewing Officer as part of the Children Looked After process and will evolve and change with the child's circumstances and needs depending on their permanence plan.

DIVORCE:

7. No submission

ENFORCEMENT AND SHARED PARENTING:

8. No submission

October 2012

Written evidence from the Association of Her Majesty's District Judges (CFB 21)

Introduction

1. The Association of Her Majesty's District Judges ("ADJ") represents the District Judges of the County Courts and District Registries of the High Court in England and Wales.

2. District Judges are responsible for the vast majority of private law children and divorce work and a substantial amount of public law work. As such, the ADJ is uniquely placed to comment on this consultation.

The Consultation

3. We understand that the Justice Select Committee ("JSC"), chaired by Sir Alan Beith MP, is undertaking pre-legislative scrutiny of the draft family justice clauses of the proposed Children and Families Bill as published on 3 September 2012, and the draft clauses to be published later this year on shared parenting and enforcement of court orders.

4. Whilst the ADJ has already given its views on the draft clauses to the DfE and MoJ in response to their invitation to do so, we set out below, for the sake of completeness, our views on all the issues the JSC is seeking to explore.

5. We also attach at Appendix 1, again for the sake of completeness, a copy of our response to the Interim Report of the Family Justice Review Panel ("FJR Response"), chaired by Sir David Norgrove.

Executive Summary

6. We agree that, where appropriate and safe to do so, disputes should be resolved independently or using dispute resolution services. However, we remain concerned that the high number of cases giving rise to significant safeguarding concerns eg domestic and substance abuse must continue to be carefully scrutinised by the court. Access to the court in such cases should be quick and easy, and should not be delayed by an inappropriate referral to a Mediation Information and Assessment Meeting ("MIAM").

7. We endorse the proposal to replace the terms "residence" and "contact" to remove the perception of winners and losers. (In this respect, see paragraph 34 of our FJR Response.) However, the present drafting and definitions, importing as they do the old terminology, fails to achieve any meaningful change.

8. In the sphere of expert evidence, we are not convinced a change from the test of "reasonably required" to "necessary" is needed. Of more concern is the pressure to avoid so-say delay and complete cases within 26 weeks, thereby leading to the temptation to refuse expert evidence which would be helpful in achieving the right outcome for the child.

9. As far as time limits in public law cases are concerned, we have grave doubts that it will be possible to achieve the 26 week time-frame even in standard track cases unless social work teams have been able to carry out all the appropriate assessments, including the exploration of kinship placements, prior to proceedings being instituted. This, in turn, creates the risk that a local authority will inappropriately delay the issue of proceedings.

10. We believe there to be a number of factors which militate in favour of the court retaining its existing role in the consideration of care plans.

11. Although we have a number of concerns about the proposal to "streamline" the court process for divorce or dissolution of a civil partnership so that uncontested cases can be dealt with "administratively," we support the repeal of s.41 matrimonial Causes Act 1973, and its equivalent under the Civil Partnership Act 2004. In our experience, they are rarely, if ever, invoked and we are satisfied that the more appropriate course in any event is to make an application under the Children Act 1989.

12. We are wholly opposed to any legislative statement as to shared parenting. Those postulated thus far would be counter-productive in that the raising of expectations will generate increasing numbers of disputes and reduce the likelihood of amicable agreement.

Mediation

13. Generally, we would refer the JSC to paragraphs 35–39 of our FJR Response attached at Appendix 1.

14. Further, section 1(2) (d) of the draft clauses suggests that rules may empower an officer of the court to refuse to deal with an application if the applicant has not attended a MIAM. This could prejudice child safety/ welfare and is a decision which only a judge should make.

15. We are in difficulties in fully addressing the proposed section 1(1) without any information as to the circumstances in which the sub-section is likely to be dis-applied.

Child Arrangement Orders

16. The definition of a "child arrangements order" ("CAO") in section 2 of the draft clauses includes the words "with whom a child is to live," which is taken straight out of the current definition of a residence order.

We consider that it is necessary properly to replace the terminology and importing the old terminology into the new definition achieves virtually nothing. Those parents who currently latch on to "residence" and "shared residence" will also latch onto whether a child is "to live" with them. The whole point of a CAO is to level the playing field by getting rid of the concepts of residence and contact. We suggest instead: "what periods of time a child is to spend with or be in the care of a parent or any other person named in the order." The consequential amendments would, of course, all need considering, as, indeed, would the impact on section 13. As presently drafted, however, the clauses do not achieve what was intended by the FJR, and represent a substantial watering down.

17. Likewise, we have concerns about Schedule 1. Paragraph 22(3) of Sch. 1 permits removal for up to one month by a person named in a CAO as a person with whom the child is to live. This raises the possibility of a parent with whom a child lives, even for a minority of his/her time, being able to remove from the jurisdiction for up to a month. This is clearly not what is intended. Further, what would be the impact on Hague Convention proceedings if removal was lawful so far as paragraph 22(3) is concerned, even though the removing parent had exceeded his/her allocated time?

Expert Evidence

18. Section 3 deals with control of expert evidence in respect of which we have the following concerns and suggestions:

(a) In relation to section 3(6) the phraseology in the civil context is "reasonably required" and we suggest it is also appropriate in this context.

(b) In relation to section 3(7), although the factors listed are generally uncontroversial, we would much prefer the phrase "the court is to have regard to all the circumstances of the case, including…."

(c) We also suggest that (g) should read: "the cost of, and the ability of the parties to fund, the expert evidence."

(d) The same points also apply to section 3 (11).

19. Of more substantial concern is the unintended consequence of reinforcing the de-skilling of social workers and children's guardians by effectively excluding them from the definition of "expert." We understand that the intention is to control external expert evidence where that evidence can be given by parties to the proceedings but the drafting appears to be at odds with the explanatory notes in this respect. This difficulty could be addressed by adding at section 3(7) (d) the words "eg from a local authority social worker or children's guardian" and at section 3(7) (e) the words "eg by a local authority social worker or children's guardian."

20. We are concerned that the tension between avoiding delay and engaging "necessary" experts may result in the refusal of permission for an expert which should have been granted. The recent case of *Islington LBC v Al Alas* illustrates the risk in this regard.

21. We have seen no evidence that social workers are receiving the support and training they need to meet their increased role. If they are to do so (in place of external experts), they must be properly resourced. There is, however, evidence of continuing under-resourcing.

Time Limits

22. So far, the objective of 26 weeks has concentrated the minds of those who work in the family justice system on whether a case can be approached in a different way in order to achieve a speedier—and best—outcome for the child. However, the guiding principle is the welfare of the child and the courts will, and must, continue to explore alternatives to care orders eg kinship placements. This must, of course, always be within the timescale for the child, but it will not always be possible to achieve this in 26 weeks. We suggest that courts must continue to work on the basis of "do it right" and as rapidly as is consistent with that, not "do it quickly" regardless of the impact upon the welfare of the child. Delay is not the only issue which the courts must consider, and in any event the statutory principle enshrined in the Children Act 1989 s. 1(2) continues to operate.

23. Crucially, in our view, there will be little or no chance of achieving the target of 26 weeks even in standard track cases unless social work teams have been able to carry out all the appropriate assessments, including the exploration of kinship placements, prior to proceedings being instituted. (We accept, of course, that in urgent cases, this will not always be possible.)

24. The straitjacket imposed by s.4(7) negates any advantage inherent in removing the time limits for interim care orders: it would be better to prescribe that the court must indicate the proposed period of extension. If the extension is required as a result of ordering a further assessment, it is highly likely that more than eight weeks will be required.

25. S.4(8) is not susceptible of sensible comment without knowing what rules of court are proposed.

Care Plans

26. We do not agree that the role of the court should focus simply on the question of whether a care order is in the child's best interests. A number of factors militate against the court retiring from this wider role:

(1) The quality of social workers and the care plans they produce is variable. The resources available to them are rarely sufficient.

(2) Judicial scrutiny of a care plan is the last chance of public scrutiny before the matter goes back to the "Executive" to decide a child's future. We remind ourselves that it was the death of Jasmine Beckford, who had been returned to the care of her mother and step-father as a result of misplaced local authority optimism, which played a significant role in the creation of the Children Act, and its emphasis on scrutiny of care.

(3) Further, the care plan (and particularly its provisions for contact) is the issue most likely to be contested in care proceedings. If parents feel that after the granting of a care order they will be cast adrift to deal with the local authority on the issue of future care planning, this may well lead to further and lengthier contested hearings on the issue of threshold.

(4) In any event, threshold and planning are, inevitably, closely intertwined and there seems little obvious advantage in removing the court scrutiny of care plans. The FJR Report acknowledges that the court should determine whether a child should go home or to an alternative family placement; equally, it will remain with the court whether a placement order should be made. The court will, likewise, retain its section 34 powers to regulate contact in the event a care order is made. With those concessions, it seems that the aspects of the care plan which the court might not be expected to scrutinise are relatively modest eg education. The court will need to consider important issues such as inter-sibling contact. The present legal position is that the court should pass responsibility over to the local authority when all the factors in the care plan are as clearly ascertained as possible. That does not mean that the court should indulge in crystal-ball-gazing, but rather that the court be satisfied that the plan is not inchoate.

(5) That said, if the scrutiny of care plans is no longer to be permitted, a corresponding strengthening of Looked After Children reviews and the role of Independent Reviewing Officers will be absolutely essential. We would refer the JSC to the observations of Peter Jackson J in the case of *A & S (Children) v Lancashire County Council* [2012] EWHC 1689 Fam, endorsing recommendations for improving the effectiveness of the IRO system. Otherwise, consideration may need to be given to removing the role of IRO from local authority control so they can be seen to be completely independent.

(6) Further, IROs cannot possibly hope to do their job properly if they have a caseload of 100–120 as is the present position and, if the scrutiny passes to them, more resources will be required. The working relationship between the child's guardian and the IRO also needs to be stronger.

(7) Consideration should also be given to the cost involved (financially and in human terms) if matters are subsequently returned to the court, whether by way of judicial review or otherwise, because the local authority did not have a well-thought-out care plan upon which to build for the future.

Divorce

27. Although we have a number of concerns about the proposal to "streamline" the court process for divorce or dissolution of a civil partnership so that uncontested cases can be dealt with "administratively," we support the repeal of s.41 matrimonial Causes Act 1973, and its equivalent under the Civil Partnership Act 2004. In our experience, they are rarely invoked and we are satisfied that the more appropriate course in any event is to make an application under the Children Act 1989.

Enforcement and Shared Parenting

28. We have responded to the Department for Education's consultation: *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* and would refer the JSC to our response which we understand will be passed to the JSC. For that reason we do not repeat here our response to that consultation save to say that we remain vehemently opposed to any legislative statement as to shared parenting for the reasons we gave in our response. We have already indicated in our response that we support the stance being taken by the JSC in this respect.

October 2012

Appendix 1

THE ASSOCIATION OF HER MAJESTY'S DISTRICT JUDGES

RESPONSE TO THE FAMILY JUSTICE REVIEW INTERIM REPORT

(a) Introduction

(a) The Association represents the District Judges of the County Courts and District Registries of the High Court in England and Wales, together with 12 District Judges at the PRFD.

(b) As at 20 May 2011, 251 District Judges are authorised to hear private law children work. A further 199 District Judges (including all 21 at the PRFD) are authorised to hear both private and public law children work.

(c) Although listing arrangements vary throughout the country, it is fair to say that District Judges handle the vast majority of the private law work that comes before the court.

(b) Preliminary General Remarks

(a) The Family Justice System is currently under great strain. Financial constraints within HMCTS inhibit the ability of dedicated and hard-working staff properly to support the judiciary, with the result that files are often mislaid and documents lost or not put on the file in time for a hearing.

(b) Further, the provision of public funding has been gradually eroded over recent years. Many parents now find themselves financially ineligible or subject to a contribution. Remuneration for lawyers has substantially reduced in real terms, and many firms have given up publicly funded work. The current proposals to reform the legal aid system would see yet more people rendered ineligible.

(c) This will leave often vulnerable, and certainly emotionally-challenged, people to face alone the daunting prospect of a court appearance at what will undoubtedly be one of the most difficult points of their lives.

(d) The consequent increase in the numbers of litigants in person will have an inevitable impact on the length of court hearings, whether cases will settle, how much can be listed on a particular day—with all the delay that will then ensue for other cases waiting to be listed.

(e) The Association recommends that an holistic approach be taken in relation to the wide spectrum of issues currently facing the Family Justice System. A "pick and mix" approach will simply not work and mediation must not be seen as a universal—and cheaper—panacea to all ills.

(c) The Consultation Questions

Towards a Family Justice Service

1. *Do you agree with the proposed role that the Family Justice Service should perform?*

1. Although the proposal to bring all family justice functions under one umbrella organisation is superficially attractive, and its aims are laudable, we have identified a number of possible difficulties of such a unified service. We make our comments on the basis that it is not the aim of the Report to remove the Family Justice System from HMCTS. If our understanding in this respect is incorrect, we would welcome the opportunity to make further representations.

2. In our view, there is a danger that any new service will replicate mistakes seen elsewhere where additional layers of administration have added greatly to the cost of providing a service but without a corresponding improvement to the service itself. Large-scale, complex organisations bring with them particular difficulties: this is readily demonstrated by the relative success of Cafcass Cymru in meeting its objectives as compared with the well-documented difficulties encountered by the much larger Cafcass in England. The proposed structure could be regarded as somewhat top-heavy.

3. It is vital that judicial independence is not only maintained, but is seen to be maintained. Listing must always remain a judicial function. Equally, the parties to a case must always have the ability to bring their dispute before a judge for determination. These concepts, however, do not sit easily with the suggestion at paragraph 3.67 that the Family Justice Service should *"facilitate court involvement, which must be proportionate to the needs of the children and families involved."* Similarly, the following paragraph 3.68 suggests that the Family Justice Service should agree its priorities (which must include budgetary priorities) *"in consultation with its partners such as local authorities, children and families, lawyers and mediators."* At the moment, these decisions are, or should be, taken as part of the robust case management of each individual case by the judge(s) assigned to it. Such decisions are appealable. The ability of the judge to direct what s/he thinks is best for the individual child, and the preparedness of all parties to accept that a tailored decision has been taken by someone seized of all relevant facts, will be negated if the budgetary priorities are set by a Family Justice Service.

4. If the administration of legal aid is undertaken by the Family Justice Service, those denied funding on means or merit (and especially the latter), may feel that the court has prejudged its case.

5. Cafcass officers are frequently witnesses before the family court. If they are part of the same service, parties may consider that they are unlikely to be challenged by the court. It is already sometimes necessary to remind parties that Cafcass recommends, but the court decides.

6. Further, not all court "social work" is provided by Cafcass. There may be, and often are, very good reasons why a local authority should report to the court, whether under section 7 or section 37.

7. Whilst sharing an estate with Cafcass has the advantages of ease of access and (possibly) saving money, it is likely to cause very great difficulties in terms of the ability of Cafcass to provide a neutral, as well as safe, setting for seeing adults and children alike. Many are likely to be wary of an invitation to meet in a building known to be the same address as the court. As paragraph 3.158 of the Report acknowledges *"Courts are seen as daunting, intimidating places, especially by children and young people."* Meeting Cafcass there is unlikely to be conducive to frank and constructive discussion and mediation.

8. Although the aspirations set out in paragraph 3.2 of the Report are uncontroversial in themselves, the question is whether a whole new organisation and structure (with its attendant cost implications) is required to convert those aspirations to achievement. It may be that the appropriate change can be achieved by working with the raw material already available.

9. We do, however, agree that the Local Family Justice Boards could conveniently bring together all the myriad local services and discussion forums, as they currently exist, to form a more cohesive whole.

2. *Ensuring that a child's voice, wishes and feelings are central to the family Justice Service is crucial. What would you recommend as the crucial safeguards to enable this to happen?*

1. Research has long indicated that children wish their views to be heard on matters that affect them. In practice, a great deal of skill and care is required.

2. However, the adults in their lives (including the judge if their parents cannot agree) retain the responsibility for making decisions in their best interests. It must be made clear to children as early as possible in the process that this burden will not be put on their shoulders so that they understand that, even though their views will be taken into account (as, of course, the Children Act requires), the ultimate decision will not necessarily reflect their wishes about a particular matter. That should allay any fears they may have about the repercussions of "taking sides."

3. This responsibility includes—sometimes—taking the decision that a child's views should not be sought because, in so doing, harm may be caused to that child (because, for instance, his views have been sought on a number of previous occasions and the court proceedings are already having a damaging effect on his well-being).

4. Even if some other mechanism is ultimately chosen for the child to communicate his views to the court (eg directly to the judge), a Cafcass officer will need to undertake this preparatory work. (Further, we should make it clear that, when we say Cafcass officer, we have in mind the court welfare officer model which has to a large extent been subsumed under the safeguarding role which now dominates a Cafcass officer's existence.)

3. *Do you agree that children should be offered a choice as to how their voice can be heard in cases that involve them, including speaking directly to the court?*

1. We agree that children should be offered a choice as to how their voice can be heard. It may, however, be appropriate to defer this until after the First Hearing Dispute Resolution Appointment ("FHDRA") at which a substantial number of cases are resolved. If not resolved, the questions as to how, where and when to involve the child can be considered at this appointment.

2. However, in respect of some methods of communication, the court will need to exercise a more cautious approach. So, while a facility for a child to speak to a trained professional (who is also competent to assess whether either parent is influencing the child) is clearly of great merit, offering the child the facility to write to the court is fraught with difficulty unless the circumstances under which the letter was written are known (eg in the presence of a Cafcass officer).

3. Subject to the reservation expressed at paragraph 2(3) and depending on the case and the child concerned, including its age, children should have the opportunity to speak to the judge, if that is what they wish. However, it must be explained to them that a judge is not able to offer confidentiality and may not reach a decision which reflects the child's wishes and feelings. Again, this is something that could be explained by the Cafcass officer as part of the preparatory work for ascertaining a child's views. It may be appropriate to offer training to those judges who feel less comfortable about seeing a child in such circumstances.

4. *Do you agree that there should be a single family court?*

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

2. So, it should be possible to achieve this at relatively modest, if any, cost, for example, by renaming all courts where family hearings occur as Family Justice Centres.

3. We envisage that a single family court could and would facilitate transfers of work between the various levels without the necessity for a formal transfer. At the same time, we suggest the opportunity is taken to put right anachronistic and illogical limitations on the powers of District Judges to deal with certain types of cases eg declarations of parentage or to sit as a District Judge (MC) if the need arises.

4. However, it is suggested that family courts remain co-located with civil courts at the very least. We say more below about specialisation but, assuming District Judges continue to exercise both civil and family jurisdictions, it makes no business sense to locate them in different buildings. At present, if a family list collapses, the judge concerned can assist with a civil list and/or box-work. The reverse is also true. There are also significant areas of overlap between family and civil work. In particular, claims under the Trusts of Land and Appointment of Trustees Act 1996 which are dealt with under the Civil Procedure Rules are often linked with an application under Schedule 1 to the Children Act and dealt with at the same time.

5. It is suggested that District Judges act as gate-keepers, allocating work to the appropriate level of judiciary. Experience of the allocation of work issued in the County Court between the CC and the FPC shows that this has worked well. In less routine cases, a District Judge could refer the matter to the designated family judge.

5. *Do you agree that the changes we have proposed to the judiciary—including greater continuity, specialisation and management—will lead to improvements in the operation of the family justice system?*

1. We agree that there should be judicial continuity wherever possible. There are clear advantages in terms of judicial preparation time and consistency of approach, as well as the confidence instilled in the parties that one judge is taking responsibility for their case. "Responsibility" is the key word. If a judge, for example, invites the parties to try a particular contact regime, that same judge should be the one to see how that has gone, to take appropriate responsibility for where it has gone wrong and put in place necessary changes. Expectations can be managed at an early stage and clear goals set as to the desired outcome.

2. One possible downside of judicial continuity is, of course, delay. It may take longer to list a case in front of a specific judge and judge-time will not be so effectively utilised. (Listing cannot be so robust if cases cannot be moved around and, when cases settle, it may be harder to fill judges' time.) In our experience, what is really important is that, when a judge has had significant involvement, or there are particularly unusual features, in a case, s/he should retain responsibility and reserve the matter. It is essential for that decision to be made by the judge rather than a member of staff at the outset of the case.

3. We accept, however, that, given its particular nature, it would be wise to have no more than two judges allocated to deal with a public law case, as currently happens.

4. Judges are already proactive in accommodating family cases in their lists, in many parts of the country in part by a process of "self-listing."

5. Specialisation is a difficult issue. In principle, of course, it is difficult to argue against the contention that specialisation brings with it great advantages in terms of quality and quantity of work achieved, and thus provides scope for economy. No doubt, some District Judges would very much welcome a diet of undiluted family work; others, however, prefer greater variety. In larger centres a degree of specialisation is achievable; in smaller courts this would be more difficult to achieve. Specialisation also has the scope for being divisive (although that might be managed by looking at areas of civil work that would also benefit from a degree of specialisation). Is it intended that specialist family or civil judges should be precluded from doing work outside their speciality? If so, that would make the system less flexible (and more costly) than at present, where a District Judge whose list goes short can help out other colleagues. We already have a successful ticketing system in place, but would suggest a degree of flexibility is maintained in the interests of the efficient dispatch of court business as a whole.

6. We have grave concerns regarding the proposals for leadership and management. At the core of our reservations is that the independence of the judiciary as a whole, and of individual judges' decisions, must be maintained.

7. We are not convinced that there is any need for what would be an additional layer in the role of the Senior Family Division Liaison Judge.

8. We are particularly concerned about the manner in which an individual judge's performance is to be monitored and question whether the "key indicators" proposed would properly measure a judge's performance. Every case is fact-sensitive and, particularly in family cases, less susceptible to a blanket approach. We are not opposed to a system of confidential appraisal/mentoring of judges at all levels, conducted by judiciary of the same level.

9. If a Designated Family Judge is to have greater management responsibilities, there will need to be a recognition that this will entail significantly more work, attracting, we suggest, the status and remuneration of a Senior Circuit Judge. Otherwise, there is the risk that no one will wish to assume the responsibility. Further, training will be required together with the allocation of sufficient time to carry out his/her functions.

6. *Do you agree that case management principles, in respect of the conduct of both private and public law proceedings, should be introduced in legislation?*

1. We do not agree that this is necessary. The recently implemented Family Procedure Rules 2010 ("FPR 2010") set out clear case management powers and responsibilities. Further, the parties themselves are required to co-operate in order to further the overriding objective. The rules are supplemented from time to time by guidance and practice directions issued by the President of the Family Division. Section 1 of the Children Act 1989 is clear. If this is not already happening (and we do not agree that it is not), it is a question of training.

2. We also repeat what we have already said about the independence of the judiciary; it is not for the legislature to dictate how a judge manages his/her cases.

3. We agree that case management by the judiciary should be supported with consistent case progression support in the form of a case progression officer.

7. *What changes are needed to the culture and skills of people working in family justice and how best can they be achieved?*

1. The Munro Review of Child Protection highlights the dangers for social workers of putting process before outcome. This applies with equal force at all levels of family justice and is already a concern with regard to Cafcass and its safeguarding responsibilities.

2. The suggestion in paragraph 3.48 of the Report that most judges have never worked in a management structure or had management responsibilities is manifestly inaccurate as far as the District Bench is concerned. The majority of District Judges are former solicitors, most of whom will have been partners in law firms with all the management issues that entails.

3. As far as training is concerned, there is a view that, rather than updates on judicial interpretation (which we can read for ourselves), it would be more helpful to understand eg psychological perspectives on child development and adult personalities, research findings etc., and that this should apply to all levels of judiciary.

8. *Do you have any other comments you wish to make on our proposals for system management and reform?*

1. We disagree that budgets should be set in terms of money, not in sitting days. Civil and criminal work is also set in terms of sitting days and, if the argument is lack of statistics, this can easily be overcome.

2. We agree that charges to local authorities for public law applications and to Cafcass for police checks should be removed.

3. We agree that the system will only deliver change if there is a competent and capable workforce. It will fail if it is not properly resourced.

4. Whilst we do not disagree that more hearings could be held in rooms that are family-friendly, we question where such rooms are. Further, it makes no practical sense to have some cases in one place and others in another with the potential loss of judicial time. The FPR 2010 already allow judges to take advantage of appropriate technology. We do, however, question how often this will be helpful and relevant in family cases.

5. In our experience, there is very rarely any such thing as a "routine hearing." Great progress can be, and is, made by judges at a first appointment, having the parties there and engaging directly with them, and with the benefit of Cafcass input. The ability or otherwise of the Private Law Programme correctly to triage those cases requiring a light touch from those needing more intensive input and resources should be evaluated and considered before further changes are implemented.

Public Law

9. *Do you agree with our proposals to refocus the role of the court?*

8. We do not agree that the role of the court should focus simply on the question of whether a care order is in the child's best interests. A number of factors militate against the court retiring from this wider role.

9. The quality of social workers and the care plans they produce is variable. The resources available to them are rarely sufficient.

10. Judicial scrutiny of a care plan is the last chance of public scrutiny before the matter goes back to the "Executive" to decide a child's future. We remind ourselves that it was the death of Jasmine Beckford, who had been returned to the care of her mother and step-father as a result of misplaced local authority optimism, which played a significant role in the creation of the Children Act, and its emphasis on scrutiny of care.

11. Further, the care plan is the issue most likely to be contested in care proceedings. If parents feel that after the granting of a care order they will be cast adrift to deal with the local authority on the issue of future care planning, this may well lead to further contests on the issue of threshold.

12. In any event, threshold and planning are, inevitably, closely intertwined and there seems little obvious advantage in removing the court scrutiny of care plans. The Report acknowledges that the court should

determine whether a child should go home or to an alternative family placement (4.158); equally, it will remain with the court whether a placement order should be made. The court will, likewise, retain its section 34 powers to regulate contact in the event a care order is made. With those concessions, it seems that the aspects of the care plan which the court might not be expected to scrutinise are relatively modest eg education. The court will need to consider important issues such as inter-sibling contact. The present legal position is that the court should pass responsibility over to the local authority when all the factors in the care plan are as clearly ascertained as possible. That does not mean that the court should indulge in crystal-ball-gazing, but rather that the court be satisfied that the plan is not inchoate.

13. Against that background the assertions at paragraph 4.154 are surprising—in particular that overly-intervenionist scrutiny leads to expert reports that are not germane to the issue. Most expert reports are germane to the issue of re-unification (or, occasionally, just contact). If necessary, the President's Practice Direction on the Instruction of Experts could be modified to emphasise the circumstances in which expert involvement is likely to be required, although we do not consider this to be necessary. We repeat what we have previously said to the review panel, namely that there may be scope for greater reliance on joint written reports addressing discrete questions and that the instruction of more "hands on" experts may often be appropriate.

14. As far as the list of suggested issues the court should not consider set out in paragraph 4.162 is concerned, the inclusion of "contingency planning" (if we have understood its meaning correctly) is particularly surprising. In the context of care proceedings, it is usually considered in terms of parallel planning and is, therefore, fundamental to the application before the court.

15. That said, if the scrutiny of care plans is no longer to be permitted, a corresponding strengthening of Looked After Children reviews and the role of Independent Reviewing Officers will be absolutely essential. The latter cannot possibly hope to do their job properly if they have a caseload of 100–120 as is the present position and, if the scrutiny passes to them, more resources will be required. We agree that the working relationship between the guardian and the IRO also needs to be stronger.

16. Consideration should also be given to the cost involved (financially and in human terms) if matters are subsequently returned to the court, whether by way of judicial review or otherwise, because the local authority did not have a well-thought-out care plan upon which to build for the future.

10. *Do you think that a six-month time limit, with suitable exceptions, for all section 31 care and supervision cases should be introduced? What should those exceptions be?*

1. Although, in principle, we welcome suggestions which reduce the delay in deciding a child's future, an arbitrary time-limit is not the answer. There are many reasons for delay; and delay can, in some cases, be constructive. *"It is generally acknowledged that it is 'avoidable' delay or delay that is not 'planned and purposeful' and leads to drift and wasted time that can be damaging…..it is also important to bear in mind that an over-hasty approach may be harmful to the child. Reactive, crisis-led, ill-considered or unplanned decisions have been found to have a significant negative consequence for children, including insufficient attention to the assessment and appraisal of all relevant factors, failure to explore all available options, lack of continuity and poor planning."* (See Larkin, McSherry and Iwaniec *"Room for improvement? Views of key professionals involved in care order proceedings"* 2005 CFLQ 17(2) at 231–245.)

2. Further, a decision can only be made in the best interests of a child if there is the appropriate evidence available to the court to make that decision. The fundamental difficulty at the present time is that it is not possible to complete cases within the six months suggested without good social work evidence and the availability of court time.

3. If there is to be a six-month rule, exceptions might include:

(a) Where there is a very real basis for optimism that a child can be reunited with a family member but, for whatever reason, this cannot be achieved with six months;

(b) Where a very specific expert opinion is required on an unusual aspect (and most likely in a case of alleged very serious non-accidental injury) and it is not possible to obtain it within the required timescale;

(c) Where a further child is born during the proceedings whose future also needs to be considered.

4. We agree that the requirement to renew interim care orders after eight weeks and then after every four weeks should be removed. The present system entails unnecessary and time-consuming paperwork. The parents always have the right to apply to discharge an order if circumstances change.

5. We agree that the requirement that local authority adoption panels should consider the suitability for adoption of a child whose case is already before the court should be removed. It is an unnecessary layer of scrutiny and can cause delay.

11. *Do you agree that the Timetable for the Child should be strengthened? What are the elements that need to be taken into account when formulating it?*

1. Anything which concentrates the minds of all concerned upon the need to avoid delay is, in principle, to be welcomed**.** However, the principle should always be that all cases should resolve as expeditiously as

possible. There will always be cases with specific deadlines—eg the need to settle living arrangements for a child to enable her to start school from a settled base, or before an important medical procedure—but for all children there should be planning at the outset for how long each stage should take. Local Authorities can be resistant to parallel planning (especially permanency planning before family placements have been fully explored), but there is no reason why the court's order as CMC stage should not routinely record not only the dates for filing and serving any outstanding assessments but also provisional dates for pre-adoption medical and panel (if the latter survives).

2. Whilst acknowledging the point made at paragraph 4.57 that delay is damaging children, we are concerned about the inference to be drawn from paragraph 4.58, that children are damaged by developing secure attachments to their caregivers and thus distressed by removal to another placement. Multiple placements are self-evidently highly undesirable, but there is much research which demonstrates the value to a child of developing secure attachment which then provides a basis for transfer to her ultimate care-giver. See eg Fahlberg: A Child's Journey Through Placement—*"It is easier to help a child and foster parents cope with the separation problems than to help the child's permanent family cope with the long-term effects of the child not having developed healthy attachment in the early years."*

12. *Do you think our approach to the strengthening of judicial case management is correct?*

1. See our earlier comments at paragraph 6.1).

2. Further, judges need to be given adequate time robustly to case manage, including appropriate preparation and reading time.

13. *What criteria should be used in the decision whether or not to appoint experts? And should the judge draft the letter of instruction?*

1. We already have clear powers to refuse an expert assessment, the essential test being whether the expert report is reasonably required to resolve the proceedings. Further clarification is set out in the President's Practice Direction referred to earlier and we see no need for further criteria being set. The issuing of guidance by the President is a flexible process by which changes in culture—perhaps in response to new published research—can be quickly and easily disseminated.

2. In practice, in our experience, there are rarely problems with the letter of instruction, the child's solicitor invariably taking the lead in this respect. If there are perceived to be problems in this regard, one suggestion is that any party seeking to instruct an expert must file and serve a draft letter of instruction with the application. Any dispute can then, and should be, resolved with the judge's red pen.

3. We do not consider that judges should routinely be drafting the letter of instruction for a number of reasons (but, principally, one of time). However, judges should identify in the order the precise matters upon which the expert is being asked to assist the court.

4. We have made the point earlier about the variable quality of social work evidence and endorse Professor Munro's Recommendation 11 in this context. But, where it is of good quality, social workers (and to some extent guardians) should have confidence in their own professional ability and, where there has already been an assessment, local authorities might be slower to request, or accede to a request for, a further "psychological assessment."

5. The concern about the expense and utility of residential assessments might usefully be addressed by greater emphasis upon the provision of mother and baby foster placements, which may provide a more realistic base for assessing competence to parent safely whilst putting in place essential safeguards for the child during that assessment.

14. *Under a proportionate working system, what are the core tasks that a guardian needs to undertake in care proceedings?*

1. The powers and duties of guardians are already succinctly prescribed in FPR 2010 PD16A.

2. The core task, quite simply, is to safeguard the interests of the child. In our view, this includes focussing on "quality assuring the local authority's plans."

3. It is clearly unnecessary for the guardian to attend every court hearing, provided the child has a fully-instructed solicitor, but the rules already permit the court to excuse attendance.

4. It is unfortunate that in some areas the relationship between local authorities and guardians is such that social workers appear reluctant to formulate plans for children for fear of being required, as a result of guardian scrutiny, to re-write them. But that is a reason for addressing the quality of local authority work, not for diluting the role of the guardian. We welcome the suggestion of a pre-proceedings guardian as a way of avoiding or minimising any such problems in the future.

15. *Could there be a greater role for other Dispute Resolution Services in support of the public law process?*

1. Public law, unlike private law, presents limited scope for traditional dispute resolution.

2. Instead, we favour an approach which recognises the benefits of education and early intervention, in other words prevention rather than cure. This could usefully start in school. Certainly, all new parents should be offered parenting classes which go beyond the practicalities of infant care and extend to behaviour management, nutrition and all aspects of child care. Health visitors should be astute to identify those parents who may need additional intervention (including those who fail to engage with HV services). Early referral to social services should result identification of appropriate support systems so that, where available and necessary, an alternative kinship carer can be sought at the earliest opportunity.

3. Pre-proceedings appointment of a guardian and the provision of competent legal advice to parents (available to some extent now, but very poorly remunerated given its potential importance) may assist in preventing the need for proceedings, as may, in appropriate cases, family group conferencing. We endorse what is said at paragraphs 57 and 58, that, wherever possible and appropriate, children should be brought up by their own families and the integrity of the birth family should be maintained.

4. Mediation may have a role to play, particularly in those cases where co-operation between parents and the statutory agencies has broken down. Local authorities should also be sympathetic to a change of social worker where trust has broken down, possibly because of a simple clash of personality. Sometimes, hearing the same message from a different professional may carry more weight.

16. *Do you have any other comments you wish to make on our proposals for public law?*

1. Although, as we have indicated earlier, we tend to favour the abolition of adoption panels, there may be a case for stream-lining their role, rather than dispensing with them altogether. There is a range of expertise in the panels which cannot necessarily be replicated in the scrutiny provided by the guardian and the court, and it may be that this proposal deserves further consideration.

2. We disagree with the statement at paragraph 68 that the paramountcy of the welfare of the child is being compromised. It is a question of balance; and "purposeful delay" can be helpful when there is a real prospect of reunification with the birth family.

Private Law

17. *Do you agree that there is a need for legislation to more formally recognise the importance of children having a meaningful relationship with both parents, post-separation?*

1. Whilst we have no strong objection to this proposal in principle and recognise that it may assist in changing perceptions, we do not consider that there is any real need. Courts already take into account, and articulate to the parties, the benefit (generally speaking) to a child of having a meaningful relationship with both parents.

2. If a statement is to be inserted into legislation as proposed by this question, we suggest there should also be a statement that there is no parental right to any particular quota of time for either parent.

18. *Do you agree with the proposals to remove the terms "contact" and "residence" and to promote the use of Parenting Agreements?*

1. We strongly agree with the proposal to remove the terms "contact" and "residence" from all issues concerning parents with parental responsibility, although this will require amendments to be made to the Children Act. (To a certain extent, this is already happening in how orders are phrased eg by setting out arrangements in a preamble and then making no formal order.) In our experience, too much time is spent by parents trying to argue about the label to be attached to a care arrangement, rather than the practical details of the arrangement itself. Explanation of what parental responsibility ("PR") and residence actually entails, and that it is PR which is really important, can often defuse the situation but, by that stage, the parties have already got worked up about status and who will be seen to be the winner and the loser. Far better not to have to go there at all.

2. We would propose instead that, for parents at least, residence and contact orders of all descriptions should be abolished and replaced by "parenting time orders," rather than specific issue orders. Such an order would simply record that the children are to be with parent X on particular days and times and with the other parent at other times. This would have the advantage that the warnings endorsed on contact orders could be re-worded to be addressed to both parents, requiring them to comply with the terms of the order. The majority of parents would continue to agree arrangements without troubling the courts. Those parents who came before the court would no longer be able to fight over status. The court in private law disputes could concentrate on the relationships between the children and their parents, not the labels to be attached. The concept of PR would, thereby, be brought back into focus. Where child protection concerns exist, the court could simply refuse to allow an abusive parent any "parenting time."

3. The distinction proposed between fathers with and without PR is artificial and unhelpful. By virtue of how the law has developed in this respect, some fathers may have PR for some but not all the children in the family. What about the (admittedly extreme) situation of an unmarried father who is not on the birth certificate for whatever reason then being asked by the mother to look after their one-month old child long term? The mother retains her PR but the father does not have it without her agreement or going to the court for an order. So, why not, instead, give all fathers PR, by reason of their being fathers, just as all mothers have PR? That would do away with another area of sterile litigation.

4. We agree that the full range of orders under section 8 Children Act 1989 should remain available to non-parental relatives.

5. We agree that parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post-separation. This may most easily be achieved as part of any mediation process (see below). It is likely to be facilitated if parents are given a short leaflet when they register the birth of their child, providing an introduction to the meaning and practical implications of PR, a suggestion with which we agree. We also refer to what we said earlier regarding parenting classes.

6. However, there needs to be a recognition that, in some cases, trying to sort out all future arrangements at the outset may do more harm than good. So, there may be merit in settling immediate arrangements and letting them settle down before tackling longer term issues such as where a child should spend Christmas Day! Parenting agreements, raised early and before trust has been established, have the potential to increase conflict rather than reduce it.

19. *Do you agree there should be a requirement to consider Dispute Resolution Services prior to making an application to the court?*

1. We agree with the general statement of intent at paragraph 105 that, where possible, disputes should be resolved independently or using dispute resolution services, when it is safe to do so.

2. We also agree, as we have previously indicated, that, subject to certain exceptions, mandatory assessment for mediation is appropriate.

3. Most importantly, as suggested, attendance at a Separated Parenting Information Programme should be available at the earliest possible stage, and pre-proceedings, sensibly prior to mediation (so that the lessons learnt can be taken into any mediation process), but perhaps as part of the overall mediation process. Anecdotal evidence is that these programmes are proving to be enormously beneficial but, having to wait for the court to make an order in this respect, is simply too late.

4. However, one reservation we have is that there is currently no evidence that that mediated settlements are effective long-term and are in the best interests of the children concerned. Mediation is "just about settlement" rather than "a just settlement". The mediator cannot advise one party or the other, and cannot veto a deal s/he does not think is in the child's best interests (although, of course, a mediator can always step in if the arrangements proposed by the parents give rise to genuine child protection concerns). The FPR 2010 Part 3 and the practice direction thereto imposes obligations on the court and the parties in relation to alternative dispute resolution and it may be sensible to monitor that development before making further changes.

5. Mediation will also be inappropriate in many cases and, where that is the case, "going through the motions" will cause delay, and likely harm to the child.

6. Our experience, particularly since the introduction of early safe-guarding checks, is that there are often significant safeguarding concerns in many private law cases, commonly involving issues such as domestic abuse, drug and alcohol misuse and mental well-being. Indeed, Cafcass' own figures show serious concerns in approximately 50% of cases. We fail to see how such cases could be safely mediated without checks, and without access to and scrutiny by the court.

7. What also if there is reluctance on the part of one party to mediate? There is already power to stay proceedings for a mediation assessment. Take the common scenario of a father applying for contact. He is willing to mediate but the mother is not. A stay will suit her. She will not turn up to compulsory mediation because she does not want contact to happen. None of this will be in the child's best interests. Our experience is that you can get a mother to court, by a combination of persuasion and coercion (eg an order that if she fails to attend orders, including an order for contact, may be made in her absence), and, once there, she can often be persuaded to try some contact. The court monitors it, increases contact and very often arrives at a result with which both parents, now looking visibly more relaxed, can live.

8. There will also need to be sufficient trained mediators to meet the need. Already, there is anecdotal evidence of parties wanting to mediate having to wait weeks for an appointment.

9. Most fundamentally, however, we believe it to be wholly wrong to make access to the courts more difficult than it already is. Article 8 ECHR gives a right to family life and Article 6 the right to a fair trial and, as the Review rightly acknowledges, family issues are, arguably, the most important ones affecting our society.

10. The evidence is that the President's Revised Private Law Programme is working well, and parties should not be presented with too many mediation hurdles to overcome before being able to bring their case to court. There is a serious risk of watering down that Programme and introducing delay by these proposals.

20. *Do you agree with the processes we outline for the resolution of private law disputes?*

1. The "information hub" is an excellent idea in principle but, to work, it must be adequately resourced. There will need to be alternatives for those who do not speak/read English (an increasingly common feature), have limited literacy skills, have limited IT skills or have no access to a computer. The telephone helpline should not be a premium number and thereby unaffordable by many and it must not be so overstretched so as to make it impossible to get through. A real person should be easily accessible.

2. We repeat our concerns about mediation and the proposal to limit access to the courts. We also consider that the role of the court in resolving difficult family matters has been under-estimated. As the judges dealing with the First Hearing Dispute Resolution Appointment ("FHDRA") (which we agree should stay), we are uniquely placed to comment. Although, in principle, delay is to be avoided, there are many private law cases where purposeful delay can be extremely constructive. These will tend to be cases concerned with contact where one parent has to re-establish trust with the other parent, and often the children, after a difficult relationship breakdown. It is not unusual to build up contact over what may be quite a lengthy period and both parties often find it helpful for this to occur under the watchful eye of the court (usually one judge who has reserved the case to him/herself). If this approach is taken, it may mean several 30 minute directions appointments extending over several months, but this frequently avoids the acrimony of a lengthy contested hearing and, most importantly, results in a resolution which endures, and which benefits the children. Our members have many examples of "happy endings" where a patient approach like this has been adopted.

3. We see no point in allocating a case to a "simple" or "complex" track. How would such cases be defined? Very few cases that get beyond the FHDRA can be considered "simple." Further, a case that would perhaps be simple where both parties are represented becomes immeasurably more difficult and time-consuming where the parties are acting in person. We consider it sufficient that the judge exercising the gate-keeper role allocates a case to a particular level of judiciary.

21. *Which urgent and important circumstances should enable an individual to be exempt from the assessment process for Dispute Resolution Services?*

1. This question highlights one of the potential problems with the proposal for mandatory assessment. Any party who is not inclined to wait will be tempted to claim that s/he are exempt. How is someone then to decide whether they are exempt or not? Will a separate hearing have to be listed? Or, will the FHDRA take longer? Will there be a potential costs argument hanging over the rest of the litigation and only resolved at the end of the case?

2. Subject to those reservations and the reservations we have articulated earlier about compulsory mediation, a sensible starting point is the list set out at Annex C to PD 3A of the FPR 2010.

22. *What do you think are the core skills for mediators undertaking an assessment?*

1. We are not qualified to comment.

2. We note that the Report does not identify what the qualifications of mediators might be. It focuses almost entirely on administrative issues (access to service, running the organisation, commitment to quality etc.). There is some concern among our members that this may be indicative of a lack of understanding as to what a mediator can realistically achieve.

23. *Is there any merit in introducing penalties, through a fee-charging regime, to reflect a person's behaviour in engaging with Dispute Resolution Services, including the court?*

1. We do not understand what is meant by a "fee-charging regime." In our experience, financial penalties can be counter-productive. In any event, the existing Pre-Application Protocol for Mediation Information and Assessment already allows the court to take into account any failure to comply with the Protocol.

2. On a linked issue, we are wholly opposed to any link between contact and maintenance. They are entirely separate matters and any linking of the two can only be to appease a non-resident parent's sense of "fairness." We cannot think of any circumstances when it could be said to be in a child's best interests for the maintenance which is for that child to be suspended.

24. *Do you have any other comments you wish to make on our proposals for private law?*

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

2. Without wishing to offend colleagues on the Midland Circuit, some concern has been expressed about being "encouraged" to issue a document along the lines of the document set out at Annex Q. Its wording does

not meet with universal approval—far from it. The court applies the law to the particular cases that come before it: it does not "want things." The document enjoins parties to "talk to each other and make every effort to agree" but the mother of a child whose father is in prison for GBH or a rape in which the child was conceived is plainly not under a duty to talk to the father.

3. The divorce process suggested at paragraph 5.175 would depend on careful scrutiny by appropriately trained staff. Any system will need to have in built checks not only to pick up administrative errors but also the frequent legal errors we encounter in present. We are sceptical that such a system could be perfected but are not opposed to this idea in principle.

4. The suggestion at paragraph 5.176 to remove the current two-stage process of divorce fails to recognise that decree nisi has to be pronounced in order to make a financial order, but that some parties wish to delay the decree absolute until, for example, a pension sharing order has been implemented. So, the divorce law itself would need to be reformed.

5. The fees charged for family applications must not be such that a parent who is not fees exempt is prevented from bringing an issue before the court.

Implementation

25. *Do you have any comments about how these proposals might best be implemented?*

We have nothing to add to what has already been said.

October 2012

Written evidence from the Family Justice Council (CFB 23)

Introduction

This document forms the response of the Family Justice Council (FJC) to the call for evidence from the Justice Committee in respect of pre-legislative scrutiny of the Children and Families Bill. The bill was itself, in part, a result of the Family Justice Review (Norgrove Report) to which the FJC responded and that response contained evidence in respect of many of the questions raised below. The Family Justice Council is an advisory NDPB, sponsored by the Judicial Office, chaired by the President of the Family Division. The Council has a multi-disciplinary membership drawn from all the key legal, social care and health professionals working in the family justice system.

Mediation

(a) *The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the Mediation Information and Assessment Meeting ("MIAM") system, and whether they will be effective;*

1. It is difficult to comment in detail as the safeguards will be contained in secondary legislation (Family Procedure Rules) and we do not know what they will provide. In general, however, there are some common factors that tend to result in pre-mediation screening being ineffective.

2. Lack of adequate training for those conducting the screening: see below for further evidence. Work is being done by the FJC Pre-Proceedings Group on this area involving Cafcass and other parties (see below).

3. Lack of adequate time for screening meetings: if, for example, the public funding available (through the LSC or its successor) will only fund a session for 45 minute, or less, and there are a wide range of issues to be covered during that session, then attention to domestic abuse and other welfare issues will necessarily be squeezed and inadequately dealt with or identified.

4. The understandable belief of some mediators that mediation can achieve results even in the most conflicted cases, and consequent operation of a low threshold of "suitability" for mediation

5. It should be recognised that research evidence from several jurisdictions shows fair and proportionate outcomes in cases that involving interest-based bargaining between the parties where there is domestic abuse are not possible due to the history of power, control and abuse in the relationship and they should not continue to be assessed as suitable for mediation.

6. The bi-annual Interdisciplinary Conference held by the FJC at Dartington (Dartington Conference) in October 2011 passed two resolutions which reflected the views of the delegates from the various disciplines and agencies involved in family law proceedings: the first called for level 2 safeguarding checks to be carried out in advance of all MIAMs and the results transmitted to mediators, which must be endorsed on the MIAM forms, to provide some protection for children and parties from risk of harm.

7. In addition, the conference recommended that all mediators or ADR providers must be fully trained to a nationally accepted standard and subject to quality assurance.

Screening

8. It is not possible to identify cases in which domestic abuse has played or is playing a part easily or by some "objective" criteria such as the previous involvement of other agencies or third parties. This is tantamount to requiring corroboration, in itself a retrograde step, and ignores the fact that persons who are abused may for many reasons, from fear, for cultural or social reasons, have been constrained from making any previous complaints. This will not mean that domestic abuse has not occurred or threats made.

9. Any legislative provision for mediators to act as initial gate-keepers and risk assessors raises several concerns. First, it is not at all clear that mediators welcome the expectation that they should carry out this role or that they are equipped, or resourced, to carry out this role. In the current system, Cafcass officers carry out initial safeguarding checks, which include access to police and local authority records. Mediators do not have access to this potentially crucial information but are reliant on the reports of the parties themselves. The domestic abuse committee of the FJC recommended that, since Cafcass have developed expertise in this role, the task of initial screening and assessment for the appropriate dispute resolution pathway for cases should be undertaken by Cafcass or its successor organisation within the Family Courts, rather than being outsourced to mediation services.

10. Apart from the specific MIAM issue being raised, it is considered that all those who may have first contact with potential family clients ought to meet a common national standard in identification and screening in relation to domestic abuse. This should include family solicitors and mediators and may include first contact through other services such as Child Contact Centres. The robustness and transferability of this identification and screening process and information will be essential in helping to protect vulnerable individuals, whether children or adults. Current work through the FJC pre-proceedings group, with the help of CAFCASS who have the safeguarding role, is developing national standards and processes that can be used by ADR services. The FJC pre-proceedings group is also working with the National Association of Child Contact Centres (NACCC) to develop a questionnaire for safer referrals.

11. All family mediators have foundation and ongoing training to screen for domestic abuse, domestic violence, child protection and other welfare issues, and operate within the Code of Practice of the Family Mediation Council (see annex A). Screening for such issues is, therefore, intended to be integral to the role of the mediator. This role includes identifying the potential of risk to adults or children, and to consider, with the participant(s), whether the perception of abuse, intimidation, and imbalance, is such as would rule out co-operative working. Mediators should also ensure, where necessary, that clients are quickly referred to a safeguarding agency.

12. In MIAMs, screening as part of the assessment for the suitability of mediation must be undertaken with each client separately and must identify the capacity of clients to take part in a mediation process where there are concerns in relation to domestic violence or of significant power imbalance or abusive or controlling behaviour. No mediator will wish to mediate in circumstances where one party is in fear of the other. The MIAM includes assessing history of conflict and experience of abuse, current concerns and fears, along with any degree of risk and whether the abuse is of a type which would rule out mediation, or whether it may be possible to create a safe environment to enable mediation eg use of co-mediators, shuttle mediation, staggered arrival and departure times and separate waiting arrangements.

13. The absence of reported adverse outcomes attributed to inadequate screening by mediators may provide some reassurance that, currently, it is being undertaken competently. However, as the expectation to attend MIAMs is extended there is an increased need to ensure mediators are operating screening processes consistently which should require mandatory training and assessment. It is this quality assured screening process that the FJC pre-proceedings group is developing alongside CAFCASS

14. Research on current screening processes for domestic abuse by mediators, especially within the context of MIAMs under the Pre-Application Protocol, suggests that screening may not be as rigorous as required, especially given the range of factors that mediators must cover within each MIAM (Paulette Morris, "They didn't do it then but they do it now: Mediation and Violence", paper delivered at the SLSA Annual Conference, University of Sussex, 14 April 2011). Morris's initial results indicate that an average of only 4 minutes is spent addressing possible issues of domestic abuse, which is clearly inadequate.

15. Whoever has the role of initial gate-keepers or risk assessors will need to be trained both in identifying signs of domestic abuse and in the methodology employed in the initial interview, and to be adequately resourced to investigate the matter sensitively and thoroughly. It is good practice, for example, never to insist on interviewing both parties together. The question remains whether any but the most skilful and experienced mediators could successfully and safely handle cases that involved domestic abuse; which often includes controlling and emotionally abusive behaviour not easily discerned.

16. The training for the judicial gatekeeper and legal advisor will also need to be comprehensive and continuing.

17. In this context, the continued development of a Domestic Abuse Toolkit such as used by Cafcass Cymru is to be welcomed. In addition, Respect produced a review in April 2010 on "Expert Domestic Violence Risk Assessments in the Family Courts" which considered, amongst other things, the knowledge, skills and training

required by experts. Such knowledge, skills and training, which would need to be reflected in the initial risk assessment process.

18. It is imperative that cases are not inappropriately routed into mediation.

(b) *The role of officers of the court in the MIAM process;*

19. Court staff are not trained to assess or filter out cases which involve domestic abuse or other welfare issues and, as such, should not have any role in MIAMs. It would be ineffective and place court staff in a position which compromises their impartial role, and could possibly compromises their own safety.

(c) *Are there any gaps in the process, and if so, who will fall through and what safeguards are needed?*

20. An obvious gap is where people are screened out of mediation, whatever the reason, but are unable to obtain legal aid for legal assistance or court proceedings. Many will fall through this gap but examples include, in respect of domestic abuse, those screened because of abuse/violence but who do not fulfil the narrow criteria for public funding; those screened out for reasons of incapacity; and those whose partner is able to afford court proceedings but refuses to participate in mediation.

21. Following MIAMs, who will guide families through successive stages of their journey through the family justice system? If mediation proceeds, the mediation process is case managed by a mediator, so this issue is addressed. However, where mediation does not proceed, the mediator would simply signpost to the next stage, so there is scope for unsupported families to get lost in trying to deal with a variety of different organisations and systems.

22. The loss of the LSC Funding Code referral (by reference to the removal from scope of the bulk of family proceedings from Legal Aid by LASPO) and its replacement with s1 will mean that the compulsory consideration of mediation and other ADR options will come at a late point in the development of any family dispute. Historically, most solicitors have been making funding code referrals early in the life of any case, as Legal Help runs out, and before taking any more substantial steps in the case. It is clear that mediation is likely to be most effective by being considered at the earliest possible stage, before positions have hardened and before the relative positions of the parties become polarised; however, the holding of the MIAM immediately before the issue of proceedings and immediately prior to making an application to the court is at a point where informal attempts at resolution by correspondence or negotiation have often been attempted, and often rebuffed or ignored. This is clearly not the most effective point to have a MIAM.

23. The failure to require MIAM attendance as a universal requirement for all those involved in family proceedings is a major gap. The LSC Funding Code requires any person applying for public funding to "consider" mediation, and equally whether applicant or respondent to potential proceedings. The existing Pre-Application Protocol to the Family Proceedings Rules preserves the equality of the "expectation" that both applicants and respondents attend a MIAM. However, the transformation from the "the court expects" into the "must attend" of s1(1) only applies to applicants.

24. At the National Family Mediation Conference on 18 September, Baroness Hale of the Supreme Court highlighted the failure of the draft legislation to require MIAM attendance as a universal requirement for all those involved in family proceedings. Unless the requirement to attend MIAMs is placed on respondents as well as applicants, there will be an imbalance and the likely slowing down of the use of mediation as a process central to the resolving of family disputes. The purpose is to ensure that both parties can make an informed choice of ADR process, including the option to go to court. Strengthening the draft legislation to provide for costs sanctions could place an effective expectation on respondents.

25. The diversity in abilities and comprehension of vulnerable adults will demand special consideration in the screening process; particularly for parents with learning disabilities. Their disability may be masked by good daily functioning. It requires specialist knowledge to identify and assess the level of disability. Gatekeepers will need to be trained to be aware of these and other disabilities as well as signs of domestic abuse.

26. Recognising and providing for cultural, religious and social diversity and the resulting expectations and influences on families (particularly those recently arrived in the UK) require sensitive intervention by professionals who are at least well informed, but preferably experienced in working with people from the particular social or ethnic background concerned. It is patently unfair to approach people without some understanding of their own beliefs; the nuance of patterns of behaviour in cultures alien to one's own can all too easily be lost or overlooked. This is particularly so in identifying cases of domestic abuse.

27. That the voice of the child be heard must be provided for by way of guidance in respect of children whose parents are participating in ADR which will give effect to the children's Art 12 rights and should include direct consultation with children themselves.

28. There is a need for recognition that the voice of the child is not limited to evidence gathering within litigation or ADR as their views are developed before, during and after any process dealing with disputes and that it is essential that the result of all litigation or ADR should be fed back to the child by their guardian, Cafcass Officer, social worker or other appropriate adult.

29. It should not be forgotten that only the court can enforce the agreements reached through mediation or negotiation between the parties facilitated by solicitors. There is not any other way this can be done, as recognised by the Norgrove Report (paragraphs 5. 125 & 5.154 to .157).

30. There remains the need for the judge to make findings about disputed facts, both to bring those particular disputes to an end and to form the basis upon which future work can be carried out, whether by the court or with mediators or other professionals working collaboratively, if it is safe to do so.

31. Judicial scrutiny of agreed orders is also essential, to give force to the order and to ensure that the order is fair, appropriate to the case and safe, and that risk has been properly assessed.

32. There will be an "advice gap" when legal aid is withdrawn form most private law cases in April 2013. Mediation is predicated on clear legal advice to support and encourage the dispute resolution process. This is a gap which mediators themselves cannot fill.

33. Mediators cannot fill the gap created by any reductions in services provided by Cafcass, the courts and other bodies. Whilst mediators firmly believe there are far more cases which would benefit from a co-operative approach, and welcome the encouragement to mediate, there will always be those cases which require adjudication and Court oversight, often alongside mediation. Similarly, any shortfall in the Cafcass provision of a thorough child centred investigation of needs as well as wishes and feelings cannot be filled by mediators with their principles of impartiality and confidentiality.

Child Arrangement Orders

(d) *What is the effect of the amendments to section 11A to 11P, is it simply a "shift in focus" to remove the perception of "winners and losers"?*

34. It is unlikely that a child arrangement order will be any more successful in resolving the difficulties it seeks to address than the current provisions for the problem remains the same: how to resolve arrangements for children when their parents live separately? As they cannot live with both of their parents all of the time, compromise has to be reached, and the paramount consideration must be what is best for the children. While the Children Act 1989 was largely successful in replacing the previous concept of custody, care and control and access with parental responsibility and s.8 residence and contact orders that settled with whom children live, and contact with both parents the concept of parental responsibility was, it seems, not been sufficiently emphasised.

35. Compelling parties to attend parenting courses can enhance their understanding of the effects of their actions on their children, and each other, and can facilitate resolution and agreement by the parties themselves, which is always preferable to the imposition of a parenting regime. However, there is a need for awareness of parents using children as a means of gaining opportunities for abusive behaviour against former partners.

36. The legislation should provide for clarity of "rights of custody" with in the Hague Convention and Brussels II R on the face of the application forms; and make clear that temporary removal for less than a month does not constitute a change of habitual residence.

Expert Evidence

(e) *Does the new test adequately safeguard against miscarriages of justice?*

37. The FPR 2010 and the current Practice Direction it includes (PD25A) should, if properly observed, provide for the proportionate use of expert evidence and rule 25.5 states that the court "will not direct an expert to attend unless it is necessary to do so in the interests of justice."

38. The wording of the new test "necessary to assist the court to resolve the proceedings justly" is perhaps an attempt at a change of emphasis. It is applicable to the particular proceedings and will therefore need determining on a case by case basis. Again, it will depend on the secondary legislation in the form of procedure rules, practice directions and the availability of public funding for appropriate advice as to the greater possibility of miscarriages of justice.

(f) *Are social workers receiving the support and training they need to meet this increased court role?*

39. Local authorities are better placed to answer this but there must be concerns given the current economic climate. The FJC continues to recommend the comprehensive implementation of the Munro Reforms.

Time Limits

(g) *What progress has been made to achieve the 26 week limit?*

40. There has already been a greater focus on timeliness, and in many areas specific plans are now in place to assist, but achieving 26 weeks in all cases is difficult to envisage. It will require a multi-faceted approach, not just robust case management, as other factors will have an impact; including steps taken pre-proceedings; concurrent criminal investigations or proceedings; judicial continuity and availability affects the listing of cases; compliance with directions, which are important in maintaining a timetable, and are very often an issue.

41. The provision that allows extension beyond 26 weeks will probably be used more extensively than is anticipated where the test is "necessary to enable the court to resolve the proceedings justly"; fact finding is unlikely to be resolved within the proposed time-scale, not only because of the availability of expert witnesses. There will be differences of approach across the jurisdiction; as there are currently.

42. The current approach of not listing final hearings until the IRH has been largely successful in avoiding wasted court time; but there may be some difficulty in maintaining this approach with the 26 week time limit.

43. To deal with cases in a just and timely manner that there should be early inclusion of the extended family including Family Group Conferences within all local authority areas and pre-proceedings processes should be linked to the FGCs.

Care Plans

(h) *Should the Judge's role be restricted to considering only the permanence provisions of care plans?*

44. The Dartington Conference passed two resolutions which usefully encompass the view of the FJC. First, the recommendation that no changes to the current scrutiny of care plans should take place prior to the implementation of the Munro reforms.

45. Secondly, the conference recommended that the courts should continue, in any event, to scrutinise care plans in respect of the splitting of siblings.

46. Currently, final evidence and care plans should be filed in advance of the IRH; care plans are filed whether or not the LA is seeking a care order, in particular where the child is to remain at home under a supervision order or a special guardianship order is recommended within the extended family. The new provisions direct that courts should only concern themselves with permanence provisions when considering care orders and it is not clear what will fall within the scope of "permanence provisions".

47. Courts should scrutinise detail in care plans where a care order is not sought; they will contain important detail as to the child's welfare including the level of support to be provided to parents where children are to remain with them. Issues of contact, contained in the care plan remain to be considered pursuant to s34 (11) before making a final order.

48. Greater clarity is need in respect of how this provision is to operate in a manner that is consistent with the paramountcy principle.

Divorce

(i) *Do the suggested provisions remove an important safeguard for children?*

49. S.41 of the Matrimonial Causes Act 1973 is rarely used and, in the Council's view, has not operated as an effective safeguard for children for many years. This is largely due to it being superceded by provisions under the Children Act 1989.

Enforcement and Shared Parenting

(j) *These clauses are yet to be published, but the Committee will consider them upon publication. The Committee will be receiving responses made to the Department for Education's consultation: Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life. If you have contributed to that consultation there is no need to replicate your response unless you wish to highlight part of your response.*

50. Any attempt to give legislative expression to a concept of "shared parenting" is likely to be misinterpreted and to generate conflict. The Council believes this would lead to more court applications and would undermine the policy of encouraging parents to work out arrangements by themselves or through mediation. Most importantly, such a change would not be in the best interests of children because of the risk that it would lead to more conflict between separated parents.

October 2012

Annex A

RESPONSIBILITIES OF MEDIATORS FOR SCREENING

The relevant provisions of the Family Mediation Council Code of Practice are:-

5.5.3. Where it appears necessary so that a specific allegation that a child has suffered significant harm may be properly investigated or where mediators suspect that a child is suffering or is likely to suffer significant harm, mediators must ensure that the relevant Social Services department is notified.

5.5.4 Mediators may notify the appropriate agency if they consider that other public policy considerations prevail, such as an adult suffering or likely to suffer significant harm.

5.5.5 Where mediators suspect that they may be required to make disclosure to the appropriate government authority under the Proceeds of Crime Act 2002 and/or relevant money laundering regulations, they must stop the mediation immediately without informing the clients of the reason.

5.7.5 Where mediators suspect that any child is suffering or likely to suffer significant harm, they must advise the participants to seek help from the appropriate agency. Mediators must also advise the participants that, in any event, they are obliged to report the matter to the appropriate agency in accordance with paragraph 5.5.3.

5.7.6 Where mediators consider that the participants are or are proposing to act in a manner likely to be seriously detrimental to the welfare of any child of the family or family member, they may withdraw from the mediation. The reason for doing this must be outlined in any further communication.

5.8.1 Mediators must be alert to the likelihood of power imbalances existing between the participants.

5.8.2 In all cases, mediators must seek to ensure that participants take part in the mediation willingly and without fear of violence or harm. They must seek to discover through a screening procedure whether or not there is fear of abuse or any other harm and whether or not it is alleged that any participant has been or is likely to be abusive towards another. Where abuse is alleged or suspected mediators must discuss whether a participant wishes to take part in mediation, and information about available support services should be provided.

5.8.3 Where mediation does take place, mediators must uphold throughout the principles of voluntary participation, fairness and safety and must conduct the process in accordance with this section. In addition, steps must be taken to ensure the safety of all participants on arrival and departure.

5.8.4 Mediators must seek to prevent manipulative, threatening or intimidating behaviour by either participant during the mediation.

6.1 All assessments for suitability for mediation must be conducted at meetings on a face-to-face basis. Assessment meetings can be conducted jointly or separately depending on client preference, but must include an individual element with each participant to allow mediators to undertake domestic abuse screening.

Written evidence from the PLO Monitoring Group for London (CFB 24)

1. These written submissions are from the PLO monitoring group of the Principal Registry of the Family Division. This is a multi-disciplinary group which meets at the Principal Registry of the Family Division on a quarterly basis. The group includes, but is not limited to, members of the judiciary, CAFCASS, local authorities, solicitors, barristers and experts.

2. The submissions summarise the Groups concerns at the impact of funding delays on children's cases. These were sent in the form of a letter to Lord McNally on 5 October 2012 and copied to various Directors at the LSC, Sir Alan Beith, Edward Timpson, Minister for Children and Families, David Norgrove, Chair of the Family Justice Board and Baroness Claire Tyler of Enfield, Chair of the CAFCASS Board.

3. These submissions have the support of the Family Law Bar Association and the Association of Lawyers for Children.

Family Justice Reform

4. We write concerning the proposed family justice reforms. We fully support the current drive to avoid delay for children. The reality is that current public funding procedures lack clarity, unnecessarily involve delay, and add to costs. We want to suggest solutions.

5. We write as a broad based multi-disciplinary group, and our focus is on the welfare of children in care proceedings.

Current Concerns

6. Our concerns relate to the introduction of a 26 week time limit for care proceedings, while there are continuing delays in the public funding of experts through the Legal Services Commission (LSC). In certain cases, expert evidence is absolutely necessary. The aim, therefore, has to be to ensure that procedures for funding experts are clear, streamlined, and do not in themselves cause delay.

7. The LSC has set hourly rates (the basis for these rates being unclear) for a number of experts. There are no set hours for work to be done, but, latterly, the LSC has objected to the number of hours estimated by experts as necessary to complete an assessment (again, with no clear basis for this).

8. Experts contract directly with solicitors firms for the work to be done, and increasingly, both solicitors and experts are finding it difficult to operate on the basis of continuing uncertainty and financial risk.

9. The uncertainties have been made more manageable by the LSC's willingness to consider prior authority for the cost of instructing particular experts in specific cases. However, from 1 October 2012, the LSC will no longer be willing to do this.

10. Even with the possibility of prior authority, there have been considerable delays in care cases, with additional, avoidable and costly hearings (and additional expense to the LSC in terms of advocates' fees). The reality is that unless experts can be fully instructed within two weeks, the 26 week limit for a care case cannot be met.

11. In the longer term, many experienced experts (in particular, child and adolescent psychiatrists) are no longer undertaking this work, as a direct result of the funding issues. Added to that, highly experienced multi-disciplinary teams have decided they are unable to continue their work (with the Monroe Family Assessment Service in London having been disbanded this year).

12. In London, where the LSC experts' rates are lower than for elsewhere (notwithstanding the existence of London weighting in almost all other areas of work) the courts increasingly rely on experts from other areas, because of the steady reduction in experts based in London, able and willing to take on this work. This has tended to add to costs, with experts being paid the higher rate, and for their travel.

13. The difficulties have been summarised in a recent decision of the President of the Family Division (copy enclosed). This is in the context of the detailed provision in the Family Procedure Rules 2010 for the instruction of experts.

Our Proposals

14. We want to offer positive suggestions to resolve these difficulties:

- The uniform application of clear criteria for deciding how experts are to be paid, with a tight, two week time scale.
- Guidelines may assist, setting out what would usually be reasonable (in terms of rates and numbers of hours needed), and how the criteria may be varied in exceptional cases.
- An urgent review of the critical situation in London, to consider how to manage the supply of experts there, and manage costs.
- Consideration in the medium terms of the LSC contracting centrally with experts who are funded by legal aid. It would streamline and rationalise the system, and could be modelled on the current centralised system for paying barristers in legally aided cases. Such a system would have to be transparent and accountable, something that would be in everyone's interests.

15. The gains would be considerable, in terms of cost effectiveness and efficiency, with the proper use of increasingly scare resources, and in terms of securing the best possible outcomes, as swiftly as possible, for the most vulnerable children in our society.

16. This letter is supported by the Association of Lawyers for Children, and the Family Law Bar Association.

October 2012

Written evidence from the Kinship Care Alliance (CFB 25)

What is the Kinship Care Alliance?

1. The Kinship Care Alliance is an informal network of organisations working with family and friends carers which subscribe to a set of shared aims and beliefs about family and friends care. Since 2006, members have been meeting regularly to develop a joint policy agenda and agree strategies to promote shared aims which are:

- to prevent children from being unnecessarily raised outside their family;
- to enhance outcomes for children who cannot live with their parents and who are living with relatives; and
- to secure improved recognition and support for family and friends carers.

2. We have responded to the questions listed in the call for evidence under themes rather than by reference to specific questions, as many of these cover similar issues.

Context of the Children and Families Bill

3. We would support the statement made in Family Rights Group's submission to this inquiry that the challenge for Parliament when a child is at risk is to strike the right balance between ensuring that:

- the child's short and long term welfare needs are met (including their safety, need for permanence, the opportunity to build strong attachments and to develop a positive sense of identity);
- planning and decision-making processes enable and support the family to address identified concerns;

— the child's right to respect to family life is observed, including exploring all potential placements within their wider family; and

— plans for the child are made without unnecessary or harmful delay and within a timescale that meets the child's short and long term needs, including formation of secure attachments..

4. The specific reforms being addressed by this inquiry are part of a more extensive programme of reforms to local authority and judicial decision-making processes. Whilst some of these are most welcome, for example increasing judicial continuity and improving case management to reduce systemic delays, others may have unintended, negative consequences for vulnerable children and families. In particular we would highlight, for example:

(i) Changes to the legal aid system,[11] will result in many family and friends carers, such as grandparents or older siblings raising children, having to represent themselves in court and navigate administrative and judicial decision-making processes alone, without legal advice or assistance. This may deter some from seeking a residence or special guardianship order, leaving the child vulnerable to being removed from their care by their parents, without notice.

(ii) The "foster to adopt" proposal which requires local authorities to consider placing children with approved adopters, initially on a temporary foster care basis until a placement order has been made,[12] creates a fast track to adoption. For example, a baby could be placed with potential adopters (who have been approved as temporary foster carers) under an interim care order before the court has made a decision at the final hearing in care proceedings that the threshold for removing the child from their parents has been established. If there was a viable family and friends care arrangement identified in such a case, a court considering the care plan would have to weigh up the advantages to the child of remaining with their existing carers (who had already been approved as adopters and temporary foster carers) with whom they have formed a strong relationship, against the risks associated with breaking such attachments in order to place the child with an otherwise suitable family members who could provide excellent care *and* meet the child's long term identity needs. In such circumstances the court would almost certainly favour maintaining the status quo, hence the child's opportunity to be raised by their family would have been prejudged by this early "foster to adopt" placement; and

5. When combined, *these and other reforms to streamline and accelerate the decision-making processes are in danger of reducing the chances of children being raised safely within their wider family network*. It is therefore essential that this inquiry considers the wider context when addressing the particular questions posed.

The Role of Family and Friends in Protecting Vulnerable Children

6. An estimated 200–300,000 children who cannot live safely with their parents are being raised by family and friends (typically grandparents, older siblings, aunts and uncles),[13] often as an alternative to being brought up in the care system. Enabling children to live safely within their family network is consistent with the child's right to respect for family[14] life and also results in generally positive outcomes for the children involved. Research[15] shows, for example, that in comparison to children in unrelated foster care, children in family and friends care are as safe,[16] and are doing as well if not better in relation to their health, school attendance and performance, self-esteem and social and personal relationships. Moreover, there is a marked improvement in their emotional health and behaviour following placement and their carers are more likely to match their ethnicity and be highly committed to them, leading to more stable placements. This is despite these children suffering from similar adversities to children in the care system and their carers having multiple problems of their own and inadequate support. For example, many of these carers have to deal with the challenging behaviour these children show as a result of their earlier tragedy or trauma;[17] they have manage to contact with the parents' without adequate support;[18] and many grandparents, in particular, suffer from isolation as they find themselves once more in a parenting role which they had not planned and which separates them from their friends and normal social networks. Many also experience severe financial hardship: they not only have to meet the additional costs of raising these children but also 38% of family and friends carers have to give up work in order to take in the child,[19] so they are bearing these additional expenses on less income. It is little wonder that 75% of family and friends carers are judged to be living in poverty.[20]

[11] Schedule 1 para 13, Legal Aid Sentencing and Punishment of Offenders Act 2012

[12] DfE (2012) Proposals for placing children with their potential adopters earlier

[13] They usually step in because of parental difficulties, such as mental or physical ill health, domestic abuse, alcohol or substance misuse, or imprisonment or bereavement.

[14] European Convention on Human Rights (Article 8).

[15] Farmer E and Moyers S (2008) Kinship Care: Fostering Effective Family and Friends Placements (Jessica Kingsley); and Hunt, J., Waterhouse, S, and Lutman, E (2008) Keeping them in the Family: Outcomes for children placed in kinship care through care proceedings. London: BAAF

[16] This research shows that only 6% of family and friends carers failed to protect the children in their care which is the same figure as for unrelated foster carers

[17] Farmer and Moyers (2008) ibid

[18] Roth, Tunnard, Lindley, De Gaye and Ashley (2011) *Managing contact* London: FRG

[19] Aziz, Roth and Lindley (2012) *Understanding family and friends care: The largest UK survey* London: FRG

[20] Farmer and Moyers (2008) ibid

7. Family and friends care arrangements for children who would otherwise be in the care system also result in huge savings to the State: it is estimated that the average costs of a child being in care are over £25,000[21] per year and the average costs to the State of care proceedings are a further £25,000 or more.[22]

8. Yet potential wider family placements are frequently identified late in care proceedings causing further delay.[23] This usually arises because:

(a) social workers focus too often on the mother, and do not routinely seek out potential carers in the wider family, particularly paternal relatives, before proceedings start,[24] and

(b) many family and friends carers refrain from offering to care for the child whilst there is still a chance that the parents (who are typically their son, daughter, brother, sister) may be able to look after the child long term. In some cases, this is because they are unaware of the depth or totality of concerns; in others it is because they don't want to undermine the parents or are fearful of reprisals from the parents if they step forward. Therefore, many wait until there is a finding of fact against the parent(s), before putting themselves forward as alternative carers. This will be far too late under the 26 week time limit, with the result that many children may be denied the chance of living in an otherwise suitable family and friends care arrangement.

26 Week Time Limit in Care Proceedings

9. We are aware from our advice and policy work that, in many parts of the country, courts are already operating a 26 week timetable on new cases, despite this provision not yet having been enacted in parliament. Although we support the government's intention to remove harmful delay for children from the system, we are very concerned that this timeframe (save in exceptional cases) will squeeze out wider family members who want to take on the care of a child who cannot live with their parents because there is simply not enough time to consider their application, and in the case of special guardianship applications their support needs, before the proceedings are concluded. We are already hearing anecdotes of family members being denied an assessment once the case is in court.

10. To guard against family members being ruled out as potential carers by an acceleration of the process rather than a welfare based decision, to the potential detriment of the children concerned, we think it is absolutely critical that families are effectively supported and engaged to address the identified concerns before care proceedings start. There is simply not enough time to do this once proceedings have started. However this pre-proceedings stage is largely unregulated, with the result that practice varies widely and key opportunities for the child to live with their family are often missed.

11. We therefore recommend that the legislation and associated regulations and guidance maximises the engagement of wider family members to find safe solutions for their child in this pre-proceedings stage by:

(a) The government issuing a *pre proceedings protocol* under s.7 Local Authority Social Services Act 1970.[25] This should set out how local authorities should work to engage families to make safe plans for their children before the proceedings start, drawing on best practice of what works. This work should be undertaken in sufficient time for the family to have a realistic opportunity to address and overcome the concerns within the timescale of the child's needs. Where necessary, *this work could be in parallel to exploring contingency options for the child* to be raised outside the family if there is evidence to suggest that this may be required.

(b) There should be a *new duty on local authorities to identify and consider wider family placements for a child, whenever they are considering removing a child from their parents* because they may be at risk. This would allow contingency planning

— at the same time as a parent is being assessed; and

— in parallel to unrelated carers who would meet the child's needs being identified before proceeding with a "foster for adoption" placement, except in emergencies. This would be best achieved by a family group conference being convened.

(c) Families should be routinely offered a Family Group Conference to develop a plan to safeguard their child, when an initial child protection conference has determined that a plan is required to protect the child or their child may be removed into the care system.

(d) The Government funding specialist independent family and friends care advice services, in order that family and friends carers should have access to such help as soon they are aware that a child in their family may be at risk.

(e) LSC level 2 advice (triggered by the letter before proceedings) should be extended to family and friends who receive the letter before proceedings or are considering taking on the care of the child.

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[21] Corry D and Maitra S (2011) Cost-Benefit Analysis of telephone services provided by Family Rights Group

[22] Review of Child Care Proceedings, System in England and Wales, Department for Constitutional Affairs, 2006

[23] Hunt, J (2001) *Scoping paper prepared for the Department of Health* London: DoH

[24] Ibid

[25] Guidance issued under this section must be complied with by local authorities unless there a exceptional circumstances to justify local variation.

(f) More effective support should be available for family and friends carers to optimise outcomes for children in these placements, including a new statutory duty on local authorities to provide support for family and friends carers raising children who cannot live with their parents, irrespective of legal status and a national financial allowance for such carers raising children to cover the real costs of raising a child for whom they are not legally financially liable.

12. These recommendations should guard against family and friends carers only coming forward after a fact finding in proceedings, thus eliminating a major source of delay in the majority of cases. However, there will be circumstances where either the pre-proceedings work with the family has not been done or circumstances have changed at the last minute, such that a family member needs to be considered late in the day. In these circumstances and in order to ensure that the opportunity of a suitable family placement is not lost whilst simultaneously ensuring that undue delay is avoided we recommend that there should be:

(a) guidance for judges that an exceptional extension to the time limit of the proceedings should be available to enable an expedited assessment of the proposed carer to take place; and

(b) an associated mechanism developed within the local authority to ensure that a fast track, yet thorough, assessment[26] is conducted.

This will be particularly important where a relative seeks a special guardianship order within in care proceedings. This is an order which can be made in favour of a non-parent to secure a child's future with them. It is essential to the success of special guardianship placements that making of such orders are not unduly rushed, particularly if speed is at the expense of agreeing a robust support package that is critical to the placement working (for example to support difficult contact arrangements or prevent significant financial hardship), once the local authority report is concluded (which routinely takes up to three months) and before the final order is made.

Removal of Time Limit on Interim Care Orders:

13. We are concerned that this proposal removes a key opportunity for wider family members to apply to take on the interim care of a child pending a final hearing. This will be very significant when the new legal aid restrictions are in force as it will become more difficult for them to make a free standing application for an interim residence/child arrangements order without a lawyer than it would be to intervene in an existing interim hearing where the other parties solicitors could assist.

We therefore recommend that, publicly funded mediation should be available to help resolve disputes between family members and the local authority over interim arrangements for the child including contact.

Reducing Court Scrutiny of Care Plans

14. We are very concerned by the proposal that the court should no longer scrutinise the "details" of the care plan. Evidence from our advice services indicates that it is often only as a result of the court's authority and scrutiny that key elements of the child's plan such as sibling placements, contact and contingency planning in care proceedings, which are fundamental to the child's future wellbeing, are effectively addressed by the local authority. The fact that the court currently provides this scrutiny, has transformed the quality of care plans in many cases.

15. Clearly Independent Reviewing Officers (IROs) will be key to ensuring that the care plan meets the child's needs. Indeed they are already tasked to challenge poor practice and any failure to implement plans on behalf of the child.[27] However, their workload (which can be up to 120 cases each) is such that they do not have the time or resources to challenge all aspects of the care plan which they feel do not meet the child's needs. Moreover, the culture of local authorities varies, and some still attempt to minimise or sideline IRO's independence and authority. This is likely to become more rather than less difficult if the expectations on them increase.

16. Given the limited resources of IROs and the pressures on local authorities budgets which affect services provided to vulnerable children and families, it seems contrary to children's welfare to remove this key layer of scrutiny**.** *We therefore recommend that the proposal to reduce court scrutiny should be actively opposed* since it may harm rather than promote the welfare of children at risk. However, if the clause remains unaltered, we suggest *it should be amended* to include contact and sibling placements as being core issues that the court should consider in addition to permanence plans for the child (Clause 3A(a)).

[26] Fast track assessments have already been developed in the Tri-Borough care proceedings Pilot in London. http://www.lbhf.gov.uk/Directory/News/Tri_borough_councils_join_forces_to_speed_up_care_proceedings_in_national_pilot.asp

[27] S.26 CA 1989 as amended

17. We also recommend that in addition to the pre-proceedings proposals set out in para 11 above, the *following safeguards are put in place to try to ensure there are appropriate checks and balances in the system* without causing any additional delay to children:

(a) Social workers should be required to actively consult grandparents and other family members who have had significant involvement with the child or the care proceedings about any significant changes to the care plan.

(b) IROs should ensure that significant family members are directly involved in or contribute to any planning meetings before a final care plan is made unless this would place the child at risk of harm.

(c) Publicly funded mediation between the family and the local authority should be available to help resolve care plan disputes.

(d) Grandparents and other family members who have had significant involvement with the child or the care proceedings should have a right to apply to court for further scrutiny of the care plan/directions where there is a fundamental disagreement about the proposed change.

(e) There should be a new duty on Independent Reviewing Officers to apply to court for further scrutiny where they consider that the proposed care plan does not promote the child's welfare. This would help to address the difficulties they experience in challenging poor local authority practice and would guard against drift in the system by increasing accountability if they fail to comply.[28]

18. We have not addressed the suggestion that there may be changes to the contact duty for children in care and the duty to place siblings together wherever possible as these proposals remain unclear, but we may wish to do so in the future.

October 2012

Written evidence from Brian Willcox (CFB 28)

Mediation

It is not fair to put so much emphasis on mediation being the solution, because not all relationship dynamics are the same. A parent may be so distraught about the breakdown of their relationship that they are not ready to mediate. There is also likely to be significant animosity between the two parents for the relationship to break down in the first place, so I think it is unreasonable to expect these people to then be able to mediate effectively.

Additionally, I think that most parents see mediation as just another hurdle to jump over to get their day in court. However, more significant is the fact that parents want to get their day in court. The reason for this is because they want to win. It has nothing to do with children, they just happen to be the unfortunate pawns in this battle for which the State provides the stage.

There is only one solution and that is to treat both parents equally. If both parents knew that they would be treated equally in the court room, they would have no point in going in the first place and would make their own child arrangements instead. All the time that there is a winner and a loser in the Family Court process, the system will continue to fail.

There is only one way of treating parents equally and that is to start from a position of children's time being divided equally between both parents. This does not mean in effect that every child has their parenting time split on a 50/50 basis between their two parents, but it is a starting point. It does mean that both parents can negotiate what they think is best for their child, safe in the knowledge that they can concede time without becoming the loser.

Child Arrangement Orders

You may wish to change the wording in arrangement orders but this is just dressing up the old package in a gentler format. It will change nothing. Parents will see through the wording and will still be confronted with the same, harsh reality that a cold, heartless court, motivated by fee earning lawyers, is driving a wedge between them and their children.

The only solution to this problem will be when both parents know that if they enter the Family Court process, they will be treated as equals.

Expert Evidence

The problem with relying on expert evidence is that parenting is not an exact science, so who is to say who is right. The world is constantly changing and so is perception with it. Examples of this are gay relationships which were once illegal but are now acceptable and the smoking ban, where smoking in pubs which was once the norm, became unacceptable overnight. Therefore, who has the right to say whether the expert's perception

[28] See A and S (Children) v Lancashire CC [2012] EWHC 1689

is right or wrong. I only have to think of Professor Meadows to appreciate that experts can be so wrapped up in their own opinion and the power that it bestows upon them, that they lose sight of reality. On the flip side to this, think of the number of experts who visited Baby P, and one realises that all is not well in this field of work.

Introduce Shared Parenting and there will not be the need for dubious expert evidence.
October 2012

Written evidence from the Interdisciplinary Alliance for Children (CFB 30)

PRE-LEGISLATIVE SCRUTINY OF THE CHILDREN AND FAMILIES BILL 2012

We understand that the Justice Select Committee will have sight of responses to the recent Government consultations on the Framework for Assessment and Co-operative Parenting but for ease of reference, we attach those submitted on behalf of the Interdisciplinary Alliance for Children (IAC).

We welcome pre-legislative scrutiny of the 2012 Children and Families Bill by the Committee as we have several concerns about the sum of the different parts of the bill and their combined implications for protecting the rights and welfare of children. Within a family justice system of the future the Alliance wishes to see a decrease in delay in cases—but within a fair and transparent application of the law in which practices are accountable.

In summary, our concerns are as follows:

PRIVATE LAW PROPOSALS

- The proposed legislation is adult driven rather than child focused.
- We cannot support any of the Government's four options for legislative amendment because we believe that all or any of them may lead to an implied assumption of shared parenting time. This would be in conflict with the paramountcy principle as set out in s.1 of the Children Act 1989 (and thus decisions determined by the child's best interests—not adult needs) and it would lead to potentially competing imperatives with resulting confusion for parents, courts and family justice professionals.
- A weakness in the provisions in relation to hearing the voice of the child and an absence of robust child centred safeguarding systems.
- As private law cases are diverted away from courts and legal aid in private law cases is largely withdrawn, mediation services will assume a frontline role in screening for domestic violence and child protection issues at the Mediation Assessment and Information Meeting (MIAM).
- We believe this constitutes an over reliance on *indirect and "arm's length"* screening for domestic abuse and child protection issues by mediators who may be inexperienced and without training in safeguarding work.
- There is no integrated national system of child protection between Mediation, Cafcass and Social Services and in its absence there is ample scope for vulnerable children and adults to fall through the cracks.
- With regard to "child arrangement orders"—and an envisioned shift in focus (away from "winners" and "losers"), this is hard to see and is likely to be especially difficult for litigants in person to understand—compared for example, to the current wording of s.8 of the Children Act 1989—which, in lay terms, is more easily understood.
- For those cases which go to court, we do not consider that the Cafcass s16 CA 1989 risk assessment processes are sufficiently robust. Children are not routinely seen and screening is carried out at "arm's length" using a telephone script.
- The problems are compounded by the provisions of s.7 of the draft Children and Families Bill which would repeal provisions requiring the court in divorce proceedings to consider arrangements made for the children in the family. Such a provision would remove one of the few remaining safeguards for children in private law proceedings as it would mean that there would be no possibility of any objective judicial scrutiny of the arrangements, even the limited paper exercise that exists at the moment would go.
- The Family Justice Review expressed concerns about how the voice of the child is to be heard in private law proceedings but the government has failed to explore options for progress in this area. Whilst accepting that some parents may deliberately breach, frustrate or undermine court-agreed contact arrangements, we would be deeply concerned about enforcement measures that fail to take full cognizance of or give consideration to the likely impact on the children concerned.
- If the Government is minded to make legislative changes, we would urge them not to do so without also putting in place the following key legislative safeguards for children:

- implementation of s.122 Adoption and Children Act 2002—using the President's Direction of 2004 as guidance; this would add s8 residence and contact proceedings (or the new child arrangements order) to the list of specified proceedings in which a child may have party status and separate representation; and,
- relaxation of the rules under s.10 CA 1989 which require leave of the court before children can initiate or vary their own s.8 CA1989 residence and contact (or new child arrangements) order.

PUBLIC LAW PROPOSALS

- We cannot support the proposed reduction in the level of court scrutiny of care plans in the absence of robust child centred safeguarding systems.
- We think there is an over reliance on the robustness of local authority practices and decision making without an accompanying strengthening of the safeguards for children and families.
- A reduction in the level of court scrutiny of care plans will place an additional burden on the Independent Reviewing Officer service (IRO) at a time when there are grave concerns both about the functioning and effectiveness of the service and a conflict of interest resulting from the employment of IROs by the same local authority who has parental responsibility for the child and proposes a care plan. There is also concern about the unacceptably large caseloads carried by IROs—these are often in excess of 100. Such concerns were clearly illustrated by the case of *A & S (Children) v Lancashire County Council (2012)* (see the judgment attached—paras 126–146; 168–217). In this case the IRO had a caseload of over 200. In such circumstances it is unrealistic and dangerous to expect the IRO to exert the level of scrutiny, expertise and protective powers as are currently applied by the court.
- 26 weeks for the completion of cases is a *target*—not a limit and practice must allow for exceptions. It is long term objective to run parallel with improvements in other parts of the system, crucially improvements in the timing and quality of local authority evidence but also improved judicial continuity and case management by a specialist judiciary. It is acknowledged that the Munro proposals for improving social work practice with families and thus local authority evidence for proceedings—will take time to "bear fruit". Moreover, in that period the appropriate use of ISWs will be crucial to achieving faster proceedings for some cases (see, final report of Mr Justice Ryder on judicial proposals for the modernisation of family justice (July 2012; Para 41, use of experts). To perceive 26 weeks as a current limit in the absence of other improvements is likely to lead to injustices.
- With regard to expert evidence the new test is not substantively different to that contained in previous rules and guidance. However uncritical adherence to a 26 week *deadline* in the face of poor/inadequate/no assessment of a parent/extend family can result in injustice to children who have a right to have the possibility of reunification with a birth parent/family member properly assessed.
- We would also alert the Committee to our concerns about the poor "fit" between the government's proposals for faster family justice (under Part IV of the CA 1989)—and those in relation to local authority duties (under Part III of the Act) as set out in our attached response to the DfE Safeguarding proposals. In particular we highlight:
  - a failure to address the interconnection between the removal of national timeframes for the assessments of children in need and their families (Part III of the Act) and the likely impact on the work of courts (under Part IV) and capacity to meet the demands of the modernisation programme for faster family justice; and,
  - a risk of further decline in public confidence in social workers where the removal of certain national guidance regarding assessment timescales in the absence of structural changes and support for front line social work practice. Indications are that there continues to be considerable variation in support and training, that it will take time to trickle through and thus improve practices of local authorities in meeting the evidential filing requirements of the PLO.

October 2012

Written evidence from Judith Fournel, Independent Social Worker and former Children's Guardian (CFB 32)

May I add my wholehearted agreement with all the representations that have been made by colleagues.

I have very little to add that has not been said before, except to endorse every point made by those of us involved in the Family Courts.

I have been a professional social worker both as a practitioner and as a manager for over 32 years and I have never known a time when so many onslaughts have been made on the provision of quality work for those children who should be the focus of our concerns.

There seems to be little regard for or awareness of the fact that those children whose cases regularly come before the Family Courts need and deserve the best possible service if they are not to be left to languish in the

care of local authorities for years. In my experience, it is not the case that most Care proceedings are overly long or an unnecessary waste of time. Children who have been neglected or abused deserve a fair hearing and this includes rigorous assessments of the possibility that their biological parents or members of their extended families could provide them with "good enough" parenting" with the right level of support. To assume that all Care cases can be concluded within 6 months is naive and dangerous. I fully accept the need for as speedy a resolution as possible for vulnerable children, particularly very young ones, but many, many children, even young ones, are not easily adopted as they may have histories (such as chronic drug and alcohol abusing parents) which indicate that they may have behavioural difficulties as they grow and develop. There is now a lot of research which connects the children of these parents with learning difficulties, amongst other things.

There seems to be a myth amongst politicians that there is a great pool of excellent potential adopters waiting for children. This is not my experience, having worked in adoption for twelve years, and many of those who do apply are often unsuitable or ignorant of the enormity of the task of caring for these emotionally damaged and distressed children. At times of austerity many families are struggling to cope with supporting their own children and it is true, as a colleague has pointed out, that before much longer, thanks to advances in medical science, infertility may be a thing of the past. The vast majority of young people who are in the Care system cannot return to their parents and yet are simply "unadoptable" due to their behaviours or even their wish to continue to belong to and see, their biological families.

I am concerned that local authorities will increasingly use section 20 (voluntary care) as an alternative to care proceedings in order to avoid getting caught up in the need to conclude a Care case in the courts within 26 weeks. This happened a short while ago when local authorities were required to pay large sums of money to commence proceedings. This will mean that many more children will be left in limbo in the system at great cost both to themselves and to the tax-payer.

It is clear to those of us who are still trying to sustain standards in this benighted profession (whatever we do is deemed to be the wrong thing), that at a time of austerity the most vulnerable and silent of those in our society are easy targets for so-called "reform". The Guardian system has been virtually destroyed since the inception of CAFCASS and social work departments are understaffed and demoralised. Lawyers who work in the family courts have always been the "poor relation" of their counterparts in all other areas of the law (most people think lawyers are parasites who make money out of other people's misfortunes!) and this situation continues. Many good lawyers have left the profession since the pay cuts of a few years ago.

The courts are clogged up with cases already. One of the main reasons why cases take so long is because it is impossible to get hearings and families have to wait months before a final hearing (of several days) can be expedited. Other instances where cases cannot be concluded in 26 weeks includes those involving large sibling groups, another baby being born or the need for a Fact Finding in cases involving serious physical or sexual abuse.

I appreciate that the 26 week rule cannot be set in stone and that there will be many cases where it will not be possible to conclude in anything like this time scale, but I am concerned to hear that the 26 week rule is already being implemented in parts of the country even before it has been agreed.

The other great concern I have, with others, is the reliance on the local authority to implement their Care Plans without rigorous scrutiny by the courts (and the Children's Guardian). Those of us who work in this area are aware that local authorities are not good at implementing their Care plans once the child is "safely looked after". Many children are left with Placement Orders but are not placed with adopters. Independent Reviewing Officers have enormous case-loads and are not truly independent, being employed by the same local authority which pays their wages.

I know that you will have heard all this before but I wanted to add my voice to those of my colleagues, in the hope that you will at least think again before introducing these latest "reforms" to a system which is already struggling to survive.

October 2012

Written evidence from Brian Hitchcock (CFB 35)

I am concerned that the Child arrangement orders proposal should not be down played. The terms resident and non-resident do create a winner and a loser whereas the Child arrangement orders proposal concentrates the parents minds on what is best for the child.

I do not regard social workers as experts. To elevate them to the role of expert will remove human rights safeguards.

Judges should continue to make judgments on care plans in their entirety. Their role should not be restricted to the permanence provisions of care plans otherwise too much power would be handed to social workers.

There is a disturbing trend of parents of children in care only having contact for a couple of hours a year with them.

Social workers need to be held in check by the judiciary.

October 2012

Written evidence from Eva Gregory (CFB 36)

I write as a practitioner, both in private and public law, of many years to add my concern at some of the proposals. The title of the exercise is to modernise family justice. No one would disagree with this proposal, but unfortunately the gist of what is proposed appears to be in difficulties , as the "modernisation" seems to have been interpreted as a reduction in services and less scrutiny by the courts. Furthermore the way the proposals have been presented has caused alarm, especially when one learns from two senior judges that nothing has been decided, there is no new legislation as yet and the 26 week limit on the length of care proceedings is a proposal and not a regulation. Apparently in spite of this there are judges who are already implementing something for which at present there is no legal basis. One conclusion can only be that if new proposals are presented for a change in law/regulation then it should be made clear what the intention is and on what legal basis people can act. In this respect the proposals from the Justice Review about the future of care proceedings are poor in their presentation and misleading.

Similarly the proposal that there should be less scrutiny by the courts of local authority care plans are not well thought out nor is there a good reason why this would be an advantage. Many local authorities are under pressure and this inevitably leads to short cuts and bypassing of rules and regulations. At present LA's do not have the mechanism to develop and carry out care plans without some external supervision and some body which creates a time table for local authorities. Research findings from Dr Brophy show that it is because LA's do not always provide their reports and assessments under the current system on time, they are in fact the chief cause for delays of proceedings. Without court scrutiny these plans are likely to be even less formalised and less thought out and not in accord to a specific time table.

October 2012

Written evidence from David Jockelson (CFB 37)

DRAFT LEGISLATION ON FAMILY JUSTICE

I am writing on behalf of the children we represent in care cases. I am a Children Panel member and have been doing this work for 30 years and many of my colleagues in this firm for almost as long.

We are very concerned at two matters:

Firstly the imposition of a 26 week time limit for care proceedings save in exceptional cases. This sounds reasonable and even generous. Delay is said to be against the interest of children who wait in care for their cases to be decided.

This is being hailed as necessary to speed up care cases in the interests of children and it may be that those proposing it genuinely believe that it will be of benefit to children.

A more careful consideration however will lead to a realisation that this effectively means a total and dangerous change in the nature of care proceedings—a change which will harm children.

Many politicians and apparently some lawyers still retain a simplistic view of proceedings as analogous to criminal proceedings where the only real issue is to determine a factual matter, such as did a person commit a crime, and then deal with the consequences. In those circumstances, the quick disposal of the case is obviously a good thing.

Some people do not seem to appreciate that care proceedings are entirely different: In most cases, the question is whether parents are good enough to care for their children at the outset of proceedings and whether they can be enabled or induced to be good enough during the course of proceedings.

Cases take more than 26 weeks if they are going to give parents the genuine opportunity of changing, which of course means giving children the genuine opportunity of remaining within their original family. In addition, cases take more than 26 weeks because of the need for a thorough exploration of the wider family once it has become clear that the parents are failing.

To impose a 26 week deadline is to destroy both these opportunities for a child to remain within their family.

26 weeks is suitable for those cases in which it is clear the parents are going to fail and there are no alternative carers within the family, possibly because both these things are clear from recent exhaustive enquiries for other children. Another small percentage of cases are suitable because it is quickly clear that the Local Authority should never have brought the case for lack of merit. Perhaps these two categories comprise 20% of cases. In which case 80% of cases are ones in which due process and careful scrutiny is entirely appropriate and should be the right of each child.

Children are also entitled to the thorough work of Guardians who as we know are currently under intolerable pressure within Cafcass with massive overloads and the destruction of standards and compromised professionalism of "proportionate working". Many excellent Guardians have left the service or are on the point of doing so.

A less obvious point is that parents currently display an astonishing level of acceptance at the trauma of the loss of their children. When justice is not done and is perceived as not having been done there is likely to be much more direct action by parents against social workers, the courts and foster carers or adopters. If and when children are traced and abducted from care this will lead to a dramatic reduction in the supply of those carers and adopters who are key players in the lives of the children.

Secondly the proposal to remove the duty of the court to scrutinise care plans in any depth will also radically reduce the quality of service to children. Most of us know that the detailed care plan as an essential document to ensure good quality future care of a child including issues of the resources needed and family contact.

The details in these Care Plans need to include the proposed placement, child's need for contact with parents, sibling and wider family is fundamental to their ongoing emotional and mental health. The support that they need educationally and psychologically eg through CAMHS is also crucial.

These are matters where the court needs to have as much clarity and certainty as possible. To give the Local Authority a care order and then simply trust them to use it in the best way is to ignore the frequent experience of all of us of the gross neglect of children in care. Social services departments are hugely overloaded and the result can be such disasters as the recent case involving Lancaster where two brothers, I think an internet link in this document would not be welcome but your members may wish to Google A and S (Children) v Lancashire County Council [2012] EWHC 1689 and see an example of children in Local Authority care being totally overlooked and neglected. The Judge said: "Lancashire County Council failed to provide the boys with a proper opportunity of securing a permanent adoptive placement and a settled and secure home life".

The care plan is a vital document which should be in the file and set guidance and plans for the care of the child for the future. The Guardian and experts involved in the case have valuable insight and information which should feed into a Care Plan before they leave the case. It also needs to be remembered that once a care order is made the case may well transfer to another team. The child's social workers leave and take with them their detailed and sensitive understanding of the child's needs. These need to be captured and made clear in a care plan.

If we are removing children from "not good enough homes" then they must receive the best possible care under a care order. The history of poor outcomes for children in care has been flagged up as a major concern by successive governments. A good care plan is the first and necessary step to improve those outcomes.

To reduce scrutiny of care plans would be a foolish false economy and would be damaging to the interests and needs of children.

You may be told that both these reforms are subject to the courts' discretion and will be applied sensitively and proper exceptions made.

This is not the case. The 26 week rule is already being applied rigidly and dogmatically.

At a conference of Nagalro on Monday (The National Association for Guardians) two senior judges including Mr Justice Ryder, the judge responsible for this programme, asserted that the time limit is not set in stone.

There were reports from every professional in the room that throughout the country this time limit is being imposed rigidly. Whatever the architect of the modernisation programme is saying, civil servants have imposed this time limit on courts.

The result is often that parents are not being given a chance to improve and family members are not being properly considered. There will soon be a large number of children who the courts have made care orders for and said cannot stay within their families but for whom there are no adoptive placements. That is the worst possible outcome.

We invite you to investigate these points and lay down a clear challenge to the assumptions that are driving this draft legislation.

A final point needs to be made that is new but gaining some recognition:

The logic of the government seems to be simplistically that children should be adopted as soon as possible. This ignores the fact that the supply of adopters is already diminishing and will hugely diminish when, probably within five or ten years, advances in assisted reproduction finally abolish parental infertility problems. Children will in fact then be in long term foster care for decades with very negative consequences for them and massive ongoing costs to Local Authorities.

October 2012

Written evidence from Middlesex Law Society (CFB 38)

I wish to advise you that the Middlesex Law Society which represents several hundred solicitors in over twenty parliamentary constituencies supports and endorses the comments made in the submission made by Mr Jockelson.

October 2012

Written evidence from Mrs Dey Wilcock, Independent Assessor, Family Public Law Specialist (CFB 39)

I fully support the recent comments of NAGALRO and the communications of David Jockelson who speaks for the majority of those of us who are experienced practitioners us at the "coal face" of public law.

Whilst we all bear in mind the need to resolve the future of the children we work for as expeditiously as possible there are quite a few cases where it is in the child's interests to continue to assess carefully and allow for parental change—this is particularly so in the case of parents with mental health difficulties. Parents can sometimes, on receiving appropriate support, turn around their situation. There are many cases like this so I would not describe them as "exceptional." Public law cases are influenced by the vagaries of human nature and have many complexities—many of which are unknown at the commencement of the proceedings—flexibility not rigidity should therefore be the key. Decisions made in good faith within the proposed short timeframe will have a potentially devastating impact on a child's life if they later prove to be the wrong decisions

More generally—I have been sad to see the services to children in Care Proceedings deteriorate so badly over the past few years especially since the inception of CAFCASS and feel very angry about the way the Legal Services Commission has attempted to cut Independent Social Worker's fees and funding generally. This has been a terrible dis-service to the familes we aim to assist.

October 2012

Written evidence from Emma Sherrington, Partner, Deputy Head of Children's Department, Fisher Meredith LLP (CFB 40)

I am writing in response to the draft legislation on Family Justice. I have been a Children Solicitor for 13 years and a Children Panel member for seven years.

I confirm that I endorse wholeheartedly and wish to echo everything that David Jockelson of Miles and Partners has written.

In particular I wish to reiterate his point that care proceedings are not just a means to an end decision but are often in themselves the very process that helps parents to change and keep families together. Throughout my career I have represented many many parents who have been able to effect significant change in their parenting and go on to successfully parent their children as a result of the intervention of care proceedings and the work undertaken within those proceedings.

Any cuts or limits to that process will deny future families having that opportunity resulting in more broken families and children in care.

October 2012

Written evidence from Kate Thomas (CFB 41)

I am writing to express my concerns about the imposition of a blanket 26 week deadline in Care Proceedings. I am an experienced social work practitioner with 35 years practical experience in the field. I have also been a Children's Guardian since 1984 and continue to practice as an Independent Social Worker.

It is my advice that every effort must be made to avoid any avoidable delay in making decisions for children. I am concerned that it is likely that a culture will develop from the proposed timescale which will prevent the courts from dealing with cases more expeditiously than 26 weeks. It is also my concern that the proposals will hinder flexibility where it is needed to preserve the option of reunification with parent. In many cases parents embark on a process of change (particularly in addiction) which will take longer than 26 weeks to create the right level of certainty.

Secondly I hope the committee recognises how all options facing a child subject to care proceedings are likely to be flawed. Rushing headlong into one option is not what is best for all children, (although it might be in some unusual cases). One size does not fit all.

Where CAFCASS previously had capacity to properly advise on timeframes it is my view that it has now struggling to provide the quality and depth of involvement across the board for all children in public law proceedings.

Thirdly I am really worried about the court removing the need for the court to scrutinize the care plan. There are many brilliant social workers and some good local authorities but they do not all fit this description. Without some judicial oversight, pressure and expectation about a child's future many children are likely to drift in ill-defined situations. The weaknesses of the IRO service would need to be addressed first.

October 2012

Written evidence from Chris Hardy (CFB 42)

I have seen the responses from Nagalro and David Jockelsten. These submissions speak for me.

I only send this in the unlikely event my experience, most recently with Kenneth Clarke's response of market forces sorting out money making professionals like me (clearly I'm a fraud on the nation) and the LSC's intolerable and arrogant behaviour impervious to all reasonably made points—as I see echoed in the reasonable tone of this response as though it will make any difference (hence this reply)—proves me wrong on this occasion.

I fully accept that some cases take too long. I rage against children having too long to wait in hopeless cases and newborns being at least past their first birthday before their future is decided. I think family carer candidates must be assessed from the start simultaneously with parents & the assessment of adopters & family carers should be speeded up, with those LAs, for example, whose staff just will not countenance trans-racial adoptions being freed of this onerous duty and it being carried out by a competent not-for-profit agency. But to say all cases but the most exceptional must be done in 6 months is too avoid the real work of sifting out the complexities so that children who need longer before the Court get that service.

I speak as one of those "experienced" Children's Guardians who fell out with CAFCASS over their appalling practices (magnificently unchallenged by everyone from Judges to Parliament (although the sound of clacking bones from the hand wringing of their collective regret could be heard down here on the South Coast where I live)), and will not work as before on the LSC's current rates, which leave me below the minimum wage (& never more than a bit above it) when my overheads are taken out, I shall see out my remaining professional years still acting for children, and, as an ISW, part of the last bulwark to the onward roll of LAs as unscrutinised decision makers (OFSTED won't deal with case referrals, the same as the old HM SSD Inspectorate never would) as the Court's powers are further whittled away.

However my confidence in the capacity of civil servants and Ministers to rubbish all this and carry on regardless remains undiminished. Indeed I have written in this (true but) ironic tone to make it that little bit easier for them to press the delete button on this one as "sour grapes", rather than have a transitory pain of conscience moment or even doubt before doing so. So you can see I am not totally heartless.

October 2012

Written evidence from Kate Tindale, Lawrence Davies & Co (CFB 43)

I confirm that I support the submission from David Jockelson with regard to the draft legislation on Family Justice. I am a Children Panel solicitor and have worked in family law for 10 years.

October 2012

Written evidence from Karen Singer (CFB 44)

I have worked as a Children's Guardian and Independent Social Worker since 1984. I support the submission that the draft legislation needs revision to ensure practice around the Country recognises a time limit of 26 weeks for cases to be finalised in the Family Court is not set in stone, this point having been confirmed by Mr. Justice Ryder at the NAGALRO conference on 15 October. From my experience over 28 years, it is only a small proportion of cases that can finalise in this time frame and in view of the statement by Mr. Justice Ryder, Courts need clearer guidance that such a time limit imposed as an expectation generally, was not the intension. Imposing it will jeopardise many, many children from the opportunity of proper explorations being made for them to be placed within their families including wider extended families. I also submit that in the Court's full and proper scrutiny of the care plan, for local authorities to reach the right care plan—and to amend where needed, limiting it will be contrary to the child's best interests. I submit that the draft legislation be revised to ensure the 26 week limit is not included as a general aim, and that practice does not forge ahead and implement

these limitations, but that it reverts to considering the child's interests in each case, as fully as is warranted, while also avoiding unnecessary delay.

October 2012

Written evidence from Boyd Carter, Solicitor Advocate Mediator (CFB 45)

I am writing on behalf of the children we represent in care cases, in support of a submission made originally by my esteemed colleague David Jockelson. I am a Children Panel member and have been doing this work for almost 20 years.

October 2012

Written evidence from SEEDS Devon (CFB 47)

ENFORCEMENT AND SHARED PARENTING :

SEEDS Devon submitted a document to the Department of Education's Consultation : Co-operative Parenting Following Family Separation : Proposed Legislation on the Involvement of Both Parents in a Child's Life.

SEEDS Devon would like to highlight the following taken from the document for the Inquiry :

In 2010 the courts refused only 300 of 95,000 contact applications. Careful research based on analysis of court records finds that the great majority of fathers get the contact they seek and often do better than mothers. Indeed, the contact presumption is so strong that research studies have found concerns raised by mothers—especially about domestic violence—are not being addressed adequately by the courts. The research evidence is clear that the claim of systematic bias against fathers is a myth.

(Liz Trinder 2012)

The same reports are being heard time and time again from parents navigating the family court system. The reality is the opposite of what has been insinuated by the government; it is the perpetrators of domestic abuse who are "playing the system" to abuse further, rather than the resident parent (usually the mothers) using the system to "freeze out the non-resident parent".

The outcome is that the family courts believe that children fare better in joint residency or shared parenting; now known as co-operative parenting under the proposed Bill. However, extensive research shows overwhelmingly that they do in fact do worse, except in cases where there is good will between the parents so they can parent co-operatively; impossible for a woman to do with an abusive ex-partner. The amicable cases with parents working together easily do not appear in Court by their very nature. A presumption of shared parenting exists in the Australian courts, yet the impact has been catastrophic regarding domestic abuse cases. This has been proved and evidenced in a plethora of research, yet still the government blindly proposes the UK to follow the same route. (e.g. Kaspieu, Gray, Weston, Moloney & Qu 2009; McIntosh & Smyth 2012; McIntosh, Smyth, Kalaher, Wells & Long 2010; Trinder 2010).

Twenty–nine homicides were recorded over a ten year period regarding fathers killing their children, five cases of which contact had been ordered by the court (Saunders 2004). Lord Justice Wall has made recommendations pertaining to this but it does not seem to have filtered down to the courts on the ground (Lord Justice Wall 2006). The government's co-operative parenting proposal would oppose these recommendations and would make the lives of thousands of children even worse. There are little resources available as it is to provide training for court personnel to improve outcomes for these children, who are also readily not listened to.

The family Justice Advisory Board advised against shared parenting becoming policy yet this advice has been ignored (Family Justice Review 2011; Rt Hon Sir Alan Beith MP July 2012). It appears a blanket view has been taken that all fathers are good role models for their children, including the perpetrators of domestic and child abuse, which will inevitably widen the inequality already experienced by thousands of women and children in the family courts.

There are not the systems currently in place to feed back any outcomes of decisions made by court personnel. They never know how their decisions have impacted on the children and family as a whole; evaluation and accountability are absent. Mothers are often so broken by their treatment in the family courts and by witnessing the detrimental effects on their children that they dare not refer back to court even when severe repercussions are evidenced.

Research shows the vast majority of abused women want their children to have contact with their fathers, but with conditions attached ensuring their safety. If family courts committed to tackling the inherent prejudice, introduced evaluation systems, along with enforceable conditions and boundaries in contact orders to protect the children, post-separation abuse could not happen. This would subsequently reduce the immense pressure faced by services such as the police, social services and the NHS, in dealing with issues rooted in post-separation abuse in a time of diminishing resources.

It is a matter of grave concern that the action to introduce legislation which will put children at increased risk, has not been undertaken with an open acknowledgement regarding the common dynamics of separated parents experiencing contention as found in domestic abuse cases. To fail to hold the need of assessing and providing for its degree and function as paramount in determining contact orders is an act of colluding with the abuse.

Legislation desperately needs to be put in place to stop post-separation abuse, not encourage it further. If a teacher, childminder or anyone else in society abused a child there would be severe repercussions without question. However, even in modern Britain children and women generally remain unsupported when abused by family members due to society's disbelief and inaction, giving credence to the unspoken underlying acceptance of abuse within family confines. The heart of our society, the British Justice System, has already taken this to a higher level in its inherent support of abusers in the family courts. A huge amount of research in the UK alone has been undertaken over the past twenty years, yet this support still remains. How can further suffering be justified under the Co-operative Parenting Bill ?

October 2012

Written evidence from the Children's Commissioner (CFB 48)

I am writing on behalf of the Office of the Children's Commissioner in response to your Committee's Call for Evidence regarding the pre-legislative scrutiny of the draft legislation on family justice published in September of this year, together with the expected clauses on adoption, enforcement and co-operative parenting.

We are also in the process of preparing a Child Rights Impact Assessment (CRIA) on this proposed legislation, and on other measures which are likely to become part of the same Bill to be introduced later in this Parliamentary Session (with the exception of the clauses concerning the Office of Children's Commissioner). This CRIA will offer a detailed analysis of this legislation, from the point of view of how it impacts on children's rights.

The purpose of this submission is to set out our response in principle to the questions posed by the Committee in its Call for Evidence. We will not, therefore, address the government's proposals on adoption here but they will be considered in the full CRIA, which will be presented to Government, and to your Committee, by the end of the calendar year. We will also be giving oral evidence to the House of Lords Select Committee on Adoption Legislation on 30 October.

In relation to the questions set out in the Call for Evidence:

1. Mediation

(a) *The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the Mediation Information and Assessment Meeting ("MIAM") system, and whether they will be effective*

It is hard to make detailed comments regarding the relationship between the court process and Mediation Information and Assessment Meeting (MIAM) system, as the draft legislation leaves most of the procedure to be set out in Family Procedure Rules. However, our main concern is that it is essential that there be no delay in the court's consideration of cases where there may be domestic violence or abuse or where children's safety may otherwise be at risk, in line with the courts' duties under Articles 6, 19 and 34 of the UN Convention on the Rights of the Child (UNCRC) to safeguard children from physical maltreatment and sexual abuse and protect their right to life and optimal development.

The Explanatory Notes in relation to Clause 1 of the draft clauses state that "the intention is that in cases which are urgent (as to be defined) or where a MIAM cannot be arranged within a specified time, or where there is evidence of domestic violence, the requirement to attend [a MIAM before the court hears the application] will not apply". It is essential, in our view, that "evidence of domestic violence" is broadly defined and does not only, for example, include the pre-existence of relevant court orders and/or criminal proceedings, as these will be present in only a minority of cases. An allegation of violence, abuse, or other risk to children's safety, or other evidence which suggests that one or more of these may be present, should be sufficient. In order to make the decision to dispense with the MIAM requirement in these circumstances it may be necessary to look at more than the "evidence contained in a standard court form" (as proposed in the Explanatory Notes) and we would welcome further consideration of this point.

We welcome the government's intention, expressed in the Explanatory Notes, to dispense with the MIAM requirement in "cases that are urgent (as to be defined) or where a MIAM cannot be arranged within a specified time". Even where there is no risk to safety, children's welfare may suffer from delay in the court hearing, due to the uncertainty regarding arrangements for their spending time with both parents and possible hostility arising between parents as a result of this. If a child is unable to spend time with one parent pending the court hearing in circumstances where it would be safe and appropriate for them to do so, this will compromise his or her Article 9 UNCRC rights to know and be cared for by both of his or her parents. Undue delay should therefore be avoided.

We would suggest that CAFCASS practitioners are best placed to make the initial safeguarding checks in the context of ensuring that those affected by domestic violence are filtered out of mediation processes. Given the seriousness of the consequences for and the impact of domestic violence upon children, and what we know about the difficulties for victims in reporting their experience, it is considered essential that their expertise and access to information is made available. In addition, it will be important that family mediators have training and meet required standards in respect of an understanding of domestic violence and its impact on children.

(b) *The role of officers of the court in the MIAM process*

Court staff are not suitably trained to have any role in MIAMS. We would be very concerned if an officer of the court were able to refuse to deal with an application because an applicant has not attended a MIAM. This could prejudice the safety and wellbeing of the child and is a decision which only a judge should make.

(c) *Are there any gaps in the process, and if so, who will fall through and what safeguards are needed?*

We are concerned about those who have experienced domestic abuse but who will not be eligible for legal aid given its narrow criteria for funding. It is essential that there are ways of hearing and understanding the child's voice and experience and that the outcomes of any resolution process affecting them is explained to them, directly by a professional.

2. Child arrangement orders

(d) *What is the effect of the amendments to section 11A to 11P, is it simply a "shift in focus" to remove the perception of "winners and losers"?*

These arrangements must always be determined above all by the child's best interests through the paramountcy principle. Our understanding of the changes to sections 11A–11P of the Children Act 1989 proposed in Schedule 1 to the draft clauses is that, in addition to reform of the terminology, to avoid the perception of a "winning" parent with residence and a "losing" parent with contact, the court will be able to make activity directions and conditions in a broader range of circumstances. In particular, in several places, references to promoting contact are replaced with the individual who is subject to the activity direction or "another individual who is party to the proceedings" helping "to establish, maintain or improve the involvement in the life of the child concerned". In s11A the changes would mean that the court can make an activity direction when making what would currently be called a residence or shared residence order, as well as when making what would currently be called a contact order. This reflects the government's intention, expressed in the Explanatory Notes, to address "issues that relate to the time spent by the child with the person with whom he or she lives, that affect the smooth operation of the arrangements for the care of the child". Section 11C would, following the changes, also allow activity conditions to be made in relation to "shared residence" as well as "contact" orders. The changes to sections 111 and 11J would provide for warning notices and enforcement arrangements to apply to all child arrangements orders, not just those relating to contact. Similarly, the changes to section 110 would make compensation payable where breach of any provision of a child arrangement order has occasioned a financial loss—not only those relating to contact.

3. Expert evidence:

(e) *Does the new test adequately safeguard against miscarriages of justice?*

In relation to question (e), we would welcome consideration of whether there should be provision for an interlocutory appeal (with permission of the court hearing the case or the appellate court) against the decision of a court to allow, or refuse to allow, instruction of an expert, assessment of a child or placing of expert evidence before the court under draft Clause 3. This should be considered in the context of how long it would take for an interlocutory appeal to be determined and how this would affect the overall timeline of the case, and how it would affect the rate of appeals against court orders. We are concerned that the best interests—and other outcomes—for children may be compromised if proceedings are concluded (perhaps after several months) and orders made, only for appellate proceedings to determine that expert evidence that should have been before the court was not heard, resulting in inappropriate orders being made and requiring new orders to be made. This could be extremely disruptive and traumatic for children and could even compromise safety in some cases.

(f) *Are social workers receiving the support and training they need to meet this increased court role?*

The training and support of social workers appears very variable. The Munro Review made many recommendations about the training and professional development which is needed for overall improvements in child protection work and the achievement of the changes needed will, it has been suggested, take a considerable time.

4. Time limits

(g) *What progress has been made to achieve the 26 week limit?*

We are unable to offer any comment on progress but would suggest that there are many reasons as to why it may be difficult to achieve in all cases and the focus must be on taking the right time to make the decision in each child's best interest, rather than simply in limiting time. There are some steps which can be taken to minimise delay which can occur at the final stages—such as the early involvement of the extended family through family group conferences—and to ensure that there is minimal disruption for the child if proceedings do take longer—such as by the use of concurrent planning. The focus of judgment must be on the likelihood that parent/s can make the changes necessary to safely care for their child within a timescale which meets the child's developmental needs and expertise in evidence-based assessment is essential to determining this. It would be of great concern if the shorter time limit led to local authorities delaying an application to the court where it was in the child's interests that assessments be undertaken in that context.

5. Care plans

(h) *Should the Judge's role be restricted to considering only the permanence provisions of care plans?*

We believe that the impact of this change will be that the effective scrutiny of plans will in future depend on the quality of oversight of assessments and plans during proceedings by the child's Guardian and the Independent Reviewing Officer (IRO). We outlined our concerns regarding this in our response to the All Party Parliamentary Group (APPG) for Child Protection's Inquiry on the implementation of the Family Justice Review, and attach a copy of that response to this letter. In addition to the points we raised in our response to the APPG Inquiry, we consider that the court should consider the permanence provisions of all plans, including those where a care order is not sought, in order to fulfil the paramountcy principle. The use of the term "permanence" here denotes the long term plan for the child, including a plan for remaining with the birth parent/s.

6. Divorce

(i) *Do the suggested provisions remove an important safeguard for children?*

We have no comment to make on this issue.

7. Enforcement and Shared parenting:

We have considerable concerns about any attempt to legislate on the basis of a concept of "shared parenting". We responded to the Department for Education's consultation Cooperative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life, and attach a copy of our response to this letter.

Please do not hesitate to contact me should you require any further information.

Sue Berelowitz
Deputy Children's Commissioner/Chief Executive

October 2012

Written evidence from PCS (CFB 49)

Legislative scrutiny of the Children and Families Bill

1. The Public and Commercial Services union (PCS) is the largest civil service trades union in the UK, with around 270,000 members. We have members working throughout the civil service and government agencies. We also organise widely in the private sector, usually in areas that have been privatised.

2. PCS represents over 14,000 staff working in the Ministry of Justice and Her Majesty's Courts and Tribunals. These include legal advisers including those who conduct directions hearings and advise magistrates in the Family Proceedings Court.

3. We welcome the committee's scrutiny of the Children and Families Bill and would be happy to supplement this initial briefing note with further evidence when required.

Impact of removal of legal representation in family proceedings

4. PCS is concerned that the changes implemented by the Children and Families Bill will come into effect into a court system, in cases involving arrangements for children, where only those who are able to afford it will be represented. This is down to the impact of cuts to legal aid contained within the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) which was given Royal Ascent earlier this year. It is estimated that 68,000 children will be affected by legal aid being removed for family contact and finance disputes.

5. This means that there will be cases where this will create inequality in court proceedings. There has been a reduction in the number of cases where parties are represented. Our legal adviser members have experience of parties appearing in person and are not convinced that many more cases will be effectively resolved by mediation as the government assumed under LASPO.

6. The inequality of representation will add a new dimension to some cases where one is a parent who is able to use their income to fund legal representation whilst the other is using theirs to feed and clothe the children. It is likely that the most vulnerable party in the case will be further disadvantaged by this inequality.

Mediation

7. PCS members working in family courts see cases, where one party to proceedings is so intimidated by the other they are unable to express their views in the same room. This type of "domestic abuse" case is unlikely to have involved the police or the court so will not fit the definition of domestic violence used by the LASPO bill.

8. Members have experienced such cases being referred to mediation and as soon as the dominant partner realises they cannot use the mediation process to manipulate the other they have refused to participate.

9. It is important that the standards of mediation are assured. Mediators need to be trained to identify cases of abuse and manipulation and to protect the vulnerable and ensure that the mediation process is not used to inflict further abuse. The vulnerable partner may after all, be a caring parent suffering from the effects of emotional abuse.

Child arrangement orders

10. It is possible that removing the concepts of residence and contact may take some of the "competition" out of arrangements for children. However, there is a minority of parents who for a number of reasons cannot agree to arrangement for the children. The Children Act 1989 was a carefully crafted successful piece of legislation and we are not satisfied that these changes will improve anything.

11. It needs to be recognised that some parents do use the court as a weapon to hurt the other, will never reach an agreement and will contest everything. These may include those that shout the loudest when they do not get what they demand. A small minority will not accept the involvement of the other parent in the life of a child and will fight this until it wears the other parent down. These are difficult cases and "shared parenting" would only serve to inflame the relationship between them and would do nothing to help the children involved.

12. Some parents do not accept the harm their behaviour has done to their children and keep pursuing children who have witnessed abuse of their other parent and want no contact with the abuser. There are occasions when the child's direct experience of domestic violence means that shared parenting is not in the child's best interests.

13. PCS is very concerned that CAFCASS seems to be reducing its support to the court in private law cases at the same time that publicly funded legal representation has been cut. The inadequacy of the ABC model used to staff Family Proceedings Court means there are not sufficient legal advisers to do the valuable work previously done by CAFCASS officers.

14. It must be remembered that only 10% of cases involving arrangements for children come to the court. A significant number of these cases there are issues which need to be explored for the protection of the children. These include drug and alcohol abuse and mental health issues as well as domestic abuse

15. The Welfare Checklist is a valuable guideline to the court and to both legal and social work practitioners. It is recognised and understood and should remain the starting point in all cases. PCS believes that the protection of children and young people must be a primary consideration in the family courts. It is therefore important that the law remains child focussed.

Creating a time limit for care cases to be completed

16. Care and supervision cases in the Family Courts are taking almost a year to complete. This will have an entirely negative impact on vulnerable children for whom a year is particularly a very long time. For the period between 1 January 2011 and 30 June 2012, the total number of disposals relating to care and supervision cases in England and Wales was 27,437. Of these, 23,900 took longer than six months to resolve, 12,635 took longer than 12 month and 4,804 took longer than 18 months.

17. We therefore support measures introduced to ensure the speedier and more proper progression of cases. However, the Government's massive court closure programme has led to a worrying increase in the distances that families have to travel to attend a court hearing. Parties, including victims and perpetrators of domestic violence, are forced to share court waiting space due to court closures and lack of resources.

18. If more cases are put into the system than the court sittings, or there are available social workers or children's guardians can progress, there will be further delays. We are aware that the workload of some children's guardians was simply doubled and they were forbidden from carrying out in depth investigations

and felt there may be evidence being kept from the court. Time limits are good but should not be met by methods which may result in a child remaining in danger.

19. The investigation into the "baby P" case led to a sudden influx of cases into the care system. In the event of another high profile case there needs to be contingency plans to ensure that the resulting cases are dealt with properly as well as speedily.

Care Plans

20. PCS is concerned that the right balance may not have been reached in relation to scrutiny of care plans. Inadequate care plans put forward due to lack of resources could influence the outcome of a case. It may be better for a child to return to a difficult home environment with siblings than to inadequately supported placement alone. There will also be cases where children will be removed from parents because the Local Authority will not put the necessary support in place. Magistrates and District Judges who sit in the Youth Court all too often see children in the care of the Local Authority for whom it has been a detrimental experience.

Conclusion

21. While PCS broadly welcomes the measures proposed in the draft Children and Families Bill, we are concerned that, under the current climate of cuts, it is difficult to see them being realised.

22. Cuts to legal aid and the MoJ's 23% budget cut and court closures are already having a devastating impact on the family court system. Without proper investment in the system, cases will take too long to resolve and vulnerable people will continue to be disadvantaged.

October 2012

Written evidence from Legal Committee of the Greater London Family Panel (CFB 50)

Draft Legislation on Family Justice—Cm 8437

This is the response of the Legal Committee of the Greater London Family Panel [GLFP] to the "Draft legislation on Family Justice" Consultation. The GLFP consists of the 500 Magistrates, who sit in the 8 Family Proceedings Courts [FPC's] across London, whose Chairman is Geoff Edwards. The Panel also consists of 26 Family-ticketed District Judges [Magistrates Court], in London dealing with FPC work. The Magistrates have elected 13 Committee members to discuss and respond to consultation documents on their behalf. The Legal Committee is chaired by John Perkins, District Judge (MC) and has James George, a Family Legal Adviser, as its Legal Secretary. The Committee is also assisted by the Panel's dedicated Justices' Clerk, Audrey Damazer.

The Legal Committee of the GLFP has considered the "Draft legislation on Family Justice" and would like to respond to the questions as set out below:

General Comments

The Committee would draw the reader's attention to our response to the consultation on Shared Parenting, submitted earlier this year (I attach a copy for your ease of reference) in particular in relation to the proposals around the Child Arrangements Order and our concern that the "shift in focus" envisaged by the draft proposals does not erode the paramountcy principle.

Our response to each section is as set out below:

1. Mediation Information & Assessment Meetings (MIAM)

Paragraph 1(1)(d) allows for Rules to make provision that a Court may "refuse to deal with any application" where the parents have not attended a MIAM. The committee proposes that the words "deal with" should be replaced with "issue". This accurately reflects the processing of applications by a court and is somewhat more specific than "deal with".

In respect of (3), the Committee understands that this proposal would require provision by way of power being delegated under the relevant legislation. Further the Committee suggests that a means of evidencing attendance at a MIAM be set out here, whether by way of a certificate or form issued by the provider.

The definitions as set out in (4) make reference to "the family court". It is noted that legislation in respect of a unified family court has not been passed and accordingly this definition should encompass the courts at FPC and County Court Level. The definition of "family application" is not necessary as it is encompassed in the definition of "relevant family application" in the same section. In respect of the definition of the MIAM, the Committee proposes there is some provision in respect of how providers would be accredited. The final definition being "relevant family application" refers the reader to a description as set out in the Family Proceedings Rules. The Committee notes that this term does not currently appear to be defined within those Rules. In respect of this definition, the Committee suggests that for the purposes of this section the term be defined as "an application made under section 8 of the Children Act '89".

2. Child Arrangements Orders

Having considered the proposals and the explanatory notes, the Committee understands the thrust of the changes around this order as being a "re-branding" exercise with a view to changing applicants attitude towards such orders and to their "rights". The committee would comment that a significant number of applicants coming to court in this respect (as well as the popular media) still refer to "access" rights, accordingly the effect of a re-branding exercise in the terms proposed with extensive amendment to primary and secondary legislation cannot be viewed with any degree of optimism.

In respect of (2) and (3), the Committee would ask why all section 8 orders are not included within the "Chid Arrangements Order". If the proposals are progressed, the Committee would suggest that a Child Arrangements Order includes arrangements in respect of the child and would therefore include Specific Issue and Prohibited Steps Orders. Otherwise there would continue to be a piecemeal approach to orders in respect to the arrangements surrounding a child.

3. Control of Expert Evidence, and of Assessments, in Children Proceedings

The Committee welcomes any effort to reduce the unnecessary or disproportionate use of expert evidence within Family Proceedings. The Committee would still urge the Government to further scrutinise the issue of experts. The experience of this court in the Family Drug & Alcohol Court, with regard to allocating teams of experts that are effectively employed (as within the NHS) has been shown to reduce delay in proceedings and the cost of expert assessments. It is clear that an industry has sprung up around court appointed experts and the Legal Services Commission appears to be making efforts to "turn the tide" in relation to the costs of the same. The Committee does not see how any significant improvement on the situation can be effected without including the NHS and the resources that are already available to the public.

The Committee supports the prohibition as stated in (3) that permission of the Court is required to subject the child to medical or psychiatric examination, but without any sanction being specified, there does not appear to be any disincentive to parties speculatively subjecting their child to such assessments. The Committee would propose it be made clear that breach of this section would amount to contempt of Court and that consequently sanctions would apply.

The Committee understands (2) and (5) to be the same, and therefore one or other should be omitted.

In respect of (6), the proposal introduces the term "justly". Although the following paragraph refers to considerations the Court is to have particular regard to, the list is not finite. Without any definition of "justly" the Committee believes this phrase to be unhelpful and potentially subject to increased litigation. The Committee would propose the term justly be removed or replaced with reference to s1(1) of the Overriding Objective as set out in the Public Law Outline.

In (9), the definitions refer to the "authorised applicant". This is already addressed in s.31 of the Children Act '89 by way of the term "authorised person". Similarly the definition of "child" is dealt with in s105 of the '89 Act and in Rule 2.3 of the Family Proceedings Rules 2010. The Committee would object to the addition of terms that do not add any value and are already defined elsewhere. The term "local authority" is defined here, similarly, the Committee asks whether this is necessary.

In respect of (11), the Committee would propose that rather than repeat the entirety of the provisions 7A and 7B, the clause to simply refer to "section 3(6) above".

4. Time Limits in Proceedings of Care or Supervision Orders

The Committee would welcome anything that could result in more timely decisions for children.

In respect of (5), the Committee repeats its comments in respect of the term "justly" as stated in 3 above. There appears to be an omission in that same paragraph when the text refers to "subsection (1)(a)(ii)". The Committee believes that (1)(a)(i) should also be included in this provision.

(6) as drafted stresses that exceptions to the time limits for proceedings must not be made routinely. Aside form being a banal statement, the Committee would propose that in (6) following the ":" the wording should be replaced with "and must record its reasons for taking this exceptional step".

In (9) the Committee proposes deletion of the words "must take account of" as being unnecessary in light of the preceding wording "must, or may or may not". At the end of that same sentence, the Committee would suggest the inclusion of the words "or issued by the President's Office".

5. Care Plans

The Committee strongly objects to the proposed amendment in (1), which seeks to limit the Court's consideration of any care plan to the "permanence provisions". This would erode the "Paramountcy Principle" and would have a significant impact on the Court's ability to properly consider the Welfare Checklist, particularly when dealing with interim care order applications. At the interim stages of care proceedings, care plans often have little or no information in respect of permanence planning, whereas they do contain important information with respect to the child, including provision of education whilst in foster care and contact with

parents/siblings. It must be remembered that proceedings under s31 and s38 of the '89 Act are an infringement of the child's and the parents' Article 8 Right to Family Life. Similarly, parties to these proceedings have the right under Article 6 to a Fair Trial. There is further provision within the '89 Act that the Court must have the welfare of the child as its paramount consideration and under s34 the Local Authority must provide for reasonable contact between the child and its parents. It is established law that the making of an interim care order is a temporary "holding" position and should not prejudice the parties' respective cases pending final hearing. By restricting the Court's ability to scrutinise a Care plan, save for permanence provisions, the proposed amendment would simultaneously restrict the Court's ability to discharge its duties under the Children Act '89, under the European Convention on Human Rights, and as established in case law.

This amendment is rejected by the Committee and unless alternative proposals can be put forward should be removed from the proposal.

(2) appears to shift the power of the court to direct the time for filing of a Care Plan and to give it to the Secretary of State. The Committee would resist any amendment purporting to remove the Court's ability to direct the Local Authority to file evidence so as to allow the Court to discharge its function in considering the Welfare Checklist.

6. Care Proceedings and Care Plans: Procedural Requirements

The Committee draws attention to (1)(b), and the reference to s32(8). There is no s32(8).

In respect of sections 7 and 8 of the draft proposals, the Committee has no direct experience of such work. The Committee does however note that the ratio for these amendments is to delegate such work to Legal Advisers within the FPC, and accordingly any additional work would need to be matched by resources in what is an already stretched jurisdiction.

Schedule 1

At paragraph 5(c), there is reference to a new "(d)". The committee understands that this is unnecessary and in fact subsumed by the new "(b)" at 5(2).

Having considered paragraph 6(2) of the schedule, the Committee fails to see what this proposal achieves, save confusion. The same should be deleted.

Paragraph 21(4) introduces a new concept, namely dispensing with the need to file and application for Parental Responsibility (which would need a change in the Rules), and the consideration of granting PR to anyone in whose favour the contact provisions of a Child Arrangements Order are made. The Committee rejects this proposal. It is a huge change to the Family Justice system, would have a great effect on litigation in the courts and is likely to lead to a significant drain on the LSC budget. It is hard to envisage any situation where the holder of a contact order (to use the old term) would need or should have PR. Any proposal of this nature should be based on research and national consultation. The ramifications of the Court system are massive in terms of a new area of litigation.

Closing

The Committee is concerned about any provision that erodes the Paramountcy Principle (i.e. the notion of Shared Parenting that permeates the commentary regarding the Child Arrangements Order). Further, the apparent exception of the parts of the care plan that are not relating to permanency would seem to restrict the courts proper consideration of the Welfare Checklist and a proper balancing of the parties' ECHR rights. Both this and the previous consultation on Shared Parenting appear to undermine the Paramountcy Principle. The Committee feels strongly that any such question should be addressed directly rather than obliquely and should be based upon research and evidence, and be the matter of consultation in its own right.

The wording in respect of the time limits in care proceedings would appear to be more concerned with the proposed generic 26 week target. As acknowledged by David Norgrove in his address to the GLFP, there is no "science" behind the 26 week figure. The Committee would urge the Government to concentrate on the "timetable for the child" which should in the first instance be established in every case and secondly be as short as is possible and proportionate in the circumstances. Any reference to a 26 week period is in the view of the Committee likely to lead those accessing the Family Courts to automatically settle on that as a timetable, which would be prejudicial to those children whose cases might otherwise be completed earlier.

The Committee is not opposed to many of the notions put forward in David Norgrove's paper, however the provisions as currently drafted are in the main a re-branding exercise (which would inevitably result in litigation) and the prospect of PR for non-parents would similarly increase litigation. The Committee feels that without drawing the NHS into the discussion the proposals around the use of experts in family proceedings amount to "tinkering at the edges."

October 2012

Australian Institute of Family Studies Submission to the House of Commons Justice Select Committee inquiry (CFB 51)

Pre-Legislative Scrutiny of the Children and Families Bill

Prepared by Dr Rae Kaspiew and Professor Lawrie Moloney.

Approved by Professor Alan Hayes AM, Director.

1. Introduction

The Australian Institute of Family Studies (AIFS) is a statutory authority that originated in the *Family Law Act 1975* (Cth). It carries out a wide range of research that is relevant to policy and practice on issues affecting families. This submission begins with an update on recent developments in approaches to post-separation parenting in Australia. It then highlights some findings from recent research projects examining the circumstances of separated families and the operation of the Australian family law system to assist the Justice Select Committee in its consideration of some of its concerns.

2. Recent developments in Australia

Legislative amendments and program development in Australia in the family law area have become increasingly oriented towards meeting the needs of families affected by complex issues, including family violence and safety concerns. This focus has emerged as a result of findings and recommendations in a series of reports, including the AIFS Evaluation of the 2006 Family Law Reforms.[29]

2012 legislative amendments

In terms of legislative change, amendments to the *Family Law Act 1975* (Cth) *(FLA)* came into effect on 7 June 2012.[30] These are intended to place greater emphasis on ensuring children are protected from harm in making post-separation parenting arrangements. The shared parenting provisions, including the presumption in favour of equal shared parental responsibility, have been left intact but a series of new provisions is intended to heighten the focus on examining issues that may compromise the wellbeing and safety of children and their caregivers. The main legislative changes are summarised in the next paragraphs.

The definition of family violence has been widened to recognise non-physical forms of abuse. The new core definition is: "for the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful" (*FLA* s4AB(1)). The definition is accompanied by a non-exhaustive list of examples, such as assault, sexual abuse, stalking, repeated derogatory taunts, property damage, injury or death to an animal, withholding financial support, isolation from family friends or culture or deprivation of liberty (*FLA* s4AB(2)). The new definition provisions also acknowledge children's exposure to family violence in this way: "a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence" (*FLA* s4AB(3)).

The amendments resolve what has been referred to as a tension[31] in the two main factors (referred to as "primary considerations") that guide determinations as to what parenting arrangements are in a child's best interests, which remains the paramount consideration. These principles are the "benefit to the child of a meaningful relationship" (*FLA* s60CC(2)(a)) with each parent after separation and the child's need "to be protected from harm" from exposure to abuse, neglect and family violence (*FLA* s60CC(2)(b)). The amendments resolve the potential for conflict between the two principles by specifying that where they conflict, greater emphasis is to be given to the need to protect children from harm (*FLA* s60CC(2A)).

In order to ensure that protection from harm is not only given greater weight in litigated matters, but also in cases negotiated by consent, the amendments have changed the obligations of "advisors" under the Act. "Advisors" include a wide range of professionals who assist parents after separation, including family counsellors, lawyers, family consultants and family dispute resolution practitioners (*FLA* s60D(2)). Advisors remain obligated to advise parents to enter into a parenting plan and consider whether "equal" or "substantial and significant time" may be in their children's best interests (*FLA* s63DA). Now, in addition, they have an obligation to tell parents that parenting arrangements should be in a child's best interests, allow them to have a meaningful relationship with each parent and protect them from harm (*FLA* s60D(1)). This advice should also prioritise protecting children from harm where a conflict arises (*FLA* s60D(1)(iii)).

[29] Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies. The other reports are: Chisholm, R. (2009). *Family courts violence review*. Canberra: Attorney General's Department; Family Law Council. (2009). *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*. Canberra: Attorney General's Department.

[30] The amending legislation is the *Family Law (Family Violence and Other Matters) Act 2011* (Cth).

[31] Chisholm (2009).

Legislative provisions perceived to create disincentives to raising concerns about family violence and ongoing safety concerns have been repealed. These are the provisions obligating courts to make costs orders against a party found to have "knowingly made a false statement" in court proceedings and the so-called "friendly parent provision" that directed the attention of courts to the extent to which a parent had facilitated a child's relationship with the other parent.

New provisions also impose obligations on courts to ask the parties about a history of family violence and the presence of concerns about child safety (*FLA* s69ZQ). Parallel obligations are imposed on parties to disclose any involvement of child welfare authorities with the child subject to proceedings under the *FLA* or another child in the family (*FLA* s60CH and s60CI).

Program development in family law

Family-law-related program development in Australia in recent years has focused on creating a more integrated system and meeting the needs of families with complex concerns. In 2009, a program aimed at increasing access to legal advice was implemented, with publicly funded legal assistance services (legal aid commissions and community legal centres) being resourced to provide legal information and advice to clients in Family Relationship Centres (FRCs). FRCs were a key element of the 2006 reforms and 65 of these centres around Australia provide information, referral and mediation services to separated families. Largely positive results of an evaluation of this program (conducted by AIFS) indicate that it improves client understanding of the law relating to post-separation parenting arrangements, contributes to more effective dispute resolution and strengthens the ability of FRCs to provide an holistic service.[32] The evaluation report is provided as Attachment A to this submission.

A second program, a pilot for the provision of mediation where there has been a history of family violence, also reflects program development focused on complex families. The pilot involved a process of coordinated family dispute resolution being applied to assist parents to resolve parenting disputes with the support of a case manager, one or two family dispute resolution practitioners, a lawyer for each party and a support worker for each party (either a family violence support practitioner or a men's support practitioner). The model on which the pilot is based was developed by Women's Legal Service Brisbane and other consultants. The service is being piloted in five sites around Australia. An evaluation by AIFS is nearing completion, but no results are publicly available yet.

3. Research evidence

We make the following points about the evidence on post-separation parenting to assist the Committee in its consideration of the questions of enforcement and shared parenting. The discussion summarises key research findings about the circumstances of separated families and patterns in parenting arrangements in Australia. It is based on two waves of data from the Longitudinal Study of Separated Families (LSSF). In the first wave of data collection, 10,000 parents from a near-nationally representative sample of separated parents were interviewed in late 2008, some 15 months after separation. In Wave 2, 70% of these parents were re-interviewed in late 2009.[33] On average, the parents in the sample had been separated for some 28 months at that time. A copy of the report on LSSF Wave 2 is in Attachment B to this submission.

Prevalence of family violence and safety concerns

A history of family violence (physical and non-physical) is more common than not among separated couples, and around half the parents interviewed indicated that non-physical forms continued well beyond separation. In LSSF Wave 1, 65% of mothers and 53% of fathers reported either physical hurt before separation (26% of mothers and 17% of fathers) or emotional abuse before or during separation (64% of mothers and 52% of fathers).[34] In LSSF Wave 2, 4–5% of mothers and fathers reported experiencing physical hurt at the hands of the former partner in the previous 12 months, and 53% of mothers and 45% of fathers indicated emotional abuse in the same time frame. In both waves, the parents who reported experience of physical hurt before separation (Wave 1) or in the preceding twelve months (Wave 2) were asked if their children had witnessed violence or abuse in that timeframe. Affirmative responses were given by the majority of parents in both waves.

In LSSF Wave 1, 21% of mothers and 17% of fathers reported holding safety concerns for their children and/or themselves as a result of the child's ongoing contact with the other parent. By LSSF Wave 2, a similar proportion of the sample reported holding safety concerns, with a core group of 10% holding the concerns through both LSSF waves.[35] For 10% of parents, concerns held in Wave 1 had dissipated by Wave 2, while newly arising concerns were reported by 7% of parents in Wave 2.

These data underline the extent to which complex concerns are pertinent to separated families in Australia. The findings indicate that child wellbeing is adversely affected when there is a history of family violence, or

[32] Moloney, L., Kaspiew, R., De Maio, J., Deblaquiere, J., Hand, K., & Horsfall, B. (2011). *Evaluation of the Family Relationships Centre legal assistance partnerships program*. Melbourne: Australian Institute of Family Studies, p. E2.

[33] Qu, L., and & Weston, R. (2010). *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies.

[34] Kaspiew *et al*. (2009), pp. 26–27.

[35] Qu & Weston (2010), p. 25.

where a parent indicates safety concerns or reports relationships that are "fearful" or characterised by "lots of conflict".[36] They underline the complexity involved in formulating policies that can realistically assist families to make arrangements that support the wellbeing of their children. An article published in the *Journal of Social Welfare and Family Law* that uses findings from the Evaluation of the 2006 Family Law Reforms to address this issue in some depth is Attachment C to this submission.[37]

Parenting arrangements

Consistent with Wave 1, three-quarters of the children in Wave 2 of the LSSF were in families with post-separation parenting arrangements where they spent most or all nights with their mothers.[38] Arrangements were stable between the waves for two-thirds of the children in the sample, with one-third experiencing changes in parenting arrangements. Across care-time arrangements, the arrangements where children saw one parent during the daytime only were less stable than other care-time arrangements, which was most often attributable to arrangements for young children (under three) converting from daytime-only contact with fathers to overnight stays, reflecting the implementation of developmentally appropriate parenting arrangements.

In LSSF Wave 1 and Wave 2, 17% and 18% of children respectively were in shared care arrangements (involving at a minimum a 35%/65% night spilt between parents). The data indicate that while the dynamics for many of these families are positive, there is a substantial minority who report ongoing conflictual and fearful relationships and the presence of safety concerns (for themselves or their child) as a result of contact with the other parent. At least one in two mothers who maintained a shared care-time arrangement between survey waves indicated they had experienced emotional abuse in the period between survey waves, while at least two in five fathers also reported such experiences.

Findings from LSSF Wave 1 and Wave 2 indicate that family dynamics have a more important influence on children's wellbeing than care-time arrangements. Analysis of parents' reports on child wellbeing indicate there are no clear patterns of differences across different care arrangements entailing contact with both parents. Children fare less well in any arrangement where the dynamics involve inter-parental relationships that are fearful or conflictual and where abuse and safety concerns are reported. In Wave 1 of the LSSF, mothers' reports suggested the children in shared care arrangements where there were ongoing safety concerns fared considerably less well than children living mainly with their mother where there were ongoing safety concerns. In Wave 2, this effect was evident in relation to some aspects of wellbeing but not others.[39]

In Australia, as in the UK, children whose relationship with one parent (usually the father) diminishes significantly or ends after separation have been of significant policy concern. In relation to this group of children in Australia, the findings of the LSSF indicate that 12% of children had no contact with their fathers in Wave 1, and this proportion increased to 13% in Wave 2.[40] The family dynamics for this group are significantly more negative than dynamics in other care-time groups. For example:

- 45% of mothers who reported having this arrangement indicated a "distant" relationship with the other parent (contrasted with 20% of mothers who reported arrangements involving daytime-only contact with the father);
- 28% reported "lots of conflict", compared with 15% in the daytime-only group; and
- 19% reported a "fearful" relationship, compared with 3% in the daytime-only group.[41]

Mediation

The findings of Waves 1 and 2 of the LSSF demonstrate that a significant number of parents who use mediation in Australia are doing so in the context of historical or ongoing family violence. In an ideal world, family mediation would take place in an atmosphere in which both parents are equally respectful of each other's perspectives, demonstrated by no history of physical hurt of emotional abuse. In practice, it was found in both LSSF waves that both mothers and fathers who had experienced emotional abuse or physical hurt were considerably more likely than other parents to report making use of family mediation services. In LSSF Wave 2, use of family dispute resolution was reported by around one in three fathers and one in four mothers who said that they had experienced physical or emotional abuse between survey waves. This contrasts with about 10% of parents who had not experienced either form of abuse.[42]

Most family mediators interviewed with respect to Wave 1 clients felt confident about their capacity to screen out cases in which the history of violence made mediation unworkable.[43] Most felt competent in their capacity to deal with the power imbalances that existed in the cases that were "screened in". Though relatively

[36] Qu & Weston (2010), p. 153.
[37] Kaspiew, R., Gray, M., Qu, L., & Weston, R. (2011). Legislative aspirations and social realities: empirical reflections on Australia's 2006 family law reforms. *Journal of Social Welfare and Family Law*, 33(4), 397–418.
[38] Qu & Weston (2010), p. 69.
[39] Qu & Weston (2010), p. 149.
[40] Qu & Weston (2010), p. 56.
[41] Qu & Weston (2010), p. 98.
[42] Qu & Weston (2010), p. 49.
[43] Kaspiew *et al*. (2009), p. 237. About two-fifths felt that about a quarter of cases referred were inappropriate for mediation because of family violence, though a further two-thirds estimated that less than a quarter were in this category. In practice, many cases are "ruled in" for family mediation, despite allegations of family violence.

positive, family lawyers were less enthusiastic about the capacity of family mediators to deal with family violence.[44] Clients had mixed reactions to family mediation, though more than 70% reported that everybody was treated fairly.[45]

The Australian experience is that post-separation family mediation deals almost exclusively with complex cases, many of which have a history of family violence or other dysfunctional behaviours linked to substance abuse or certain forms of mental illness. These features of mediation clientele have underpinned the development of policies and programs aimed at dealing with families with complex needs, such as those referred to in section 2 of this submission. They also underline the need for rigorous screening and assessment processes, the application of mediation in ways designed to reduce or minimise risk (including through the application of shuttle processes), and mechanisms for identifying cases that should proceed directly to court.

4. Conclusion

In the past two years in Australia, significant emphasis has been placed on meeting the needs of separated families who are affected by complex issues, including family violence, ongoing safety concerns and some mental health issues. Empirical evidence demonstrates that such families are the main users of services, including Family Relationship Centres, mediation services and courts. The empirical evidence also indicates that a substantial proportion of parents are capable of managing post-separation parenting issues with minimal use of services. For some of these families, shared parenting arrangements involving varying distributions of time between each parents' home meet the needs of parents and children, but such arrangements still apply to a minority of children (peaking at 27% for the 5–11 year age group, but averaging 18% across the population).[46] Care-time arrangements are less influential on child wellbeing than family dynamics, with children in families where there is family violence, ongoing safety concerns and negative inter-parental relationships faring less well than children in families not affected by these issues.

Recent legislative changes in Australia are intended to heighten the focus on ensuring children are protected from harm in making post-separation parenting arrangements, with these changes aimed at influencing the advice parents receive from relationship services as well as the way in which matters are litigated and decided in court. Program development has been oriented toward achieving greater integration between legal and non-legal support services to provide parents with access to more holistic support. Attention has also been focused on developing approaches to mediation that are safe and appropriate in some circumstances where there has been family violence, and identifying cases that need to proceed expeditiously to court.

5. References

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Qu, L., & Weston, R. (2010). *Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies.

6. Attachments

Attachment A: Evaluation of the Family Relationships Centre legal assistance partnerships program.

Attachment B: Parenting dynamics after separation: A follow-up study of parents who separated after the 2006 family law reforms.

Attachment C: Legislative aspirations and social realities: empirical reflections on Australia's 2006 family law reforms.

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[44] Kaspiew *et al*. (2009), p. 239.
[45] Kaspiew *et al*. (2009), p. 99, p. 241.
[46] Qu & Weston (2010), p. 57.

Written evidence from Richard Hansom (CFB 52)

I write in support of the submissions made by David Jockelson against the imposition of a 26 week limit on Care Proceedings. I agree with him that such an artificially imposed limit will cause injustice to children and parents contrary to their Human Rights.

I am a solicitor of many years standing on the Law Society's Children Panel.

October 2012

Written evidence from Ranjit Mann (CFB 53)

I am fully supportive of the submissions made by David Jockelson in respect of the time limit and scrutiny of care plans. I have a current case in which my report has been rushed through despite cultural issues or acknowledgement of the length of time it can take to assess families who require an interpreter. There is no doubt that the family will argue they have had not had justice, and further court time will be required to hear their pleas. The time limit is not designed to deal with the situation on the ground with families, particularly where there are complex issues such as a large number of siblings or cultural issues to take into account.

October 2012

Written evidence from Lois Sayers (CFB 54)

I write to support the submissions made by NALGRO colleagues regarding the proposed 26 week deadline. With particular reference to the email from David Jockelson.

As discussed in this communication, the proposal has very serious implications for children within the care system and its implementation can have only serious negative consequences for children .

October 2012

Written evidence from Ron Bailey, Jacque Courtnage and others[47] (CFB 58)

PREAMBLE

1. This submission is by 80 people who supported John Hemming MP's Family Justice (Transparency Accountability and Cost of Living) Bill (the Hemming PBM). It concerns clauses that are currently NOT in the draft clauses, but which we believe urgently should be.

2. We thank the Committee's clerk for allowing a late submission: the reason is that the clauses that we propose should be in the government's Bill were previously in the Hemming PMB that fell on 26th October—so we now submit that clauses of that Bill should be in the government's Bill.

SUMMARY

3. We submit that the government's Bill must contain clauses requiring that:

(i) Family Group Conferences are offered to families where an authority is considering care proceedings.

(ii) Proper information is provided for families.

(iii) Parties to a case are allowed to have McKenzie friends to assist them.

(iv) Bona fide academic research is permitted, with safeguards regarding confidentiality.

(v) Grandparents and wider family members are given certain rights in court.

(vi) Children in care should, as the norm, be placed near their homes.

(vii) An independent complaints procedure must be established in cases of complaints of serious abuse by children in care.

(viii) It should be an offence to discriminate against children in care or care leavers.

(ix) Courts should give reasons when dispensing with parental consent to adoption.

(x) Local authorities should promote contact with parents and grandparent for children in care.

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[47] **Una Gosling; Mike Gosling; Sylvia Oram; David Cutts ; Elia Nacals; Phil Frampton; Hal Ward; Tamara Bradshaw; John Jahme; David English; Victoria Haigh; Jane Philbin; Tracy McAteer; Peter Hatter; Sarah Matthews; Philip Thompson; Rosalind Barker; Vicky Sutton; Carly Seddon; Linda Edge; Cheryl Mathers; Bernice Shaughnessy; Michael Curtis; Amy Miller; Jo Anne; Douglas Seddon; Sezrah Sylvan; Kimberly Myers; Katherine Cherry; Katherine McCourt; Debbie Jesus; Helen Chandler; Tim Haines; Phoenix Tempest; John Sankey; Maria Slovakia; Julie Haines; Bob Honecker; Paul Whitehouse; Sharon Brown; Luna Valentine; Ann Marie Sim; Asta Skinulyte-Gulbaek; Mist Stilipec; Claire Pritchard; David Paul Jenkins; Jan Smith; Abigail Shillito; Stephanie Freeman; Carole Jahme; Russ Martin; Jilly Edwards; Jill McCartan; Deborah Page; Jyoti Basra; Nichola Waldron; Jackie McCartney; Jamie Mattox; Brutus Paine; Sinbad King; Franca Gray; Ian Watson; Matthew Lowe; Joan Lowe; Bekkah Payne; and Mel Letham.**

We request that this submission be read in conjunction with the Hemming PMB as published by the House. The clause numbers referred to below are those in the Hemming PMB.

Clause 1 Requirement to offer Family Group Conferences

4. The point at which many families commence contact with their Children's Services Authority (CSA) is currently at a "case conference" or "child protection conference"—a meeting of professionals who decide what steps the CSA should take regarding a child deemed to be at risk.

4.1 But children (if old enough) and families may be excluded, or may not see reports being discussed. So decisions may be taken without their input. This means that the meeting will not have as much information as possible when making difficult decisions—like taking children into care. This is not only unjust: it is not in the interests of children.

4.2 A better practice is now developing—Family Group Conferencing (FGC). This approach involves the children (where old enough), the families and, where appropriate, the wider families.

4.3 The FGC approach is supported by the British Association of Social Workers in evidence to the Family Justice Review:

> "There has been an increased use of Family Group Conferences which can be very effective and empowering of families if used appropriately and practitioners have received the necessary training to equip them to undertake this work). There should be increased roll-out of this approach. It requires very little adjustment in terms of skills but it does require a different attitude/values set".

Banardos told this Committee's inquiry into The Operation of the Family Courts:

> "A better option (is) a requirement to have family group conferencing ... our experience of one (such) services ... was that for 27 families for whom care proceedings were considered none of those children went into care". (our emphasis).

And the Committee's report concluded (at page 93):

> "We were very impressed by the account of Family Group Conferences in Liverpool. It is a matter of regret that a service with an apparent 100% success rate is being cut back".

4.4.And note the results quoted above by Barnardos. A 100% success rate—no children taken into care: from a purely financial point of view, quite apart from child welfare, this new approach saves public money.

And the Munro Inquiry highlighted a report from Oxfordshire County Council CSA:

> "These types of evidence-based programmes are expensive to set up but there is increasing evidence that, by avoiding the need for looked after children to move to more intensive and expensive placements, they not only provide better outcomes for children and young people but are cost effective ... these intensive programmes have contributed to lower than average numbers of Looked After Children and resulted in identifiable savings within the existing Children and Young People's budget ... in excess of £400,000".[48]

4.5 In conclusion, Family Group Conferences:

- — Enjoy widespread support in the social work field;
- — Provide better results for children and families;
- — Prevent the break-up of families; and
- — Save public money.

Clause 1(1) of the Hemming PMB, while not abolishing child protection conferences (they may be necessary at times), establishes the FGC approach as the norm by requiring that families are offered such a facility. An FGC is defined as:

> "a family led decision making meeting convened by an independent co-ordinator in which a plan for the child is made by the family, involving the child (if old enough), the parents, and potentially extended family members and friends which addresses any concerns about the child's future safety and welfare".

4.6 *The Government's response*. On 26 October the Minister (Jeremy Wright MP) said that "many of the proposals in clause 1 are already covered by existing guidelines and good practice" and that although the government wants to encourage FGCs "we do not believe that legislation to make them compulsory is appropriate at this point" because they are "not always suitable for all families in all circumstances"[49]

4.7 *Our response*. No reason is given for that view and so we submit:

(i) that in view of the success of FGCs explained above that this unsubstantiated comment is wrong.

(ii) However, even if that view is not accepted then the requirement to offer FGCs should still be made mandatory with a caveat to cover exceptional circumstances.

[48] **At page 95.**
[49] **Hansard 26 October col 1247.**

Clause 1(5) Provision of Information

5. Since 1999 government guidance entitled Working Together has stated that "the local authority has a responsibility to make sure children and adults have all the Information they require to help them understand the processes that are followed when there are concerns about a child's welfare".[50]

5.1 In practice this guidance has not worked:

"Children and adults are often confused about what is happening to them. The need to address this will rise"—Norgrove Family Justice Review November 2011 page 5.

"From the perspective of adopted families Adoption UK often hears of limited information and explanation being provided to families about what will be happening and why" ADOPTION UK response to Family Justice Review page 4.

"They (ie families)... are confused ... and they don't understand the processes"—Munro Review of Child Protection para 2.26.

"We surveyed about 453 single parents ... over half found the system dreadful and poor. About 73% find it difficult to navigate" -Gingerbread evidence to the Justice Committee, 25 January 2011, Qu 78.

5.2 This Committee previously investigated the need for guidance, especially because of the increasing number of litigants in person, and reported the unanimous view of Judges that this slowed things down, thus causing severe wastage of Court time, and so concluded that:

"This will require guidance to be developed to accommodate the challenges posed by larger number of litigants in person".[51]

Clause 1(5) deals with this by requiring that:

"Any child or parents or other relatives of the child attending a Family Group Conference must be given in advance a publication explaining the childcare system and how it may affect them in the future and referred to an independent advice and advocacy organisation".

5.3 *The Government's response*. The Minister recognised "the importance of parents having simple information to support them"[52] but said that this is already the case.

5.4 *Our response*. In the light of the evidence above this statement is complacent: the reality is confusion and lack of information. Guidance that has been operation for 13 years has not ended this. Legislation is needed, as per clause 1(5) of the Hemming PMB.

Clause 2: McKenzie Friends and Observers

6. Clause 2(1) permits parties to a case to have two "friends" with them, to support advise or advocate. Much of the evidence quoted above regarding clause 1(5) (Provision of Information) demonstrates the need for this. Additional evidence is provided by the report of the recent Family Justice Review:

"the common complaint (was) that the courts are daunting and intimidating places for families".[53]

Detailed research by the London Safeguarding Children's Group also showed that when families arrive in court to see a large number of lawyers and professionals lined up:

"Professionals" need to understand how intimidating it is (for parents) to be so "outnumbered".[54]

6.1 Clause 2(1) rectifies this and also ensure that confidentiality is maintained by making these friends "subject to the same rules of confidentiality as the party to the proceedings". So breach of confidentiality would be contempt of court.

6.2 *The Government's Response*. The Bill's "support for the use of McKenzie Friends ... is welcomed. The support for attendance by observers is also welcomed".[55]

6.3 *Our response*. On this there is unanimity: we submit therefore that can be no reason why clause 2(1) of the Hemming PMB should not form part of the government's Bill.

Clause 2 Transparency and Accountability

7. The family courts sit in private to protect the anonymity and interests of children. *The Bill accepts this* but makes provisions that will make the courts more transparent and accountable.

Former Children's Minister (Tim Loughton MP) said:

"we need greater transparency in the courts ... I am an inveterate believer in greater transparency".[56]

[50] **Working Together page 286 para 10.7.**
[51] **Operation of the Family Courts 14 July 2011 par 237 page 73.**
[52] Hansard October 26 cols 1247–8.
[53] **Family Justice Review 2012 page 40.**
[54] **London Safeguarding Children's Group December 2010.**
[55] **Hansard 26 October col 1248.**
[56] **Evidence to the Justice Committee 26 April 2012 Questions 332 and 334.**

The NSPCC has made similar comments:

> "we support efforts to make the family courts more transparent ... but without increasing the likelihood of identifying children".[57]

Clause 2 of the Hemming PMB achieves this balance.

7.1 Clause 2(2) permits bona fide academic research into proceedings in the family courts. The need for this has been highlighted previously by this Committee:

> "Family courts sit in private to protect the anonymity of children. But there is a danger that justice in secret could allow injustice to children".[58]

This point was demonstrated by research by Professor Jill Ireland into the quality of expert evidence used in the courts, which showed that there is a risk of injustice because:

> "one fifth of expert psychologists were not deemed qualified ... two thirds of their reports were 'poor' or 'very poor'."[59]

And by a recent case in the Court of Appeal in which it was established that a child had been removed from his family on the basis of incorrect evidence:

> "the Principal Registry ordered a toddler to be returned to his parents (after) it was established that the baby was vitamin D and calcium deficient and had undiagnosed rickets".[60]

7.2 There can be little that is more unjust than a child being taken from their family because of incorrect evidence.

7.3 However, the Hemming PMB also recognises the need for confidentiality by saying that:

(a) **"**any publication of the research removes all identifying details; and

(b) it shall be a contempt of court for any person receiving or publishing information pursuant to this section to reveal the identity of any person whose details he has received".

7.4 *The Government's Response*: The Minister dealt mainly with the quality of expert evidence and when it should be used. He did, however, recognise that the Bill wanted "researchers to have access to court records including experts' reports" but went on to say that "Practice Direction 12G ... enables any person lawfully in receipt of information relating to children proceedings to pass that information to researchers conducting an approved research project**"**[61] so the clause is unnecessary (our emphasis).

7.5 *Our response*. The inadequacy of the Minister's statement lies in the words "an approved research project". Proper accountability is not about research "approved" by the powers-that-be. That is the accountability of the former communist states. Proper accountability is about the system being open to scrutiny "from below"—whether "approved" or not but subject, of course, to the strict confidentiality rules explained above.

Clause 2 Grandparents and Wider Family Members

8. Clause 2(3)(a) enables wider family members to attend that part of the hearing that maybe be considering whether the child should be placed with them. Sub clause (3)(b) permits grandparents to participate in the proceeding if they have had long term involvement with their grandchildren and have information that could assist the court.

8.1 However the clause recognises that children may be inhibited from giving evidence in front of certain people so it provides that the judge may exclude any person from that part of the proceedings where the child is giving evidence if, in his opinion, their presence would inhibit the child.

8.2 *The Government's response*. The Minister's remarks largely miss the point, as they relate to the duties of local authorities, whereas the clause deals with events in court. He asserts also that "the court may at any time direct that any person be made a party to the proceedings".

8.3 *Our response*. This is not a response to these clauses. The Minister did not give any reason why wider family members should not be allowed to attend that part of any hearing that is considering placing a child with them; nor did he give any reason as to why grandparents should not be allowed to participate as of right if they have information that is helpful to the court. We submit that 2(3)(a) and (b) are simply common sense.

8.4 Clause 2(4) allows grandparents to direct and indirect contact with their grandchildren if the child so wishes, without this contact being supervised unless it is not the interest of the child. This is to rectify the situation highlighted by the following statements (of many) by grandparents.

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[57] **Evidence to the Justice Committee September 2010 Ev 129.**
[58] **Justice Committee Report July 2100 p 99.**
[59] **Evaluating Expert Evidence Prof Jill Ireland February 2012.**
[60] **Press Release by Goodman Ray Solicitors 9 May 2012.**
[61] **Hansard 26 October col 1249.**

"I spent over seven years with my grandchildren two or three times a week. After they were taken into care[62] I can only see them twice a year for two hours supervised. I cannot write, phone or text I can only send them birthday and Christmas cards".

In a joint statement four "grandparents organisations"[63] said:

"We have many similar cases but few will speak out because some are told to keep quiet while others think it may damage their case for contact with their grandchildren".

8.5 *The Government's response*. The Minister misrepresented the Hemming PMB by asserting that "any legislation that granted an automatic right to specific individuals to have contact with the child would, potentially" not be consistent with the principle that the welfare of the child must come first.[64]

8.6 *Our response*. True as that may be, it is not what clause 2(4) says. The clause only gives this right of contact if the child so wishes it and if it is in the interest of the welfare of the child. The government has not answered the point: this clause should appear in its Bill.

Clause 2(5) Placement of Children Near their Home

9. Clause 2(5) amends the Children Act 1989 to require that children taken into care are placed near their home unless it is not in their interest to do so.. This is because of the plethora of evidence that placing children far from their home puts them in greater danger. The London Evening Standard reported on the 12 September:

"the Standard today exposes the scandal of London children being 'exported' to care homes across the country where they are at increased risk of abuse. Almost two thirds of youngsters taken into care are sent outside their borough and....maltreated and introduced to drugs...police (warn) this places them in greater danger".

9.1 And BBC Radio 4's The Report programme said on 31 May:

"Rochdale Council leader says children should no longer be sent to care homes in the borough because their safety 'is not being guaranteed'"—41 children's homes in Rochdale,house vulnerable children from all over England.

"Last year an inquiry into Lancashire's 101 children's homes found that the council and the police had little knowledge of some of (them). It estimated 21,000 children...were being cared for in areas outside their home authority":

"councillor Steen says placing vulnerable girls, susceptible to grooming, so far away from home, can lead to them ' becoming invisible'...so cannot be monitored or helped".

9.2 In May this year a joint enquiry by the All Party Parliamentary Group for Runaway and Missing Children and Adults and the All Party Parliamentary Group for Looked After Children and Care Leavers called for "urgent action to reduce this practice" of sending children far away from their original areas. Clause 2(5) provides that urgent action.

9.3 *The Government's response*. The Minister made two points: (i) that the current law is that children must be placed near their home if reasonably practicable and (ii) there might not be a suitable children's home in the child's area.

9.4 *Our response*. As regards (i) this is wholly inadequate, as the words "as far as is reasonable practicable" are being used as a "coach and horses". Note the Lancashire findings above—21,000 children placed away from their home; or the Rochdale situation—41 homes with children from all over England. As the Joint APPG Report said "urgent action" is needed, not complacency as to the danger to children.

As regards (ii) the Minister may have a point: there may not be a suitable home locally at the moment. To that we say (a) that this must change—resources or not, if we are to protect children from the dangers of being placed far away resources must be made available; (b) perhaps there should be a gradual phasing in of this clause to enable provision to be made; and (c) perhaps most importantly even if we accept the Minisetr's point there needs to be an immediate a change in the law to reduce the current practice of tens of thousands of children being in danger.

Clause 3 Complaints by Children in Care

10. This states that where a child in care complains about serious abuse, those complaints should be dealt with by a body that is independent of the local authority. This is needed because of the evidence that local authorities have not investigated or have ignored complaints by children in their care. The Times of 24th September reported that "confidential papers showed a decade of abuse in South Yorkshire".

"Police and child protection agencies have held extensive knowledge of this ... for 10 years".

"As long ago as 1996, a social services investigation uncovered concerns that girls were being coerced into 'child prostitution' by ... men who regularly collected them from residential care homes".

[62] **In proceedings totally unrelated to the grandparents.**
[63] **The Grandparents Association; Grandparents Apart Wales, Grandparents Apart Uk, Grandparents Action Group.**
[64] **Hansard 26 October col 1250.**

"A July 2010 independent review for the Rotherham Safeguarding Children Board ... described the offences as 'child sexual exploitation at the top end of seriousness'."

In September the Mail online reported that:

"Rochdale Council and police had 127 warnings about sex abuse ... gang raped dozens of children, finds damning report".

"NHS warned Rochdale Borough Council ... on dozens of occasions over six years about sex abuse risks".

10.1 There are numerous other examples. For instance Lancashire 2011: Mr. Justice Jackson concluded that children in care 'suffered real lifelong damage' but 'the council's actions did not come under independent scrutiny'."[65]

And the Jimmy Saville case revealed that children from Duncroft School who complained were ignored or punished.

10.2 *The Government's response*. The Minister explained the current situation that children must be provided with an independent advocate[66] as required by the Children Act 1989.

10.3 *Our response*. Exactly. That has been the case since 1989. The results quoted above show how it has not worked. Only a truly independent procedure can do that.

Clause 3(4) Prohibiting Discrimination against children in care and care leavers

11. There is considerable evidence that this is widespread. A care leaver told us:

"I have twice lost my job when my employers have come across my upbringing, despite having more professional experience and qualifications than my managers. We are views as mad, bad or sad".

Another said:

"I lost my job and at the Employment Tribunal the barrister told them that as a result of being ex-care I would have a residual tendency to fabricate".

In July this year Children's Minister, Edward Timpson MP launched a report by the All Party Parliamentary Group for Looked After Children and Care Leavers that said:

"There was concern that the attitude of teachers towards children in care remains mixed, with some children being labelled as troublemakers simply because of their looked after status".

The Who Cares Trust website states that:

"The discrimination faced by children in care is brought to life time and time again through our interactions with (them)".

11.1 *The Government's response*. The Minister did not mention this clause.

11.2 *Our response*. It should be made an offence immediately and should be in the government's Bill.

Clause 4 Adoption Without Parental Consent

12. The Children and Adoption and Act 2002 permits adoption "without parental consent" if a child is at risk. In Section 1(4) Parliament laid down safeguards that "the court must have regard to", including:

(i) The child's wishes (where old enough) and needs, and the lifelong effect of losing contact with his birth family.

(ii) The harm that the child has, or might.

(iii) The relationship the child has with relatives and the value to the child of it continuing.

(iv) The ability of the relatives to provide a secure home for the child and the wishes of the relatives.

Parliament has decreed that all these points must be considered by judges.

12.1 In practice these provisions are often ignored. We have 8 judgements that make no reference to the consideration of these provisions. Julie Haines, from Justice for Families says: "I have assisted hundreds of cases. The judges usually do not explain how they consider these points".

12.2 *The Minister's response*. He pointed out that the court is already under a duty to consider the points summarised above.[67]

12.3 *Our response*. We agree—that is the law. But the evidence is that courts are not explaining how or even whether they have considered these matters. Our clause would require them to do so. These are safeguards parliament has laid down before dispensing with parental consent: it is reasonable to require the courts to explain how they have considered them.

[65] **A and S (Children) v Lancashire County Council.**
[66] **Hansard 26th October col 1251.**
[67] **Hansard 26th October col 1252.**

CLAUSE 5 DUTY OF LOCAL AUTHORITIES

13. This deals with the duties of local authorities when children are in care. While maintaining the position that the welfare of the children is of paramount importance it also requires the local authority to ensure that the child has access to and contact with both parents and grandparents, unless such contact is not in the interest of the child.

13.1 The Government's response. The Minister did not mention this clause.

13.2 Our response. It should be in the government's Bill.

November 2012

Written evidence from Jane Fortin, Emeritus Professor, Sussex Law School, University of Sussex (CFB 62)

I watched with interest the proceedings of the Select Committee on Wednesday morning 21 November 2012. When giving evidence to your committee, Lord McNally read out a section of a letter that I had written to him enclosing a summary of our recent research report, *Taking a longer view of contact: the perspectives of young adults who experienced parental separation in their youth*. Jane Fortin, Joan Hunt and Lesley Scanlan.

Lord McNally suggested that our research findings were "common sense" and proceeded to say that a common sense approach is being adopted by the government.

I would like to set the record straight and emphasise to you and your committee that Lord McNally's remarks should not be taken to infer that any "common sense" approach promoted by our research findings matches that adopted by the Government. I made it very plain in my letter to Lord McNally that our research findings suggest to us that the Government's approach is misguided.

November 2012

Written evidence from the National Association of Independent Reviewing Officers[68] (CFB 66)

Our attention has (belatedly) been drawn to your committee's pre-legislative scrutiny of the draft legislation on Family Justice. Can I begin by apologising for the lateness of our response? I can only say that members of our organisation are all busy IROs working at the frontline of the child care system and we cannot always keep an eye on developments in Parliament. It would be most helpful if your committee clerks could in future include us in consultation exercises on matters such as these.

The National Association of Independent Reviewing Officers (NAIRO) is a national organisation devoted to improving outcomes for looked after children by maximising the positive impact of the reviewing process. We have a fast-growing membership of IROs (currently standing at well over 200) with representation all over the country. We also have the benefit of several leading academics in social work or related fields, amongst our associate membership. We also have a number of eminent patrons who support our work.

We intend to give evidence in relation to a fairly narrow part of the draft Bill, namely the part that deals with the potential contribution of IROs to the welfare of children who are the subject of care proceedings. In particular, we comment on Clause 5 and the intention to refocus and reduce the scrutiny of the family court in relation to local authority care plans.

IROs have the responsibility anyway for the rigorous scrutiny of local authority care plans for all looked after children, whether they are within the court arena or not (and most looked after children are not within that arena) Many of the comments below will apply to all looked after children, but for the purposes of this evidence we are considering just those children in family proceedings.

Much concern has been expressed about the reduced role of the court (and the children's guardian) in scrutinising the care plan. If this reduction is to be safe, it critically depends on the capacity of the IRO service to provide alternative effective and authoritative scrutiny. But can the IRO service be relied upon to provide this high quality scrutiny? Considerable concern has been expressed by many organisations submitting written evidence to your committee about this. Issues which have been raised in other statements include:

Concerns about independence: Can IROs provide genuinely independent scrutiny of local authority activity when they themselves are employed by the local authority?

Concerns about management culture: in some local authorities. It appears that some LAs do not encourage a robust challenging IRO service and indeed may sometimes seek to side-line and marginalise the service. In the worst cases IROs have been bullied and intimidated for making inconvenient representations.

[68] Patrons of the National Association of Independent Reviewing Officers; Rt Hon Vince Cable MP; The Earl of Listowel; Professor June Thoburn, Emeritus Professor of, Social Work, University of East Anglia; John Kemmis, Former Chief Executive, VOICE; Maxine Wrigley, Chief Executive, A National Voice.

Caseloads: There are concerns that in some local authorities, IROs are struggling with completely unmanageable caseloads.

Supervision, training and performance management: There are concerns that IROs are not being properly supervised, trained and performance managed.

These concerns have led some commentators to believe that it is not feasible for IROs to continue to be located within and managed by local authorities. The Children's Minister should make use (they would say) of the powers under Section 11 of the Children and Young Persons Act 2008 to externalise the management of the IRO service.

NAIRO has not yet arrived at a firm position on this issue. We believe the jury is still out. We believe that in some local authorities the management arrangements provided for IROs do provide a platform for a genuinely independent, effective scrutinising service. In other local authorities this is clearly not the case and the service is failing. Ofsted has recently identified some very troubling examples of inadequate IRO services. For example, recent Ofsted inspection of 2 London boroughs, have found the IRO service in those authorities to be:

— Not meeting statutory requirements.

— Lacking in robust challenge and scrutiny of the local authority.

— Unmanaged—IROs are unsupervised and do not receive appraisal or training.

NAIRO's position is that it may be possible for IROs to provide an effective scrutiny located within local authorities but it will require many local authorities to raise their game by a significant degree in relation to the management arrangements they provide for IROs.

The recent case of Lancashire County Council and A&S has been referred to by some of your witnesses. The Honourable Mr Justice Peter Jackson in his judgement of 21.6.12, made withering criticism of LCC's treatment of A&S and also of the IRO service in Lancashire. However in relation to the IRO concerned:

— He had a caseload of more than 200 at times (three times the good practice guidance).

— He was inadequately trained in general, and in legal principles in particular.

— He had no access to independent legal advice.

— He had inadequate supervision monitoring and appraisal.

It is perhaps not surprising that he was unable to offer the scrutiny and challenge required.

In his judgment Mr Jackson referred to the fact that the LCC barrister had drawn the attention of the court to two documents prepared by NAIRO. These documents are:

— A Code of Practice for IROs.

— A Protocol for the Management of IROs within local authorities.

It would appear that these documents were drawn to the court's attention in an attempt to demonstrate that helpful guidance was now available which could give the court some confidence that the quality of IRO services is improving. However as far as we know there is no local authority in the country which has adopted either of these documents! Indeed the Association of Directors of Children's Services with whom NAIRO was seeking to collaborate on management issues, have told us they don't believe such a protocol is needed and have withdrawn from discussions about it. It is perhaps significant that the ADCS, in their written evidence to your committee, do not mention the role of the IRO.

In May of this year we wrote to the then Children's Minister, Tim Loughton, to draw his attention to several cases where IROs have been bulled or intimidated by their local authority managers. We were surprised and disappointed that the Minister and his officials at the DfE did not think it was possible to take significant action on these issues.

In summary therefore it is our position that it may be possible that the IRO service, managed by local authorities, will be able to provide an effective and independent service to the courts in scrutiny of care plans—the jury is still out. But if this is to be the case, some local authorities will need to raise their game (and will need to show that they have raised it) to a considerable extent.

It is essential that Ofsted should pay close attention to management arrangements for IROs in order to assess whether local authorities have raised their game.

Otherwise the Children's Minister needs to use his powers under Section 11 of the Children and Young Persons Act, 2008 to externalise the management of the IRO service.

NAIRO is developing a "toolkit" for IRO managers (some elements of which were commended in the Lancashire case alluded to above) which we believe will be helpful to local authorities in improving their management arrangements.

I hope these comments are of some help to your committee. We would be pleased to give further oral or other evidence to your committee on these issues if that would be helpful.

November 2012

Written evidence from Dr Jonathan Maddock (CFB 67)

Personally I think that Shared Parenting should be a Right with the presumption of 50/50 parenting in the event of a separation or divorce, except in exceptional circumstances.

Parental Alienation which appears to be mainly the preserve of mums, as they are usually the "resident" parent needs to be made a crime with strict penalties which are enforced by the Family Court & Judicial System.

Please see enclosed article.[69] (not printed)

False Accusations of Child Abuse or Inappropriate behaviour and/or other malicious allegations should result in penalties against the accuser and redress for the falsely accused including financial redress.

Spreading malicious rumours in the workplace and/or community about the other parent should also be regarded as Libel/Slander by the Police rather than "just one of those things".

There is a very low threshold for the Police to arrest a father who although often acting in the best interests of the child is accused of "harassment" by the mother. Again there appears to be sexual discrimination against fathers when it comes to what is or isn't deemed to be harassment by the Police and being arrested for harassment is then used by the mother to refuse access to the child—which rewards the mother for making false accusations and is not in the best interests of the child.

The Family Courts & Cafcass do not seem to think that mothers are capable of child or sexual abuse? This needs to be brought up to date with the latest evidence that mothers do abuse their children physically, mentally, emotionally and sexually and that it is not just men who abuse children.

For instance when mothers regularly sleep with their children aged 9–10 or older especially in the nude this should be regarded as sexual abuse. At present it is just regarded by Social Services as "inappropriate parenting". Obviously if a father were to do this then he would be arrested!

CSA payments should be linked to the parent—usually the father—actually seeing their own child—being forced to pay for someone else to bring up your own child often with a stepdad is NOT acceptable and is immoral and is not in the best interests of the child.

The new Welfare Act which comes into effect on 1 April discriminates against separated fathers 2013 and will cause severe financial hardship to them and their families:

1. Housing Benefit changes to deduct 14% and 25% of HB for having a spare bedroom or two spare bedrooms respectively are not fair or justified.
2. Council Tax Benefit is also proposed to be cut by 25% for instance in Central Bedfordshire Council from 1 April 2013 by the Tory Council.

Though experience I have personally found that Family Court deals with evidence from mothers and fathers differently with an heavy bias towards evidence from the mother (in my opinion)—often not even hearing or allowing evidence from the father.

Appealing against Family Court decisions or trying to modify decisions is also almost impossible too, in my case it was not allowed by one of the other Family Court Judges

For instance one Judge ordered a CRB check on the stepdad. The stepdad refused saying it would infringe his privacy. The second judge would not make the CRB Check compulsory. CRB Checks should certainly be regarded by the Family Court & Cafcass as being "In the Best Interests of the Child"—at present this is not the case.

Fathers should have the Right to request an enhanced CRB check on ALL Stepdads and mothers' boyfriends. A modification on "Clares Law" which is in the best interests of the child.

With the forthcoming abolition of Legal Aid for Family Court from 1 April 2013 it is essential that attendance at Mediation be made compulsory BEFORE a party can go to Family Court.

November 2012

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[69] http://www.articlesaboutmen.com/2010/06/parental-alienation-is-a-crime-911/1404/

Written evidence from Father A[70] (CFB 68)

I write to you today to submit the below written evidence, in order for it to be carefully considered as part and parcel of your review into the Children and Families Bill.

I present this evidence to you as a loving, committed and caring parent. I am a father and member of the public you serve and I confirm that I do not represent a particular party or organisation. I can and do relate very closely to causes and aims that organisations such as Relate, Cafcass, Families Need Fathers and Fathers for Justice set out however my evidence does not specifically repeat nor relate to their views on the Bill, but is a personal account from my own experiences in this regard:

> [...] would gladly support and contribute to this review in whichever way possible to help achieve a better outcome for Children and Families alike.

Here is a short summary in bullet point format, and I reference my specific experience as evidence to set the context for the issues I believe need to be addressed within this Bill as a matter of desperate urgency—I have captured, in [capital letters], the key points I wish to be considered in relation to each key point I wish to submit:

> 1—I am a parent who has in recent years separated from my ex-partner; we have a young son together. At the point of writing this evidence submission, it has been three years since our separation, and our son is four years old. I wish to set my personal circumstances out, so you get a sense of perspective in relation to the person behind this evidence submission as I appreciate that not all parents are the same and not all parents take their God-given gift of parental responsibility seriously. I am [...] [over 30] years old, am fit and able. I am permanently employed in the private sector and am fortunate to be in the top 10% of earners across the population as a whole. I have never been unemployed and have never, ever claimed state aid. I have never, ever been in trouble with the police or the law and contribute positively to society on as many levels as possible. I work hard to make a good life for myself and my son and those around me, and believe I am an excellent role model.
>
> 2—At the point of separation, both parties (my ex-partner and I) set out to work together and reach agreement on the critical matter of child care, visitation, access arrangements etc. and all of these agreements were reached privately and documented in correspondence between both parties. This was difficult, as I was the party who ended the relationship and of course this very, very difficult decision was not taken lightly [...]. Additionally, the CSA were contacted (pro-actively by myself, and then validated by my ex-partner) to ensure financial matters relating to child maintenance were clear and put into practice with immediate effect. I understand this approach to be actively encouraged and endorsed by the Government and all professional bodies that deal with Children and Family matters including separation as the most amenable, expedient and cost efficient way of dealing with separation:
>
> > ***THIS VERY RECOMMENDATION AND PREFERENCE (REACHING AGREEMENTS PRIVATELY AND AVOIDING COURT) IS ONE OF THE FIRST AND MOST CRITICAL GAPS/FAILURES OF THE CURRENT LEGAL FRAMEWORK IN RELATION TO CONTACT AGREEMENTS REACHED BETWEEN PARTIES OUTSIDE OF THE COURT PROCESS. THE STARK REALITY IS, DESPITE THIS GOOD INTENTION, IT FAILS FAR TOO MANY SEPARATED CHILDREN AND FAMILIES WHEN A PARENT WITH COMPLETE CONTROL, THE RESIDENT PARENT, EXERCISES THAT CONTROL FOR THEIR OWN MOTIVE. PLEASE ALSO SEE POINT 4.
>
> 3—Almost immediately following separation and these agreements being reached, a catalogue of incidents occurred all relating to contact/access/visitation agreements between my son and I being changed/removed/stopped all together by my ex-partner with no grounds or reason. Every single one of these incidents were inflicted on my son and I, the non-resident parent, by my ex-partner, the resident parent. I have never, ever missed nor changed a contact or visitation agreement in the full three year period since separation:
>
> > ***FOLLOWING POINT 2 ABOVE, THERE IS NO RECOURSE, CONSEQUENCE OR SUPPORT INFRASTRUCTURE FOR CHILDREN OR PARENTS WHO ARE SUBJECTED TO FLAGRANT BREACHES OF AGREEMENT WITH NO REASONABLE GROUNDS. THIS VERY GAP/FAILURE OF THE CURRENT LEGAL FRAMEWORK ACTS AS AN INCENTIVE FOR ANY PARENT WISHING TO ALIENATE A CHILD FROM A PARENT OR INFLICT CONSEQUENCES OR PUNISHMENT ON THE OTHER PARTY/PARENT.
>
> 4—Upon each of these incidents occurring I sought help, guidance and advice across the Public Service sector including proactively contacting and in two instances physically visiting the Police and Cafcass for help. To my complete and utter shock, I found both of these bodies categorically stating that the only means of stopping this behaviour, acknowledged by both bodies as a worryingly common and growing trend, was to seek legal counsel through the Court system as they were completely and entirely powerless to intervene unless there were clear and obvious risks to the child's welfare:
>
> > ***IT IS OF GRAVE CONCERN THAT BOTH BODIES IN QUESTION HERE DEEM CHILDS WELFARE ONLY TO RELATE TO THEIR PHYSICAL WELLBEING AND NOT RELATED TO EMOTIONAL HARM CAUSED BY CLEAR AND BLATANT ALIENTATION FROM A PARENT. IT CAN SIMPLY NO LONGER BE DENIED THAT PARENTAL ALIENATION IS AN ISSUE

[70] Redacted for publication with the agreement of Father A. Redactions are signified thus: "[…]".

OF EPIDEMIC PROPORTION IN MANY SEPARATED FAMILY CASES, WITH SIGNIFICANT EMOTIONAL DAMAGE RISKS ASSOCIATED WITH IT.

5—I arranged private mediation between by ex-partner and I [...], all of which I paid for, to again find a means of improving communication but despite these attempts, the pattern of control and parental alienation continued and accelerated with the clear and obvious lack of any consequence or legal recourse for this behaviour:

***THERE IS NO RECOURSE, CONSEQUENCE OR INCENTIVE FOR A RESIDENT PARENT, BENEFITING FROM STATE AID, TO CHANGE THEIR CONDUCT OR BEHAVIOUR IF THEY ARE SET ON ALIENATING A CHILD FROM ONE OF THEIR PARENTS, OR AN ENTIRE PART OF THEIR FAMILY. I FOUND IT PERVERSE THAT I ENDED UP PAYING FOR BOTH THE LEGAL AID THROUGH MY TAX CONTRIBUTIONS AND MEDIATION PRIVATELY, WITH ABSOLUTELY NO CONSEQUENCE OR INCENTIVE FOR AGREEMENTS REACHED BEING ADHERED TO. ADDITIONALLY, ONCE AGAIN THE POLICE AND CAFCASS CONFIRMED THAT MEDIATION HAS NO LEGALLY BINDING STATUS, THEREFORE NO CONSEQUENCE NOR RECOURSE SHOULD A RESIDENT PARENT DECIDE DIFFERENTLY. LEGAL LITIGATION WAS AND REMAINS THE ROUTE BOTH THE POLICE AND CAFCASS RECOMMEND IN THESE CASES.

6—Following total failure of all of the above steps to change the pattern of behaviour and protect the critical relationship between my son and me, I took the step of starting formal court proceedings by obtaining a legal representative and filing an application for a defined contact order through the Family Court:

***SEE POINT 5 ABOVE—I UNDERSTAND THAT LEGAL AID IS BEING REMOVED IN FAMILY LAW CASES EFFECTIVE APRIL 1 2013, BUT YET AGAIN I SEE THE COMPLETE LACK OF CONSEQUENCE OR RECOURSE IN ANY OF THE STEPS PRIOR TO A LEGAL PROCESS RESULTING ONLY IN MORE AND MORE LITIGATION, NOT LESS. HOW ARE PARENTS, DURING THE DIFFICULT POINT OF SEPERATION, GOING TO REACH AGREEMENT ON WHAT IS BEST FOR THE CHILDREN CONCERNED WITH NO FRAMEWORK TO DO SO, WHEN THE VERY REASON FOR SEPERATION IS OFTEN THEIR INABILITY TO REACH COMPROMISE???

7—As part and parcel of this process, Cafcass were requested to complete a Section 7 report to investigate any Child Welfare concerns. The outcome of the Cafcass report [...] categorically stipulates that there are no welfare concerns, no educational or development concerns, a perfectly content and happy little child and a pair of perfectly capable adults who provide a loving, rich, rewarding environment and home for our child to grow and develop.

8—During the Family Court process, recordings documented by the Court Clerk, arrived at through agreements between both parties who were both represented by legal counsel (paid for by me in my case, and legal aid in my ex-partners case) in the very court itself have been ignored, breached and changed with no recourse or consequence for the party ignoring, breaching and changing those legal recordings:

***BEYOND ALL COMPREHENSION, EVEN WHEN IN THE FAMILY COURTS THE MAGISTRATES APPEAR EITHER POWERLESS OR FEARFUL OF MAKING TOUGH DECISIONS TO ENSURE THAT RICH, REWARDING, MEANINFUL RELATIONSHIPS AND BONDS BETWEEN CHILDREN AND THEIR ENTIRE FAMILIES ARE PROTECTED AND NO CONSEQUENCES FOR THE PARENTS INFLICTING THEM, AGAIN IN MANY CASES THE ALL-TOO-POWERFUL RESIDENT PARENT. MY CASE HAS NOW BEEN REFERRED TO THE COUNTY COURT AND WHILST MY EX PARTNERS BEHAVIOUR HAS BEEN RECORDED AS A CRITICAL REASON IN THE DECISION TO REFER TO THE COUNTY COURT, AGAIN THIS RESULTS IN MORE STEPS IN A LEGAL PROCESS WHICH CARRIES SIGNIFICANT TIME AND COST IMPLICATIONS, RESULTING IN NEAR FINANCIAL RUIN AND THE MOST UNBELIEVABLE STRESS AND ANXIETY.

[...].

In summary, I have found the last three years to be excruciatingly difficult with almost no support what so ever, no legal framework or guide to support me and no public service available. Almost everyone and everything has pointed to the only solution being the court process which I have found to be an outrageously expensive, lengthy and very emotional and anxious process.

Everything has pointed to non-resident separated parents, with fathers making up the vast, vast majority of those cases at the complete mercy of the resident parent (most often the mother) exercising complete control of the relationship and bond between child/children and father. This is especially acute in younger children, where parental alienation and manipulation I have found to be of the most serious and alarming scale.

I am not an expert in this field, and I appreciate that there are many cases that involve deep complexity and risk involving violence, harm, substance abuse and so the list continues. At the same time, there are far too many children who have desperately loving, caring, committed and capable parents (very often fathers, and

there is no need to avoid the stark reality of this fact) who are simply being failed by an inadequate process, poor support infrastructure and complete lack of framework.

I believe the solutions to some of these issues are to include some critical lessons learned and experienced by parents in situations like mine:

1. When families separate and children are involved, there simply has to be a better process, support infrastructure and framework to deal with child care and access/contact arrangements at the very earliest possible opportunity. These agreements need to carry credence, and not simply be open to change and manipulation by either party as they see fit. There are, after all, children at the centre of these critical agreements.
2. There is a chronic crisis relating to parental alienation and all-powerful resident parents inflicting the most unacceptable examples of contact/access/visitation being changed or stopped or removed all together with no reason or grounds, and there is simply no consequence or impact of doing so unless a very lengthy, outrageously costly and stressful court battle is concluded. There simply has to be a different start point in relation to child care/access/contact presumption at point of separation to mitigate the risk of power struggle and alienation.
3. The public service, especially the Police and Cafcass, simply have to do more. It is simply unacceptable for those bodies to stand by and allow, what they themselves acknowledge to be a common and growing trend, to continue.

[...]. The journey my son and I have been on so far leaves me with little faith that the outcome will be much different from what it is today, but I simply can no longer accept this to be the case.

I will do whatever it takes to address this most pressing matter of all for my son, and the thousands of children like him out there who I have heartbreakingly come to learn are dealing with the same unbelievable situation.

My son [...] is the most wonderful gift I could ever have been given. I will never give up on my son, and I hope this Justice Committee will not either.

November 2012

Written evidence from the Family Rights Group

What is Family Rights Group?

1. Family Rights Group is the charity in England and Wales that advises families whose children are involved with, or require, local authority services because of welfare needs or concerns. We promote policies and practices that help children to be raised safely and thrive within their family and community and give families a voice when decisions are made about their children's lives. And we campaign for effective support to help struggling parents and family and friends carers, who are raising children that cannot live at home.

We provide a free, confidential telephone and email advice service assisting over 7,000 callers per year. Typically, this involves advising:

— parents of their legal position, helping them to understand the child protection concerns and supporting them to work with the local authority to make, and implement, safe plans for their child; and

— relatives and friends about taking on the care of a child who is unable to live with their parents, and the implications of different legal options.

We convene the national Family Group Conference Network, have developed national quality standards for family group conference services (see paragraph Appendix para 4.3) and are trialing a national accreditation scheme for such services.

We are also active members of the Kinship Care Alliance, which comprises a number of voluntary organisations working with family and friends carers, local authorities and academics. The Alliance develops and promotes a joint policy agenda aimed at preventing children from being unnecessarily raised outside their family and securing improved support to enhance outcomes for children who are raised in family and friends care.

Context of the Children and Families Bill

2. The challenge for Parliament when a child is at risk is to strike the right balance between ensuring that:

— the child's short and long term welfare needs are met (including their safety, need for permanence, the opportunity to build strong attachments and to develop a positive sense of identity);

— planning and decision-making processes enable and support the family to address identified concerns;

— the child's right to respect to family life is observed, including exploring all potential placements within their wider family; and

— plans for the child are made without unnecessary or harmful delay and within a timescale that meets the child's short and long term needs, including formation of secure attachments.

3. The specific reforms being addressed by this inquiry are part of a more extensive programme of reforms to local authority and judicial decision-making processes. Whilst some of these are most welcome, for example increasing judicial continuity and improving case management to reduce systemic delays, others may have unintended, negative consequences for vulnerable children and families, for example:

(i) The new draft safeguarding guidance[71] issued for consultation, following the recommendations of the Munro Inquiry, drastically reduces national child protection guidance, leaving practice decisions far more to social work discretion or local authority protocols. This may result in a lack of consistency in safeguarding practice across the country, especially with severe financial pressures on individual authorities. The draft guidance also fails to mention the importance of partnership working with parents when children are subject to child protection enquires, which may place children at greater risk (see Appendix para 1). And it proposes changes to the way in which vulnerable children's needs are assessed, focusing on support for children at risk of harm, potentially at the expense of early preventive support for children in need, which often averts the situation escalating into child protection;

(ii) Changes to the legal aid system,[72] will result in many family and friends carers, such as grandparents or older siblings raising children, having to represent themselves in court and navigate administrative and judicial decision-making processes alone, without legal advice or assistance. This may deter some from seeking a residence or special guardianship order, leaving the child vulnerable to being removed from their care by their parents, without notice.

(iii) The "foster to adopt" proposal which requires local authorities to consider placing children with approved adopters, initially on a temporary foster care basis until a placement order has been made,[73] creates a fast track to adoption. For example, a baby could be placed with potential adopters (who have been approved as temporary foster carers) under an interim care order before the court has made a decision at the final hearing in care proceedings that the threshold for removing the child from their parents has been established. If there was a viable family and friends care arrangement identified in such a case, a court considering the care plan would have to weigh up the advantages to the child of remaining with their existing carers (who had already been approved as adopters and temporary foster carers) with whom they have formed a strong relationship, against the risks associated with breaking such attachments in order to place the child with an otherwise suitable family members who could provide excellent care *and* meet the child's long term identity needs. In such circumstances the court would almost certainly favour maintaining the status quo, hence the child's opportunity to be raised by their family would have been prejudged by this early "foster to adopt" placement; and

(iv) the removal of adoption panel scrutiny of the proposed plan for adoption in placement order cases[74] from 1 September 2012 further reduces external scrutiny of permanence plans, which may impact on the quality of permanence plans.

4. When combined, these and other reforms to streamline and accelerate the decision-making processes are in danger of marginalising parents and reducing the chances of children being raised safely within their wider family network. It is therefore essential that this inquiry considers the wider context when addressing the particular questions posed.

26 Week Time Limit in Care Proceedings:

5. We are aware from our advice and policy work that, in many parts of the country, courts are already operating a 26 week timetable (save in exceptional cases) on new cases, despite this provision not yet having been enacted in parliament. Although we support the government's intention to remove harmful delay for children from the system, we are very concerned that this 26 week time limit,

— reduces the time available for parents to demonstrate their parenting abilities; and

— squeezes out potential family carers because there is simply not enough time to consider their application, and in the case of special guardianship applications their support needs, before the proceedings are concluded. We are already hearing anecdotes of family members being denied an assessment once the case is in court.

6. To guard against the child's chance of being raised by their parents or wider family being determined by an acceleration of the process rather than a welfare based decision, we think it is critical that families are supported to address identified concerns and make safe plans for their children before care proceedings start.

[71] http://www.education.gov.uk/a00211065/revised-safeguarding-guidance.

[72] Schedule 1 para 13, Legal Aid Sentencing and Punishment of Offenders Act 2012

[73] Department for Education (2012)Proposals for Placing Children with their Potential Adopters Earlier

[74] Adoption Agencies (Panel and Consequential Amendments) Regulations 2012 and revised statutory guidance http://www.legislation.gov.uk/uksi/2012/1410/made

There is simply not enough time to do this once proceedings have started. However this pre-proceedings stage is largely unregulated, with the result that practice varies widely and key opportunities for the child to live with their family are often missed.

7. We have described in the Appendix paragraph 4 key, yet under-exploited, interventions that effectively engage parents and relatives in making safe plans for their child. We therefore recommend that

(a) The government issues a *pre proceedings protocol* under s.7 Local Authority Social Services Act 1970.[75] This should set out how local authorities should work to engage families to make safe plans for their children before the proceedings start, drawing on best practice of what works (see Appendix). This work should be undertaken in sufficient time for the family to have a realistic opportunity to address and overcome the concerns within the timescale of the child's needs. Where necessary, *this work could be in parallel to exploring contingency options for the child* to be raised outside the family if there is evidence to suggest that this may be required.

(b) The government continues to fund, and expands, Family Rights Group's advice service to enable more such families to access specialist independent advice;

(c) All parents whose children are subject to s.47 enquiries should have a right to have a *professional advocate* to support them through the process;

(d) There should be a corresponding duty on local authorities to commission specialist parental advocacy services, and that duty should be funded by Government.

(e) There should be a new *duty on local authorities to identify and consider wider family placements for a child, whenever they are considering removing a child from their parents* because they may be at risk. This would allow contingency planning to take place whilst still working with the parents.

(f) Families should be routinely offered a *Family Group Conference* to develop a plan to safeguard their child, when an initial child protection conference has determined that a plan is required to protect the child or their child may be removed into the care system.

(g) The *letter before proceedings* should be revised so that a *letter of concerns* is sent to parents as early as possible in the child protection process when proceedings are being *considered* rather than *intended.* This would give them a real opportunity to address the concerns before the proceedings start and could still spell out that proceedings might follow if the concerns are not satisfactorily addressed;

(h) *LSC level 2 advice* should be triggered by this *letter of concerns* so that advice is available earlier;

(i) *LSC level 2 advice* should also be extended to family members who are considering taking on the care of the child; and

(j) More effective support should be available for family and friends carers to optimise outcomes for children in these placements, including a new statutory duty on local authorities to provide ***support for family and friends carers*** raising children who cannot live with their parents, irrespective of legal status and a national financial allowance for such carers raising children to cover the real costs of raising a child for whom they are not in law financially liable.

8. These recommendations should substantially reduce the number of family and friends carers only coming forward after a fact finding in proceedings, thus eliminating a major source of delay. However, there will be circumstances where either the pre-proceedings work with the family has not been done or circumstances have changed at the last minute, such that a family member needs to be considered late in the day. In these circumstances and in order to ensure that the opportunity of a suitable family placement is not lost whilst simultaneously ensuring that undue delay is avoided **we recommend that** there should be:

(a) guidance for judges that an exceptional extension to the time limit of the proceedings should be available to enable an expedited assessment of the proposed carer to take place; and

(b) an associated mechanism developed within the local authority to ensure that a fast track, yet thorough, assessment[76] is conducted.

This will be particularly important where a relative seeks a special guardianship order within in care proceedings. This is an order which can be made in favour of a non-parent to secure a child's future with them. It is essential to the success of special guardianship placements that making of such orders are not unduly rushed, particularly if speed is a the expense of agreeing a robust support package that is critical to the placement working(for example to support difficult contact arrangements or prevent significant financial hardship), once the local authority report is concluded (which routinely takes up to three months) and before the final order is made.

[75] Guidance issued under this section must be complied with by local authorities unless there a exceptional circumstances to justify local variation.

[76] Fast track assessments have already been developed in the Tri-Borough care proceedings Pilot in London. http://www.lbhf.gov.uk/Directory/News/Tri_borough_councils_join_forces_to_speed_up_care_proceedings_in_national_pilot.asp

Removal of Time Limit on Interim Care Orders:

9. One effect of this proposal will be to remove the opportunity for:

(a) parents to challenge interim care plans where there is a change in circumstances since the original interim order was made;

(b) parents to resolve contact disputes during the proceedings; and

(c) wider family members from being able to apply to take on the interim care of a child pending a final hearing. This will be very significant when the new legal aid restrictions are in force as it will become more difficult for them to make a free standing application for an interim residence/child arrangements order without a lawyer than it would be to intervene in an existing interim hearing where the other parties' solicitors could assist.

We therefore recommend that**,** publicly funded mediation should be available to help resolve disputes over interim arrangements for the child including contact.

Reducing Court Scrutiny of Care Plans

10. We are very concerned by the proposal that the court should no longer scrutinise the "details" of the care plan. It is often only as a result of the court's authority and scrutiny that key elements of the child's plan, such as sibling placements, contact and contingency planning in care proceedings, which are fundamental to the child's future wellbeing, are effectively addressed by the local authority. The fact that the court currently provides this scrutiny, has transformed the quality of many care plans.

11. We are particularly worried because this comes on top of other actions to reduce external scrutiny, described in para 3 above and proposals that have been recently consulted upon to alter the contact and sibling placement duties for children in care.

12. Clearly Independent Reviewing Officers (IROs) will be key to ensuring that the care plan meets the child's needs. Indeed they are already tasked to challenge poor practice and any failure to implement plans on behalf of the child.[77] However, their workload (which can be up to 120 cases each) is such that they do not have the time or resources to challenge all aspects of the care plan which they feel do not meet the child's needs. Moreover, the culture of local authorities varies, and some still attempt to minimise or sideline IRO's independence and authority. This is likely to become more rather than less difficult if the expectations on them increase.

13. Given the limited resources of IROs and the pressures on local authorities budgets which affect services provided to vulnerable children and families, it seems contrary to children's welfare to remove this key layer of scrutiny. *We therefore recommend that the proposal to reduce court scrutiny should be opposed* since it may harm the welfare of children at risk. However, if the clause remains, we suggest *it should be amended* to include contact and sibling placements as being core issues that the court should consider in addition to permanence plans for the child (Clause 3A(a)).

14. We also recommend that in addition to the pre-proceedings proposals set out in para 7 above, the *following safeguards are put in place to ensure there are appropriate checks and balances in the system* without causing any additional delay to children:

(a) Social workers should be required to actively consult parents and other family members about any significant changes to the care plan;

(b) IROs should ensure that parents and other family members are directly involved in and/or contribute to any planning meetings before a final care plan is made unless this would place the child at risk of harm

(c) The existing principle, established by Human Rights Act case law, that local authorities should consult with parents and other significant family members if there is a fundamental change to the care plan after a care order is made,[78] should be enshrined in primary legislation;

(d) Publicly funded mediation between the family and the local authority should be available to help resolve care plan disputes;

(e) Parents/others with parental responsibility and significant family members should have a right to apply to court for further scrutiny of the care plan/directions where there is a fundamental disagreement about the proposed change.

(f) There should be a new duty on Independent Reviewing Officers to apply to court for further scrutiny where they consider that the proposed care plan does not promote the child's welfare. This would help them to challenge poor local authority practice and would guard against drift in the system.[79]

[77] S.26 CA 1989 as amended
[78] See for example, *Re: C (A Child)* [2007] EWCA Civ 2 C/A
[79] See *A and S (Children) v Lancashire CC* [2012] EWHC 1689

APPENDIX

ENGAGING FAMILIES PRE-PROCEEDINGS—WHAT WORKS

1. When Children's Services become concerned about the safety and welfare of a child, the typical experience of parents is that they find it difficult to work with the local authority because they are frightened, angry and bewildered. They are often overwhelmed by continuous assessments and meetings in which they are under the spot light of a large numbers of professionals. They are often unclear about the totality of the concerns and the reasons for them and they fear that their child may be removed by the local authority. Yet research demonstrates that when a child is at risk, an effective partnership working between the family and local authority is key to keeping them safe.[80] This makes practical sense because 93% of children subject to a child protection plan live at home,[81] hence it is their parents who are responsible for their day to day care and the plan's implementation. Indeed parental non-cooperation is the key trigger for local authorities issuing care proceedings.

2. An estimated 200–300,000 children who cannot live safely with their parents are being raised by family and friends (typically grandparents, older siblings, aunts and uncles),[82] often as an alternative to being brought up in the care system. Enabling children to live safely within their family network is consistent with the child's right to respect for family[83] and also results in positive outcomes for the children involved. Research[84] shows, for example, that in comparison to children in unrelated foster care, children in family and friends care are as safe,[85] and are doing as well if not better in relation to their health, school attendance and performance, self-esteem and social and personal relationships. Moreover, there is a marked improvement in their emotional health and behaviour following placement and their carers are more likely to match their ethnicity and be highly committed to them, leading to more stable placements. This is despite these children suffering from similar adversities to children in the care system and their carers often having multiple problems of their own including severe financial hardship and isolation yet recovering little or no support.

3. Family and friends care arrangements for children who would otherwise be in the care system also result in huge cost savings to the State: it is estimated that the average costs of a child being in care are over £25,000[86] per year and the average costs to the State of care proceedings are a further £25,000 or more.[87] Yet potential wider family placements are frequently identified late in care proceedings[88] because:

(i) social workers focus too often exclusively on the mother, and do not routinely seek our potential carers in the wider family, particularly paternal relatives, before proceedings start,[89] and

(ii) many family and friends carers refrain from offering to care for the child whilst there is still a chance that the parents may be able to raise the child long term. In some cases, this is because they are unaware of the depth or totality of concerns; in others it is because they don't want to undermine the parents or are fearful of reprisals from the parents if they step forward. Therefore, many wait until there is a finding of fact against the parent(s), before putting themselves forward as alternative carers. *This will be far too late under the 26 week time limit, with the result that many children may be denied the chance of living in an otherwise suitable family and friends care arrangement.*

4. The following interventions maximise the chances of early family engagement:

Independent advice for parents and relatives:

4.1 Research has found that when parents and family members are able to discuss with an independent specialist adviser how the system works and the options open to them, it can significantly impact on their ability to work constructively with the local authority in this pre-proceedings stage. This has important implications for the child and family, but also results in significant costs saved in avoiding children unnecessary entering the care system. A forthcoming evaluation found that for every £1 invested in Family Rights Group advice service, the impact was that it saved £10.80 in costs to the public purse.[90] However Family Rights Group is the only national organisation that gives this specialist advice on legal *and* social work aspects of the case, including the need for parents to face home truths and be realistic when making plans for their child. In the last six months (April-September 2012) the numbers of families contacting our service has risen by over 50% compared

[80] DoH (1995) *Child Protection: Messages from Research*

[81] DCSF: Referrals, assessment and children and young people who are the subject of a child protection plan, England—Year ending 31 March 2009

[82] They usually step in because of parental difficulties, such as mental or physical ill health, domestic abuse, alcohol or substance misuse, or imprisonment or bereavement.

[83] European Convention on Human Rights (Article 8).

[84] Farmer E and Moyers S (2008) *Kinship Care: Fostering Effective Family and Friends Placements* (Jessica Kingsley); and Hunt, J, Waterhouse, S, and Lutman, E (2008) *Keeping them in the Family: Outcomes for children placed in kinship care through care proceedings.* London: BAAF

[85] This research shows that only 6% of family and friends carers failed to protect the children in their care which is the same figure as for unrelated foster carers

[86] Corry D and Maitra S *Cost-Benefit Analysis of Telephone advice services provided by the Family Rights Group*, March 2011

[87] Review of Child Care Proceedings System, Department for Constitutional Affairs, 2006 XXX

[88] Hunt, J (2001) *Scoping paper prepared for the Department of Health* London: DoH

[89] Ibid

[90] Featherstone et al (Oct 2012) *Evaluation of Family Rights Group Advice and Advocacy Service,* Family Rights Group

to the same period a year ago. On current resources, we are only able to advise 60% of callers. Further, government funding for this service is due to end in April 2013 and there has not been any announcement to date about continued funding. If it is not renewed, partnership working will be undermined and children will be put a greater risk as a result.

Professional family advocacy:

4.2 Since 2003 Family Rights Group has also led the development of professional advocacy for parents involved in child protection processes. Using highly qualified child care solicitors, social workers or advocates with equivalent expertise, we advocate for parents at different stages of the child protection process, including accompanying them and where necessary speaking on their behalf at local authority meetings and helping them to get the support they need for their children to thrive. *A key finding from independent evaluations of this service*[91] *is that both families and social work professionals feel that our independent advocates play an important role in aiding communication between them and helping them to work in partnership to an agreed plan.* However this is a very small scale venture, currently dependent on spot purchasing by London local authorities. There are only a very few other advocacy services across the country with expertise in this area.

Family Group Conferences:

4.3 FGCs originate from New Zealand and are family led, decision making meetings in which a plan for the child is made by the family (including extended family members and friends) which addresses the local authority's concerns to ensure the child's future safety and well-being.[92] They are convened by an independent co-ordinator who visits all relevant family members to prepare them for the FGC. Importantly, with the help of an advocate where appropriate, children are supported to participate and express their wishes as part of the FGC.[93] FGCs have the advantage of ensuring that wider families members understand early the seriousness of the situation. They provide family members with the opportunity to make a plan to support the child to remain safely with their parents, if feasible, but also to draw up temporary or long term contingency plans about the child's future care including identifying whether there are family members who would wish to raise the child, if they cannot remain at home. :

There have been a considerable number of research studies on FGCs which, collectively, suggest that they are a very effective way of engaging families to make and implement safe plans for their children. Specifically these studies confirm that FGCs:

- result in extended family members supporting struggling parents and when necessary taking on the care of the child if they cannot remain with their parents;
- engage fathers and paternal relatives;
- give children a voice;
- improve outcomes for children at risk; and
- are cost effective in preventing children being unnecessarily subject to care proceedings or removed into care. This is supported by a survey by Family Rights Group (2010)[94] which shows that *for every £1 spent on delivering FGCs, the savings to the state could be as much as £11*: nine FGC projects which responded to the survey reported that they prevented 229 children becoming looked after in the previous year, including avoidance of proceedings for 116 children and resulted in 58 children returning to their family from local authority care. However, despite there having been an expansion in the number of child welfare FGC services in recent years, they are still non statutory, hence:
  - Around 30% of local authorities in England still do not having any FGC service or commission FGCs. Where they do, the decision to offer families an FGC largely depends upon the social worker. Only a small minority of authorities which have a policy to offer an FGC to all families prior to proceedings.
  - A number are now closing or being scaled down, or the principles upon which they work are being compromised as a result of funding cuts.

CAFCASS involvement in the pre-proceedings stage

4.4 An ongoing pilot project being run by CAFCASS in the West Midlands involves Family Court Advisers participating in preproceedings social work in 27 cases. A key aim is to contribute to the quality of assessments, the safe diversion of cases from care proceedings and to provide a head start to the work of the CAFCASS officer if the case proceeds to court. The interim evaluation found that the involvement of the Family Court Advises had a positive impact on parental engagement pre-proceedings, not least because of their independence from the local authority; in some cases they had been able to modify plans at the pre-proceedings meetings so

[91] Fraser C and Featherstone B (2011) Evaluation of Family Rights Group's Parent/Carer Advocacy Service 2009 -2010 http://www.frg.org.uk/images/PDFS/frg-advocacy-service-evaluation-report-2011.pdf

[92] Further details about FGCs can be found in Appendix 1.

[93] Further information about how FGCs operate can be found in *Family Group Conferences in the Court Arena* 2011http://www.frg.org.uk/images/Policy_Papers/fgc-revised-practice-guidance-sept-2011-final.pdf

[94] Family Rights Group survey of members of the National FGC network July 2010 (unpublished).

that they were more realistic and therefore more achievable for the parents. The project is still ongoing, but current case information suggests that that cases fully diverted in the Cafcass Plus sample have remained diverted. Cases that have progressed to court in the Coventry area have evidenced shorter case duration when measured against the annual performance court statistics. Both outcomes suggest that support, assessment and decision-making has been made more robust, such that cases only come before the court, when alternatives for permanence at home or within the extended family have been fully explored.

Letter before proceedings

4.5 In our experience families find that it is helpful when the child protection concerns are clearly set out for them. Typically this happens for the first time in the "Letter before Proceedings" which also invites them to a meeting to discuss how they must address the concerns in order to avert proceedings. However, our advice work suggests that its use is patchy and it is often sent far too late for families to have any real chance of making the necessary changes within the child's timetable. If the letter before proceedings was amended to be sent much earlier in the process setting out the concerns, the opportunity for families to address their problems to the satisfaction of Children's services would be maximised.

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