HOUSE OF COMMONS

ORAL EVIDENCE

TAKEN BEFORE THE

JUSTICE COMMITTEE

PRE-LEGISLATIVE SCRUTINY OF THE CHILDREN AND FAMILIES BILL

WEDNESDAY 21 NOVEMBER 2012

LISA HARKER and TOM RAHILLY

LORD McNALLY and EDWARD TIMPSON MP

Evidence heard in Public Questions 120 - 190

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Oral Evidence

Taken before the Justice Committee

on Wednesday 21 November 2012

Members present:

Sir Alan Beith (Chair)
Steve Brine
Mr Robert Buckland
Rehman Chishti
Jeremy Corbyn
Nick de Bois
Mr Elfyn Llwyd

Examination of Witnesses

Witnesses: **Lisa Harker**, Head of the Strategy Unit, NSPCC, and **Tom Rahilly**, Head of Strategy and Development for looked after children, NSPCC, gave evidence.

Q120 Chair: Welcome, Mr Rahilly and Ms Harker from the NSPCC. You are both from the same organisation but with different areas of responsibility within what we are talking about. We are very grateful for your help in our pre-legislative scrutiny of clauses in the Children and Families Bill. We look forward to gaining knowledge from your experience.

We have had quite a bit of discussion with other witnesses about the 26-week limit and what types of case are likely to constitute "exceptional" circumstances. Do you think there should be a non-exhaustive list of examples in the Family Procedure Rules, mentioning things like Family Drug and Alcohol Court cases?

Tom Rahilly: If I can start off, we are certainly very broadly supportive of the need to tackle delay, and the evidence is very clear of the impact that delay has on children, but we are not sure about the blanket assumption around the 26-week rule and, particularly, that the use of the word "exceptional" is right. Therefore, trying to describe that in terms of these particular types of cases may not always work. We very much want to see that the time scale that is set is based on the needs of the child and the intervention support that is needed to make the right decision for that individual child.

Can I just describe a project that we are running in Glasgow, which is a slightly different legal system but we think that the lessons apply here? It is a project where infant mental health teams, social workers and the courts all work together to provide both an assessment about whether or not that child should come into care and also support to work with the families. The first stage of that assessment takes around six months, but it is not an assessment for a decision on permanency and whether or not that child should come into care. It is an assessment about the type of intervention that is needed. Then the intervention that follows—that attachment-based intervention with the child and its parents—tends to take between six and nine months after that. It is only after that that they then make a recommendation to the courts about whether or not that child should come into care or they should return home to their families.

It is based on a piece of work that was originally done in New Orleans in America. We think that the evaluation of that approach is particularly strong. The findings showed that there was an increase in the number of children who were adopted. There was a reduction in the maltreatment of children.

Q121 Chair: Are you saying that this is the result of having a time limit or not having a time limit?

Tom Rahilly: I am trying to say that it is the result of an approach that would not be possible under a 26-week time limit. The most important finding from it is that there was a recent seven-year follow-up study, which found that the mental health outcomes, which we know are so critical for these children, were virtually indistinguishable between those who went into care and those who returned home within that treatment group. It was that approach, which was based on working with an intervention that met the needs of that individual child, that would not be possible under a 26-week limit and that we would be concerned an approach like this would stop. Some of those similar concerns have been raised around approaches such as the Family Drug and Alcohol Court because the interventions there take longer. We would be concerned to see if there was an explicit thing that set out, "These are the cases that should take longer." It should be about a planned intervention with each child and, therefore, the length of time that that needs to take.

Q122 Chair: Do you conclude from that that an assessment should be made right at the beginning of whether it is a case that should be exempted from the 26-week limit?

Tom Rahilly: In order to plan for those interventions, you need to know that you have that timetable to be able to do that rather than continue to make extensions along the way. As I said, the first phase of that is an assessment piece of work, which looks at attachment relationships between the child and their parent, and that piece of work itself takes around six months in the model that we are running in Glasgow and what happened in New Orleans too. So, yes, you need that time to be able to do that work with the child and their families.

Q123 Chair: Do you recognise that in some care cases the parent may feel, if the child has been taken away from the home, that the passage of time and the ability for that to be extended to quite a long period—let us say a year in some cases now—changes the circumstances, which the court subsequently considers to the disadvantage of the parent, and to the disadvantage or the possibility of the child going back to the parental home?

Tom Rahilly: We would always want to see it from the perspective of the child and what the outcomes for those children were. In the evaluation of the study that we are replicating, when it took place in New Orleans in America, outcomes for both groups—for those who went into care or those returned home—were significantly improved as a result of the intervention. The particular model works with both parents and the foster carers of the child, irrespective of the route that the child takes, whether they come into care or not. It has been shown in that initial evaluation that approaches like that really do achieve, or have the potential to achieve, good outcomes for the child.

Q124 Nick de Bois: I would like to turn, briefly, to the interim care and supervision orders, if I may. This is very straightforward. Does the NSPCC support the proposed change to the interim care and supervision orders?

Tom Rahilly: This concerns the court's discretion on the length of time that those should take.

Nick de Bois: Yes.

Tom Rahilly: Yes; we are broadly in support of it. We think it is sensible that the court should have the discretion to do that. I know that concerns have been raised by others around the ability for kinship carers to come forward.

Q125 Nick de Bois: Yes; I was going to turn specifically to that. The Kinship Care Alliance says that there is this possible negative consequence of it not actually allowing more family involvement in interim care. What are your thoughts on that? Do you think there is any validity in what they say?

Tom Rahilly: The key to getting that right is in pre-proceedings work, with the social work team doing a proper genogram, and being able to identify those family members and give them the opportunity to come forward in the meetings that happen following a letter before proceedings and things like that.

Q126 Nick de Bois: That is a good statement. I understand the statement of intent that you are making, but do you think that safeguards could specifically be put in place? Are there any default measures that could be put in place?

Tom Rahilly: It is not an area of work that we focused on in our response to the Committee. Broadly speaking, the proposal seems sensible to us.

Q127 Nick de Bois: In principle, you like the proposal, but you are not really troubled by any possibility of the concern that I have raised.

Tom Rahilly: No.

Q128 Steve Brine: Mr Rahilly, yesterday we were hearing from Hampshire county council and others, who were talking about the increased pre-court work with social workers as opposed to expert witnesses. I wondered if the NSPCC would care to comment on that and whether they are broadly supportive of that drift.

Tom Rahilly: The drift?

Q129 Steve Brine: The drift to doing much more pre-court work with the families and social workers than relying on expert witnesses in court itself.

Tom Rahilly: It is clear that one of the ways in which we need to tackle delay within our courts is exactly that. It is pre-proceedings work. It is ensuring that there are opportunities for other family members to come forward to look at the support arrangements for the child and to look at what support can be provided to children on the edge of care. It is absolutely critical to get this right. It is also critical to making sure that the documentation and care plans that are presented are of a high quality to tackle some of those issues that we have had in terms of delay. That is not to say that there isn't a role for expert witnesses, but they need to be adding additional and new pieces of evidence rather than continuing to present alternative views.

As part of the preparation for our work on this, we held a series of round tables bringing together representatives from local government, the judiciary and CAFCASS. One of the strong pieces of evidence and views that came through from those round tables was a feeling that quite often the use of expert witnesses was seeking to add to the weight of evidence rather than really building up the case beyond what was already known. There needs to be an ability to use effective social work assessments to take a decisive decision. I think the term that was used at the time was "to grasp the nettle about the decision that needed to be made".

Steve Brine: We need to move on as we have such limited time with you. Thank you.

Q130 Jeremy Corbyn: On the question of judicial scrutiny of plans, what improvements would you want to make about the role of independent reviewing officers?

Tom Rahilly: On independent reviewing officers, specifically, there are a range of different issues, which have already been highlighted to the Committee. They are issues around their case load and their abilities to do that scrutiny, their independence and their ability to challenge local authorities. It is telling that the National Association of Independent Reviewing Officers wrote to Ministers in May of this year highlighting some of those concerns around their independence.

Q131 Jeremy Corbyn: Are you saying that you want them to have a more formal judicial or semi-judicial role?

Tom Rahilly: No. I am saying that they themselves highlighted their inability to challenge decisions that were being made. Examples were cited around independent reviewing officers not being able to challenge unless they had been given authority by one of their senior managers to do so. That was one of the examples cited in that letter to Ministers. It is a difficult subject because there are obvious advantages to them being within a local authority structure, but that also limits their independence. It is an issue that has not been addressed as effectively as it can be in the proposals that have been put forward. In the Government's own response to the Family Justice Review it identifies the need for, and there was a recommendation about, strengthening the role of the IROs. They said that they, broadly, agreed with the thrust of the proposals and they would look to implement ways to build on good practice in collaboration with the sector, but that is not, really, an issue that has been addressed, I don't think.

Q132 Jeremy Corbyn: Do you believe that they are truly independent?

Tom Rahilly: No. IROs themselves say that they don't always have that true independence and that ability to challenge, so, no, I don't think they are.

Q133 Jeremy Corbyn: So what is your suggestion?

Tom Rahilly: As it stands at the moment, we have concerns around some of the proposals to reduce the scrutiny of the care plans because that independent scrutiny of it is vital to getting some of that support right. Unless we really identify how to change the solution for IROs, which people have not done yet because this is a debate that has been going on for a long time, there is a sunset clause that is still in existence from the Children and Young People's Bill 2008 around the—

Q134 Jeremy Corbyn: I am sorry to interrupt you. The point is that we have legislation coming up, and we are doing a pre-legislative scrutiny. Therefore, there is an opportunity to make some positive proposals on this. Would you want a registration system, a code of practice or something like that to guarantee their independence and, therefore, enhanced effectiveness?

Tom Rahilly: As I was saying, the previous proposal that was put forward in legislation was around the establishment of an alternative, independent agency for IROs, but that is a debate that has been ongoing and I don't think that anyone has come out with a satisfactory solution. As I sit here today, I don't have that answer for you, I am afraid. There are values to being part of a local authority and those present challenges too. As a result of that debate not being resolved, there are difficulties around reducing some of the independent scrutiny of care plans that the courts provide only looking at permanency plans. Some of the therapeutic support elements that might be within a care plan are critical to making those placements right. We need an independent scrutiny of those elements of the plans too.

We did some work earlier on this year on children returning home from care. We spoke to around 30 social workers and their team managers across seven different local authorities. All of those social workers, pretty much, identified care planning as being more effective where the court had been involved than, for example, voluntary accommodated children, and they all highlighted that it had been the scrutiny of the courts that had enhanced the quality of that care planning. In some cases, it was a matter of identifying examples of services that the children would not have received if that independent scrutiny had not been there. Given that that debate around the role of the IRO hasn't been satisfactorily resolved, there are challenges in the way in which the legislation is currently framed.

Q135 Mr Buckland: Can I move on to shared parenting? We are all familiar now with the draft clause as it has emerged after the Norgrove report. There is a presumption that each parent shall enjoy a meaningful relationship with the children or, rather, the child shall enjoy a meaningful relationship with both parents. It is important that we get it the right way round because these are all about children's rights rather than parental rights. There are a couple of provisions within that draft clause that allow that presumption to be rebutted in certain circumstances. Do you think that the balance is about right now or do you still have concerns about the introduction of this presumption?

Lisa Harker: I would like to start by putting on record that the NSPCC agrees that children benefit from having a meaningful relationship with both parents post-separation where this is safe, but we do oppose the clause as worded for three reasons.

First, we are concerned that the introduction of a presumption will, inadvertently, dilute the paramountcy principle. I know that that is not the Government's intention, but we are concerned that by putting it forward, by placing on the statute the presumption, it takes the attention away from what we believe to be the most important consideration above all, which is the welfare of the child. That is our first and foremost concern.

Secondly, we are worried that it would increase litigation and conflict. We know from the introduction of a similar provision in Australia that that was the case. It was interpreted as a new right by parents and that led, initially, to increased litigation. The law, subsequently, had to be changed to reinforce the priority of the safety of the child.

Thirdly, we are worried that vulnerable families may feel that they have no choice but to agree contact arrangements that they feel are unsafe or unsuitable, not in the best interests of the child, because they themselves believe that the change is tantamount to an automatic presumption of shared contact. This was also the case in Australia where we know that it led to an increased reluctance to disclose abuse and violence as a result of the reforms.

Q136 Mr Buckland: If there was, perhaps, further clarity to emphasise the point that "shared" does not necessarily mean equal, would that help, do you think?

Lisa Harker: It is very difficult for us to judge how this is going to be interpreted both by judges and, more widely, parents and society. We will certainly be seeking around the wording of the clauses to clarify the terms—terms such as "suffering harm" and "furthering the welfare of the child"—in an attempt to ensure that there is no dilution of the paramountcy principle. Our concern is that, whatever the Government's intention, the interpretation of it more widely in society may be seen as a right of parents to equal contact, and that will cause confusion and increase conflict.

Q137 Mr Buckland: It was put to us yesterday by witnesses from Families Need Fathers and Families Need Fathers Cymru that there was, unfortunately, a perception in some quarters that there was a bias in the system, that the law needs to send a message out that such a bias did not exist, and that the system was still focused around the rights of the child and the

interests of the child as opposed to a parental rights' approach. Would you accept that argument, or do you think there are flaws in it?

Lisa Harker: I would accept the argument that this may be based on a perception rather than actual bias. We have found no evidence of an actual bias in the system in terms of the decisions that judges are currently making. Non-resident parents and resident parents are equally unlikely or likely to get what they wish from the court orders. So there doesn't seem to be a bias in the system as it currently stands, but there does appear, among a proportion of society, to be a perception of a bias. Our concern is that in seeking to address that perception in this way, through a change in legislation, there is an unnecessary risk of a decision being made that is not in the best interests of a child. As the Family Justice Review put it, this would be an unnecessary risk for little gain.

Q138 Mr Buckland: Over half the respondents to the Government's consultation supported the Government's view on the shared parenting clause. Do you have any comment about that? Do you think that that should be conclusive of the issue, or is more required?

Lisa Harker: The Committee should look at where those responses had come from, and disproportionately from one part of society that is concerned about a perceived injustice, and, potentially, some examples of real injustices. We do not dispute that there could be cases of real injustice.

Q139 Chair: Can we be clear as to whether it is your view that the content of court orders is likely to change—that the courts will behave differently if the law is changed in this way?

Lisa Harker: It is very difficult for us to judge whether the individual decisions of judges will be affected by this. I have certainly heard evidence from Mr Justice Ryder and others that there will be no change in practice. As I say, we feel, as it currently stands, that the paramountcy principle is driving decisions and there is no gender bias.

Q140 Mr Buckland: Finally, in reading the evidence that Mr Justice Ryder gave to us yesterday, he suggested that the draft clause could be construed in a different way, that the presumption—the paramountcy principle—remains, that the welfare principle is overarching and this comes in as an imperative. There is a difference, is there not, in law between the imperative approach and the legal presumption? Do you think that, if the clause is interpreted as an imperative rather than as a presumption, then the mischief that you mention could be cured?

Lisa Harker: We would also be concerned about the potential misinterpretation of the imperative. It is difficult for us to judge how that would affect individual decision making. At best the practice would not change at all, and at worst a child may be put at risk because a decision with the adults' concerns had been put ahead of the child's welfare.

Q141 Mr Llwyd: I have one brief question. If there is a perception abroad that there is bias built into the system and you don't take the view that we need to legislate it—as it happens, I don't either—how would you address that alleged perception?

Lisa Harker: That is a very big question around a cultural change in society. We know that the majority of people, when asked, believe in exactly the same way as I stated at the beginning of my evidence that children benefit from a meaningful relationship with both parents post-separation, and it is only a minority in society who do not hold that view. This may be about wider cultural debate and change at all levels of society. We do need to remember that it is only the minority of parents where arrangements need to be made for a

child post-separation who end up in the court, so this is addressing 10% of post-separation cases rather than the vast majority, who never get to the court at all.

Chair: Ms Harker and Mr Rahilly, thank you very much indeed for your help today. It has been very helpful to us in the work we are doing. Thank you. We have further witnesses.

Examination of Witnesses

Witnesses: **Lord McNally**, Minister of State for Justice and Deputy Leader of the House of Lords, and **Edward Timpson MP**, Parliamentary Under-Secretary of State (Children and Families), gave evidence.

Q142 Chair: Lord McNally, welcome back. You are now a regular visitor to us. Mr Timpson, we are glad to have you with us on this cross-departmental matter on which you have taken over responsibility. We are working on our pre-legislative scrutiny of clauses in the Children and Families Bill, on which you have asked us to report by Christmas, and we are certainly doing our best to achieve that. I will ask Mr Brine to open the questions.

Q143 Steve Brine: Lord McNally, welcome back. Hello, Minister; it is nice to see you. This question is really for you, Tom. The Government consulted on new powers to enforce court orders, but there is no draft clause for us on pre-legislative scrutiny. What are the Government's plans for legislating on this topic? I know you have views on that.

Lord McNally: Enforcement is a very difficult area, and the truth of the matter is that we are proceeding with caution on the issue.

Q144 Chair: Forgive me, Lord McNally, but that is not what I would define as "proceeding with caution".

Lord McNally: The reality is that, when you get to the issue of enforcement, you run up against the reality of how draconian you can be without causing more problems by enforcing. That is why I used the phrase "proceeding with caution". Of course one of the things we will be doing is to listen to the views of this Committee on this.

Mr Timpson: There are two elements to this. The first is whether we need to increase the suite of options to judges who are dealing with breaches in terms of determining what would be the right penalty for a breach and whether we need to extend it. The purpose of the consultation was whether we need to widen out the options available to judges. The other element of it, which runs alongside that, is whether the current enforcement process is being effective. Certainly some of the recommendations from the Family Justice Review around enforcement we have taken forward, in terms of how quickly you can get a case where there has been a breach back into court—that is a real problem and one that I certainly came across in my time at the family Bar—but also the issue around judicial continuity, to make sure that the judge who is hearing the case where there has been an alleged breach has a background knowledge and understanding of the circumstances of that case, and particularly in relation to the child so that the decision that they make reflects that background knowledge as well.

There is still a lot of work that we need to do to improve how we deal with a breach and, therefore, how enforcement follows. We are looking carefully at the consultation and the views expressed within it. We are also considering whether, as well as improving the process of breach and how it is dealt with within the courts, we need to increase the variety of options available to judges in ensuring that the right decision is made as to how that breach is dealt with.

Lord McNally: Judicial continuity would be an important and beneficial factor in this. As to sanctions, if you put some severe sanctions in, it might smarten people up in following the instructions. The problem is that, if you get to a situation where a party is digging his or her heels in, do you then start wheeling out punishments that, in those circumstances, might seem draconian? It is a very difficult balance. Are you going to send a mother who is being intransigent ultimately to jail? It is a very serious step. What one would want to do is leave a lot of flexibility in the hands of judges who are fully in command of the facts of the case, but, in the end, you also have to work out what you write into law as any sanctions for breach.

Q145 Steve Brine: Maybe the collection of data will help with this being in the difficult basket. This Committee, as you will know, in its report "Operation of the Family Courts" was pretty critical of the lack of what it called "robust data" in the development of policies. What progress has been made to improve collect data collection since that report?

Lord McNally: A lot of progress has been made. I shared the Committee's surprise at how late in the day we had come to collecting data. I recently had meetings with the senior judiciary on this, and I think they were excited by the fact that there was now a flow of data coming to them that would enable them to identify problems early and to address them in an appropriate manner. There is now in place a system of data collection and data analysis that will be, as the Committee previously identified, a positive advance as far as administering cases is concerned.

Mr Timpson: To reinforce, first of all, what Lord McNally has said to Mr Brine, it is so instrumental that we move to a single family court system so that there is a more coherent way of collecting that data. I think you heard evidence yesterday from Mr Justice Ryder about what he was doing in relation to public law proceedings in the care monitoring system, which is starting to collate good and solid information about what is causing delays in individual cases and how the case management processes are becoming more efficient but still need more work in other areas. There is a lot of work that needs to be done.

I have also had the time available to talk to Mr Justice Ryder and others about the work that they are doing. My colleague Lord McNally talked about them being excited. Clearly there is a real appetite for them to get a grip on what is happening in the family justice courts because, ultimately, it is not only going to improve their decision making and efficiency but also the outcomes for the children, who, ultimately, we are there to try and help and represent.

Q146 Steve Brine: The Australian Institute of Family Studies conducted research following their reforms to give them more data, but you are confident that what is coming in and the move to a single family court, which will be neater and tidier, will allow much better data to flow. You are not looking to go elsewhere for the collection of that data.

Mr Timpson: We are keeping a very close eye on the progress that is being made, and if we need to do more we will, of course, look at other avenues that we can explore to ensure that the data is as robust as possible because it is for a purpose. If the data is achieving the ends that we are looking for, which is a more coherent, efficient and progressive family court system, then that will have achieved its aim. It is something that we need to keep under very close scrutiny. I assume that is what the Ministry of Justice as well as my Department will be doing.

Lord McNally: Indeed. The longer I stay in this job, the more amazed I am in how late we are in coming to practices that one would have thought were common sense, which is to have efficient up-to-date data of what is actually happening. Otherwise, you are flying blind in many of these areas of policy. As Mr Timpson said, I have also had the pleasure of talking,

as have you, to Mr Justice Ryder. I was really convinced that he saw the benefit and was already using the benefit of well-researched, well-provided and well-analysed data.

Steve Brine: I am content, Mr Chairman.

Q147 Nick de Bois: Let me turn to the MIAM process, but, first, I would just remind the Committee of my declaration of interests. I am going through mediation myself at the moment.

Turning to witnesses to the inquiry that we have had on this, they actually include mediators who have been suggesting that the trigger, if you like, for mandatory MIAM attendance is at the court application stage when we often have entrenched views. I would like to ask what the Government will do to ensure that the MIAM process doesn't become something of a futile, almost box-ticking exercise because of people arriving with these rather entrenched views when they are highly conflicted.

Lord McNally: The reality in a lot of these cases, rather like the sanctions, is that we are often dealing with people with deeply entrenched views, with a degree of emotional bitterness, and it is extremely difficult to simply write into statute how they should behave. We are trying to avoid a box-ticking approach or an approach that involves mediation at too late a stage. In both cases, it is a matter of persuasion, early information and early guidance.

People can't be dragooned into mediation. In a way, it is going to take a long time, a lot of gentle public education and, I would hope, a clear demonstration that it works, to persuade people that mediation is a far better process than a legalistic process that, by its very nature, increases the confrontation. Again, we have to leave in place the fact that it may be at the very door of the court that the MIAM process is finally agreed to. Hopefully, by working with other agencies, we will try and make sure that much earlier in the process conflicting parties are aware of that alternative and are aware that advice and support is available to them to go through a process that may be, and we believe will be, less painful, less confrontational and, certainly if children are involved, less stressful for the family as a whole.

Mr Timpson: If I could add to that, Chair, this isn't something new. In terms of legally funded applicants, they have been going through this process of mediation and considering mediation since 1997. What we are trying to do is to extend this out to all those who may find themselves having some contact with the court in relation to a private children matter. That is why we are putting in another £10 million on top of the £50 million that we already have to ensure that there are sufficient family mediators, who are trained to the required standard, to meet that demand. Of course we want to have that in place as early as possible in the involvement of parents with the courts, but we are not in the position of compelling people into mediation where it is not appropriate. What we want is for people to have the information, guidance and advice at as early a point as possible so that they can see whether it is going to work in their case. That is only part of a wider reform of the whole of the system to try and take out much of the adversarial nature that currently exists.

Q148 Nick de Bois: Rationally, few would disagree with what is trying to be achieved, but you are asking people to make a rational decision at a time when it is not necessarily easy to be rational, I suppose.

Just picking up on a point, the current draft clause allows officers of the court to refuse to deal with applications that, as I understand it, they deem not to have complied with the MIAM process, so there is no right to judicial oversight as a result. Shouldn't this clause be amended to allow a right to judicial oversight, and doesn't not having judicial oversight almost enhance the idea that it is a tick-box process to get through, so that people with entrenched positions can get to court?

Lord McNally: As will already be clear, I am a layman, but Ed has been a practitioner at the sharp end on this.

Q149 Nick de Bois: That is quite important because I am a layman, too. I am not on the legal side, and that is my temptation in relation to this process.

Lord McNally: We make a balanced team in that respect. As I read it, the fact that an officer of the court can, as it were, refer them back is a decent hurdle to make people clear. I would be very dubious about making an appeal because part of the aim is to try and clear judges' desks for important cases. I may use terms that are not legalistic, but, as I understand it, the attempt is to try and make it a process where the judges are able to concentrate on important matters and where more formalistic processes can be dealt with at a different level. It is not a complete block but it is a way of making people think hard and consider, even at that late stage, mediation. In the end, as far as I understand it, if they tick the box, then proceedings can go ahead.

Q150 Nick de Bois: That was my point to Mr Timpson, yes.

Mr Timpson: If I can add bits of further clarification to that, which I hope will be helpful, the court officers will not be deciding the FM1 forms that come in in relation to complying with the MIAM process on the basis of the merits of whether they have complied with it or not. It is a procedural element of their task. So they are not, in a sense, in a quasi-judicial role in trying to decide whether the merits of the process have been met or not. It is simply whether they have complied with the form and the process required for them to move into the next stage of the application being heard by the court.

Q151 Nick de Bois: It is interesting. I have one final question, if I may, as I am conscious of time. Why have the Government chosen not to make attendance at MIAM compulsory for the respondent, because, again, the implication is that the lawyer sits you down and says, "We are going to go through this process because you have more chance, if it is successful, of not ending up in court, but if you don't go through this you may not end up in court and you get sent back." Now the respondent doesn't need to attend. I am curious about that. You seem to be encouraging mediation—I fully support that—but, actually, you wouldn't even have a meeting, necessarily, with the respondent.

Lord McNally: Again, as a layman, my attitude is that nothing could bring mediation into disrepute more than the idea of resentful, unco-operative and belligerent—

Q152 Nick de Bois: Do you have evidence to back that up? It is an opinion, but do you have evidence? You have been doing this process for a while.

Lord McNally: No. I am taking advice on that. Whether we have got evidence, I look to my learned friend. That would be my attitude. I am looking it now from the wider development of mediation. Mediation is not in our system still thought of as a first stop. One of the problems across our justice system is that court proceedings are seen as the first stop. This is part of a more general belief that, by bringing mediation into the system more centrally, we stop unnecessary, confrontational legal solutions.

Q153 Nick de Bois: Lord McNally, I would like to hear now, if I may, from Mr Timpson. I am conscious of time.

Mr Timpson: There is an inherent difference between an applicant and respondent. The applicant is the one who has proactively sought the court to decide on a particular issue, whereas a respondent has not had any contact with the court and so is outside of that process. So to compel them into mediation is attacking the problem from a very different angle. Of

course, once it is in court, the court can direct that the respondent takes part in a mediation session. Often that takes place at the first hearing. In any event, it is part of the dispute resolution with the children and family reporter. There are mechanisms to ensure that there is an opportunity for mediation, but, again, it is ensuring that for both parties it is going to be meaningful. What we don't want to do is to compel anybody—there are exceptions within the new Act as to those who would be eligible to legal aid—but we want to make sure that everybody gets the opportunity, where it would be appropriate to do so, to try and resolve the matter before there needs to be any court involvement. But, if it does go into court, there is still the opportunity for it to be done in that way.

Lord McNally: One point that is clear on that is that, if domestic violence was involved, there would be no question of compulsory mediation.

Q154 Rehman Chishti: Can I make clear at the outset that, apart from having a predominantly criminal practice, I had a small family law practice?

I want to touch on a point raised by Lord McNally on the issue about sanctions. Would I be right in saying that hardly any committals for sentence to prison took place with regard to breach of contact orders? All parties know it is there but it is never used. For repeated breaches of contact orders, what would you think would be the appropriate sanction on that?

Mr Timpson: I am happy to answer that. It is a very rare occurrence for a private law children case to end up with one of the parents being committed to prison. There are a lot of committal proceedings that take place, and I have been involved in many of them myself. Of course there are other sanctions available to the judge, which are used in terms of putting a penal notice on orders; there is the opportunity of a penalty and paid work. But, more often than not, you find that it is used as an opportunity to try and move the parents on and to try and re-enact contact where it has broken down. This is why we looked at how we could find, potentially, other avenues for a judge to explore to ensure that a breach is dealt with in a way that is going to benefit the child by bringing in alternative sanctions. That is what we are considering from the outcome of the consultation.

Some judges look at whether they need to reverse—this has happened in a number of cases that have ended up in the Court of Appeal—and have reversed the residence of a child on the back of an implacably hostile parent who is denying contact and frustrating the judicial process. It would be quite unusual, as you suggest, for a case to reach the stage where a parent is being committed to prison. The whole point of many of the reforms that we are bringing in is to try and prevent this sort of situation where breaches occur in the first place by trying to get an agreement with parents at an early stage.

Q155 Rehman Chishti: Linked to that, the scenario often was a slap on the wrist and there is also an implication on legal aid, because parties would be paid legal aid to take that breach to the court. Sometimes the parties were on welfare. On that basis, you have a problem where the state is funding them to make those payments.

Mr Timpson: We want to avoid unnecessary multiple breaches of orders that end up coming back to court again and again and again without a proper resolution. Of course there are consequences for the public purse.

Lord McNally: I go back to what I said. Writing in draconian punishments that are never imposed I do not think is very sensible law making. On the other hand, it has been put to me that the sanction that most often brings one party to its senses is the judge's power to reverse the custody order. If they think that their intransigence means that they are going to lose everything, then they think very hard about taking such a position.

Chair: Do you want to pursue the cross-jurisdictional issues?

Q156 Rehman Chishti: Yes. Can I take you to child arrangements orders and a few supplementary questions? Witnesses to the inquiry have suggested that the introduction of child arrangements orders and removal of "residence" and "contact" risks creating confusion and delay in cross-jurisdictional cases. What is your view on that?

Mr Timpson: In relation to the current system we have with residence and contact, where the body of the order makes it clear with whom a child lives and with whom the child has contact and spends time with the non-resident parent, that is the basis on which there can be a decision as to where a child is habitually resident and other matters that are important for cross-jurisdictional purposes.

Where the child arrangements orders will still maintain that is within the body of the order. It will still be clear exactly what the arrangements are, with whom a child lives and with whom a child spends time, so that shouldn't have any implications for ensuring that there is a cross-jurisdictional marry-up and an ability for them to ascertain exactly what those arrangements are. I don't see that there would be any difficulty with that.

In terms of communicating those changes of the residence and contact in child arrangements orders, I know that the Ministry of Justice have some ongoing discussions with their international colleagues. That will form part of those discussions so that there can be no ambiguity as to what the new arrangements are.

Q157 Rehman Chishti: I will move on to my second question. The Family Law Bar Association suggests that this could be avoided by amending the clause to clarify that, if you have a child arrangements order under which the child is to live with a certain person, that person has rights of custody for Hague Convention purposes. Do you agree with that?

Mr Timpson: As I say, the body of the order would be clear as to where a child will be living at any point. I am happy to look at what the Family Law Bar Association says as a consideration of whether we have got the legislation right. My advice and understanding is that the changes that we are making won't affect our ability to make it clear exactly what those arrangements are and how they will impact on cross-jurisdictional matters.

Q158 Chair: That didn't seem to be the view of the judges who spoke to us yesterday. There seemed a desire for greater clarity.

Mr Timpson: The issues that were raised by the judges who were before you yesterday, Chairman, were about parental responsibility and whether that would be affected by the child arrangements orders. Parental responsibility will not be affected by that. It will still be exactly as it is now. That was the concern. I hesitate to suggest that there may have been some confusion on the part of one of our esteemed justices, but I want to make it clear that the parental responsibility element will still be as it currently stands.

Lord McNally: No MoJ Minister would ever suggest such confusion. As I understand it as well, we are signatories to the Hague Convention. I attended a meeting in Brussels on various compliance with these issues. What is written down on paper and what happens in reality is always extremely difficult and becomes more complicated once you start crossing international borders, but I think there is a general will of Governments to co-operate on these matters and to make sure that relevant jurisdictions recognise the reality.

Chair: We need to move on to give sufficient time to shared parenting, so I move on at this point to Mr Llwyd.

Q159 Mr Llwyd: Let me go back, briefly, to yesterday's session. I don't think there was any confusion at all in what the judges told us. I put the questions to them and they were quite explicit. They thought that the new orders would create a difficulty vis-à-vis extra-territorial proceedings. That was confirmed from their evidence. There was no confusion about it.

Lord McNally: Can I, then, say, as Mr Timpson has said, that we will look at that? Not being in any way unctuous, if judges give us that advice, it is incumbent on us to go and take a look at what they have said and respond to that.

Q160 Mr Llwyd: On the issue of shared parenting, what effect do you think the draft clause will have on the content of court orders?

Mr Timpson: I don't think we can be prescriptive about the effect it will have on each individual case and the orders that the court will be making. The most important element of this is to ensure that there is real confidence in the family justice system and the decisions that they are making around a child's arrangements between parents where, sadly, they have separated and need the assistance of the court to come to arrangements for their own individual child.

This is a long-running issue. This isn't something that has cropped up recently. I know when my predecessor, the Member for East Worthing & Shoreham, was before the Committee in June, he talked about this in 2006, when this matter was discussed in a previous Bill Committee. There is an ongoing perception of an in-built legal bias towards one parent or another that we need to overcome. That doesn't in any way fetter the discretion of a judge in making a decision, which still has to be based on the paramountcy principle for the welfare of the child that they are making a decision about.

Mr Llwyd, I am not able to say that this is how each order is going to be affected by the change that we are going to bring in. My anticipation is that it will ensure that there is greater confidence in the decision-making process by making it clear on the face of legislation that, where it is safe to do so and it is commensurate with the welfare of a child, an ongoing relationship with both parents would be in their best interests.

Q161 Chair: I did not quite follow whether that meant there would be an effect or there would be no effect on judicial decisions. You told us about an effect on perception, but did you mean that there would or wouldn't be an effect on judicial decisions?

Mr Timpson: Chairman, what I am saying is that you can't at this stage anticipate, with judges still having the discretion they have in deciding a case, how each individual case would play out as compared with what we currently have.

Chair: No; overall.

Mr Timpson: What we are clear about is that this is not about enhancing parents' rights. This is about the rights of children.

Q162 Chair: We can come to those issues. It is a simple question. Is your assumption that there will be some change in the general corpus of judicial decisions in this area as a result of redrafting this legislation?

Mr Timpson: We can't say what the change will be.

Q163 Chair: Any change.

Mr Timpson: We don't know what the change will be, whether it is going to be significantly different from the current decisions made by the court, but we can say that, by bringing the changes into legislation that we propose, the parents who find themselves either considering going through the court process or actually find themselves in the court process

themselves will have much greater confidence that the decision is being made in a way that is commensurate with the best interests of the child where an ongoing relationship with both parents is safe and in the welfare of the child in question. It will help resolve cases at an earlier opportunity because it is more explicit and clear exactly how a court will make that decision.

Q164 Mr Llwyd: Mr Timpson, both you and I have practised at the family Bar of the same circuit for some time. During those years, did you actually see any bias built into the system?

Mr Timpson: I saw and came across a number of clients, both mothers and fathers, who felt an injustice based on their perception of how the court was set up as there being winners and losers and that there would be a favourability for one parent over another. We are trying to take that adversarial heat out of these disputes. We want to take out the conflict and concentrate people's minds on the child rather than the battle between one parent over another and a hierarchy of orders.

Q165 Mr Llwyd: But you know, Mr Timpson, with respect, that every judge whom you and I have appeared before would start from the standpoint that it is an excellent thing for both parents to have as much time as possible with that child that is commensurate with the best interests of the child being paramount. That is true, isn't it?

Mr Timpson: As I say, we are not fettering the paramountcy principle on which the judge will base their decision.

Q166 Mr Llwyd: No. Yesterday, the judges thought it might undermine the paramountcy principle.

Mr Timpson: One of the judges who was before you yesterday felt that it may be a helpful way of ensuring that parents do have confidence in the decisions being made.

Q167 Mr Llwyd: Let me move to the word "confidence" again. You have used the words "confidence" and "perception". This is really about trying to dispel a perception that there is a bias built into the system. Is that not right?

Mr Timpson: It is a large part of the reasoning behind the need to look at how we can improve the confidence of those who have contact with the court. Yes, it is a large element of ensuring that those who go before the court know exactly what to expect, how the court is going to make the decision, and to take away this sense that there is an in-built bias and it is not always focused on the needs of the child.

Q168 Mr Llwyd: Do you know of any other statutory procedure that is adopted to deal with a perception? Do we legislate to deal with perceptions? I have never heard of it before.

Mr Timpson: With respect, without trawling through the thousands of pieces of legislation on the statute book, I cannot give you a sense of exactly how that may have played out in each case and whether an argument has been made in the past on the same basis. What we are trying to do, as I have tried to make clear, and I think it was made clear at the last Committee hearing, is to move away from a sense of winners and losers in a family system where the sole focus of everybody involved, including the parents and the lawyers, is in ensuring that the best outcome for the child is achieved through that process. As I said, this is not something new; this has been a long-running issue, but there is a sense that the system is not set up to deal with the situation or it is not clear to those who have cause to come into contact with the courts that that is what is happening.

Lord McNally: Can I just perhaps throw back on your experience? I come to this relatively new. I did approach this with some caution and scepticism. On three different occasions to three different audiences—one a legal audience, one social workers and one a mixed audience—I voiced some of my scepticism, and three times out of the audience individuals came out with the same point to me, which was, "Do not underestimate the willingness of parents to use their children as weapons in an ongoing dispute." The fact that I got that as a spontaneous reaction to my scepticism made me think that this was something worth while doing if it mitigated against allowing parents to use children and contact with children as a means of prolonging their dispute with their spouse. I wonder whether you have come across those experiences.

Q169 Mr Llwyd: With respect, Lord McNally, I will answer the question, but what we have is an intractable minority of cases where you are not going to impress upon either party the need to look after the interests of the children. Those are people who are banging their heads together. This shared parenting thing will do nothing for them. It will not affect it in one shadow. It will not affect it at all. I am afraid that this shared parenting thing is about headlining.

Chair: I think Lord McNally was asking you whether you agree with that.

Mr Llwyd: Yes, he probably is. From my experience, to answer the question briefly, with respect to you, Lord McNally—and I do have a great deal of respect for you—I don't think it is going to make any difference at all.

Lord McNally: I think the point on headlining is worth making. When this was announced, I thought that we got all the wrong headlines but not through our fault, because the headline implied a movement away from the primacy of the welfare of the child and that is not our intention.

Q170 Mr Llwyd: That is a very fair response, if I can say. I have one further question. With regard to the rebuttal of the presumption that we are now talking about, is it going to be problematic with, for example, unrepresented litigants, and will it lead to further fact-finding hearings?

Mr Timpson: Of course we already have unrepresented litigants who are going through similar cases where there are fact-finding hearings taking place. In that sense, there wouldn't be any change to their involvement in the case and how that may play out. In terms of the tests that the judge will go through, we listened through the consultation about strengthening the issues around safeguarding and that is why we have added in the harm test so that it is clear on the face of the Bill that that is the process the judge has to go through.

In terms of whether there will be an increase or decrease in the number of finding of fact hearings, again, that very much depends on the sorts of cases that come before the judge. We can't anticipate what they will be.

Q171 Mr Llwyd: But if there had been an impact assessment, for example, on this clause, we would have an answer, wouldn't we?

Mr Timpson: The process changed over the summer, but we are going through the pre-legislative scrutiny, which everyone would welcome. We want to listen to what this Committee has to say on the back of its work on the pre-legislative scrutiny. There is an on-going assessment of what the impact may be, but the impact assessment will be published in line with the Bill when it comes before the House in the usual way.

Q172 Mr Llwyd: But we have impact assessments on other clauses of this Bill.

Mr Timpson: We want to listen to what the Committee has to say and we are going to be bringing forward the impact assessment when we have the information necessary.

Mr Llwyd: I do have other questions, but I know that colleagues want to ask other questions on this matter so I will stop there.

Q173 Chair: I would just draw Lord McNally's attention to the fact that not at the beginning but much more recently there was a *Daily Telegraph* report that said: "Absent fathers are to be given a legal right to spend time with their children unless they are likely to cause them harm, under changes to access laws unveiled yesterday."

Lord McNally: One of the benefits of evidence sessions like this and the parliamentary process is that that will not be seen. We are hoping to get a better settlement in terms by a whole range of initiatives, but we are not moving away from the paramountcy of the interests of the child. As I say, it is certainly true that some of the warnings that have come from this Committee must be taken into account. Also, there is the fact that we have a system where children are used as weapons in growing disputes. This is not deep research, but those interventions from experienced people in the field suggest that it is far more prevalent than perhaps just a small and embittered minority.

Q174 Mr Buckland: Looking at a way forward and agreeing with the points both of you have made about the importance of language here, is not the short title to new clause 1A a problem? We are using the phrase "shared parenting" when in fact what we are talking about in the body of the clause is "parental involvement". Wouldn't it be a wise move to get rid of that phrase "shared parenting", because doesn't it lead to assumptions that "shared parenting" means "equal parenting", which then goes on to the sort of problems that we have all agreed upon?

Mr Timpson: Mr Buckland, it is an interesting and important point that you raise. I have been talking about perception, so it is only right that I deal with it in relation to the point that you make. The first thing that is important to clarify—I know, again, that this was raised at the Committee last time this was raised with Ministers—is the sense that this may be about the equality of time and that it is, somehow, going to feed into the Australian experience. That is absolutely not the case. I want to be explicit about that. This is not about dividing up time. We know that that is just nonsensical in many cases. I know that examples have been given of Members of Parliament trying to have quality of time with their children when they are away for half the week. I know that that certainly wouldn't work in my case. Yes, it is important that we knock that one on the head.

In terms of the pointers as to the language that you use, we want to make sure that we don't encourage overtly the sorts of articles that we heard the Chairman mention, which is exactly what we are trying not to do. As I said before, this is about the rights of children and making sure that we get the best deal for children. Yes, it is trying to involve both parents where it is safe to do so and it is commensurate with the welfare of the child. I am sure that Lord McNally will join me in reflecting on the point that you make. It is the purpose of the pre-legislative scrutiny to take on board the views that you are expressing and we will give it some further consideration.

Q175 Mr Buckland: I am very grateful to you. The short title is not, in law, a material part of the Bill, but it is important that the message is sent out, isn't it? Finally, on substance, concern has been expressed about the conflict in presumptions, namely, the overarching presumption about the paramountcy of the child and the welfare of the child. Mr Justice Ryder, in his remarks to this Committee yesterday, said that the draft clause could be

construed not to be a presumption but, perhaps, as an imperative clause, which would then preserve the hierarchy of the paramountcy principle. Would that be a way forward that would be attractive to you?

Mr Timpson: This clause has been drafted carefully and in conjunction with parliamentary counsel to ensure that the paramountcy principle isn't fettered in any way as a consequence of the additional elements of the Children Act that we will be bringing in. That is our intention. We will look carefully at what Mr Justice Ryder has said. He is playing an important role in the reform of the family justice courts, as we know, so he is a voice that we are going to want to take on board and take heed of. There is a legalistic element to this in making sure that the draft reflects exactly our intention. So, through this process, we are trying to ensure, as we have done in some of the changes that we have already made, that that is exactly what happens.

Lord McNally: Again, without being unctuous, the Committee is doing us a service by allowing us to bring out the fact that this is not a 50-50 proposal. It isn't a dilution of paramountcy. Today I received a study from the university of Sussex, which I have not had time to read, but the covering letter says: "Our research shows that successful contact is linked to a number of factors, including the absence of conflict and children enjoying good pre-separation relationships with their non-resident parents. If the child's pre-separation relationship with the non-resident parent was good, post-separation contact is likely to be beneficial. However, when it was poor, contact may be of little benefit to the child, and depending on other factors, may even be seriously damaging."

Chair: We have the same document.

Lord McNally: It seems to me that that is common sense. What we are trying to do is to introduce a common-sense factor into this. Again, as a layman, we were talking earlier about whether suitable parts in terms of breach might produce a more realistic approach. If there are these cases of intransigence or even what I was suggesting, where the children are being used as weapons, what we are trying to do here is to introduce into the process a more realistic approach by both parties, that will get the best—which a lot of the studies identify—of shared contact.

Q176 Chair: We do have some time problems. Can I press Mr Timpson a little on intention? I clearly understand from the evidence that you have both given that it is the intention of the Government that these clauses should change people's perception to the court process and perhaps lead them to make some different decisions themselves before going into court, but it is not the intention of the Government that court decisions should, in general, be changed as a result of these clauses becoming law. Is that correct?

Mr Timpson: Yes. The court will still be making a decision based on the paramountcy principle, as they would if there was a case with a finding of fact hearing, or if you had a case of leave to remove from the jurisdiction, where there is a whole host of other considerations and factors that the court would have to take into account above the welfare checklist. Ultimately, the decision is still for the judge to make with his or her discretion as to what is in the child's best interest based on the paramountcy principle. There is within the additional clause that we want to introduce another element of the factors that the courts have to consider when coming to that judgment. Ultimately, it will still be their judgment, as it should be, with full discretion, unfettered by anything else.

Q177 Chair: That is a statement of fact. I am trying to establish what the Government's intention is. We have agreed what two of the Government's intentions are. You have said that the Government do not know whether it will have an effect on court decisions. You have made that quite clear. You don't know and you can't anticipate. Is it the

Government's intention that court decisions should be changed by the insertion of these words into law or not?

Mr Timpson: We are not looking to change the way a judge makes a decision based on the paramountcy principle. Yes, it will be clear on the face of the Act that they will be considering the presumption rebuttal that we have been discussing. To suggest that this is going to create a huge sea change in the way that the judges come to their final decisions about what is in the child's best interests is not the intention. The intention, as I say, is to deal with the sense that there is an in-built bias towards one parent or another within the current system, to get more confidence into that system with those who come into contact with it, and that, ultimately, with that clear knowledge that that is the way the court's thinking and process works to come to a decision, parents will think more carefully about how they can resolve their differences before having to go to court and have it all played out in the way that we know it can be.

Q178 Chair: Thank you for making that clear. There are some other topics that we do need to cover in our remaining time. One is the 26-week limit. Why does the Lord Chancellor need a power to vary by regulation the 26-week period or the 8-week extension period, and should that be an affirmative resolution if he does have to have that power?

Mr Timpson: The current draft clause has, on the face of it, a 26-week limit. The purpose of that is to make it absolutely clear about the intention of the draft legislation and the message that we want to send about reducing delay. I know you have heard evidence from others about how that has been effective in some of the trial areas, particularly the tri-borough area, where they managed in 28 cases to reduce it down to round about 24 weeks on average per case. There may be cause to suggest that that 26 weeks in the future could be varied, and we want the option of being able to do so. Of course I am happy to hear the Committee's views about the validity of having 26 weeks within the primary legislation as opposed to elsewhere in any other further legislation that comes forward.

Q179 Chair: There have been a number of suggestions about the stage at which some key decisions have to be made quite early on. The Family Rights Group and Kinship Care Alliance have suggested that the pre-proceedings stage being largely unregulated results in key opportunities for children to live with their families being missed. Should there be a pre-proceedings protocol that includes provisions for the involvement and assessment of the wider family, because they could be lost in implementing the 26-week timetable?

Mr Timpson: Chairman, there is already a duty on local authorities to consider the wider family as potential carers when they take a child into care. The use of family group conferences—I know from my own experience and I am starting to go back a few years now; they are starting to build up—were becoming more and more used. When they were run well, they were very effective. When they were not run so well, obviously, they were not so effective. We have been working with the Family Rights Group. We have been providing funding to them for two years for them to try and develop the conferences and improve them. I don't believe, unless I am pointed towards it, that there is any evidence to suggest that families are not being considered in the stages of a case going through court.

The point you raised about making sure that there is more up-front work done before an application is made by a local authority is extremely important. I came across too many cases where a lot of the work and the assessment was being done during the proceedings. So the more work that is done early, the more the likelihood is that all the potential options for a child's future can be explored thoroughly before a case gets to court.

Q180 Chair: One of the things that emerged from our evidence session yesterday was the thought that, if there is to be an exception to the 26-week limit in a particular case, it might be better if that was identified right at the beginning of the process so that the process itself can be planned, rather than it being a very late decision that doesn't allow the proper timetabling of what may be necessary in a difficult case.

Mr Timpson: Tight case management is going to be absolutely key. We know, where there is tight case management, then decisions can be made earlier in the process of a case going through court. What I wouldn't want to do is to place on judges who have to decide the case themselves certain points where they have to make decisions about whether the case can be resolved justly within the 26-week time limit. It would seem to me that the case management conference would be a good point to make that sort of decision, but, also, there is no reason why it should involve additional hearings over and above the ones that would normally take place during the passage of a case through the court. Ultimately, it should be the judge making, through strong and robust case management, the decision at the right time that is commensurate with the best interests of the child.

Lord McNally: If I may just add to that, I had the opportunity earlier this week to meet a group of very senior judges—the highest in the land, as they say—and what struck me about it was that they were really up to the challenge of improving case management and judicial training to see that through. That is one of the things that gives me encouragement in this. It is not just going to be changes in the law or setting inflexible targets but it is getting a culture within family justice that puts the child at the heart of the process and where judges take their responsibilities for effective management to make sure that that is settled as justly but as speedily as possible in the interests of the child. As I said, I was very interested about the enthusiasm of the judiciary for taking this through.

Mr Timpson: Chairman, I am conscious of the time, but I want to re-emphasise the importance of training, not just of the judiciary but also social workers who will be providing assessments to the court and giving evidence. You have had evidence from the Hampshire area about what they are doing to train social workers. I know that when I was practising we held sessions for social workers to train them as to how to present their case to the court. All of that is going to be essential because, even though we have had the public law outline to try and reduce delay in the past, it has only been effective in patches. Mr Llwyd will know as well as I do that there are some courts and some judges who are very astute in ensuring that cases are managed effectively. There are others where it is slightly less so, and that can bring about unnecessary delay in cases where, as we know, the person who suffers most is the child.

Lord McNally: But the single court is going to have an impact on this and what we started off with, namely, the actual statistics so that we can compare. There may sometimes be local reasons for long-drawn-out cases, but the good thing that the statistics show up is that people have to justify why they are so out of line with what others achieve.

Q181 Jeremy Corbyn: Very briefly, I want to bring you on to the question of expert witnesses. There seems to be a bit of a disconnect here. We have heard from representatives of expert witnesses and lawyers dealing with children's cases that a judge will order an expert witness to be used or to assist a case, and the Legal Services Commission either does not fund it sufficiently or refuses to fund it at all. It would, therefore, appear that an order from the judge is undermined by an administrative process. I wondered if you had some thoughts about this.

Lord McNally: What we are trying to do is to make sure that expert witnesses are not overused. It is one of the factors, which is perhaps even wider in our society, that we always take a default position of covering our backsides by getting a consultant, expert or adviser to make the decision that is not their responsibility but the responsibility of others. It is certainly

true that we are trying to make sure, as it were, that that default position of calling on expert witnesses is used less frequently and that the social work advice and the judgment of the judge becomes much more central to the process. That is the approach that we are taking as far as expert witnesses are concerned.

Mr Timpson: Can I make a general point about experts? A vicious circle has been built up in that a judge who does not feel that they have confidence in the presentation of a case by a social worker falls back on expert evidence in the form of an independent social worker or others, in order for them to feel that they can resolve the case justly and with the information that they need to be confident in doing so. That, then, in itself makes social workers feel less confident about their role within the court process. We have reached a point now where only 7% of care cases don't have an additional expert over and above the local authority and the guardian, who, themselves, should be able to provide in more than 7% of cases the necessary evidence and assessment available to a judge for them to be able to make a permanency decision.

The tri-borough work that has been going on in London has shown that there are a number of cases where you can, justly, resolve the case without the need for a whole host of additional experts. Of course it is important that it is still always at the judge's discretion as to what evidence they require. If that means experts in the field, whether it is clinical psychology, psychiatry or whatever it may be, they must have the ability to do that.

Q182 Jeremy Corbyn: I understand your concerns about cost and unnecessary use of expert witnesses and Lord McNally's point that sometimes it is an ability to remove the decision from the person who should be making it to somebody else. I understand all that. However, to have an expert witness requires a judge's order. The judge, one assumes, doesn't willy-nilly give these orders. Therefore, surely, the Legal Services Commission is under an obligation to approve it once a court has ordered it to be the case. What we have is a situation where a judge's order is simply not carried out because the Legal Services Commission won't provide the resources.

Mr Timpson: Of course we want to avoid any unnecessary delay in the work being undertaken.

Jeremy Corbyn: I think we are all at one on that.

Mr Timpson: Where there are barriers to that happening, we need to try and resolve it. Predominantly, there is an issue that the MoJ is working with the LSC to try and resolve difficulties. I don't know the details of the progress of the work that they are doing, but it is something that needs more attention and we will look carefully at the point that you make.

Jeremy Corbyn: Thank you.

Lord McNally: For clarity, in the legislation, we are strengthening the power of the judges in their control over expert witnesses. I can say that a review of case files found experts featured in nearly 90% of care cases, and where experts are commissioned there are, on average, nearly four expert reports in each case. This is a growing tendency in our society. I will not take it wider. One of the things that I found recently in government is, when in doubt, cover yourself by getting somebody else to make the decision. We are trying to get the decision made by the experts in the case, with the judge having control, and local authorities, social workers and CAFCASS giving the right advice to the courts. Nothing that we are doing will detract from where a specialist is needed to give advice to the court, but, again, it is always useful to look at the facts, and, when you see this kind of inflation in use, then it is well worth us looking at it.

The LSC does not generally assess whether a report is necessary in a case. It only looks closely at the number of hours and the hourly rates. There may be different arrangements in relation to very high-cost cases, which are dealt with in a very different way.

In general, if permission is given, and if the solicitor in the case wants to engage an expert, as long as it is within the guideline costs, they can go ahead and do that, but they don't have carte blanche to engage any expert at any cost.

Q183 Mr Llwyd: On that very point, Lord McNally, I understand that work is being done. I urge you, please, to look again at the area, because experts have told us that the way in which they are being filtered out currently is to offer them unrealistic rates. Therefore, they are being excluded from the process in that way. They are being told, "You may do the work and we will assess how much we will pay you at the end of the day." That is not really a way to run a system. I would urge you to have another look at it because that is the evidence that we have received.

Lord McNally: As you will know, as to the evidence of the affected party, we are going to give less work to experts.

Q184 Mr Llwyd: I accept that point, Lord McNally. There is a need to filter out the unnecessary use of experts. But the problem we have currently, as my friend Mr Corbyn says, is where the judge says, "We need an expert", and the LSC says, "We will offer you peanuts"; so therefore they can't do the work. That is the way it works now.

Lord McNally: I am not sure that the description of "peanuts" would fit. One of my other responsibilities is the LSC, and one of my determinations is that the LSC will be an effective, efficient organisation. We are addressing that with a sense of urgency and I will take back the points you make.

Q185 Mr Llwyd: I am grateful for that; thank you. I will go through these questions fairly briefly because time is pressing. The Norgrove report recommended that the court should refocus on the core issues of the care plan, including contact with the birth family. The Government's response to that report accepted this recommendation, but the draft clause does not include contact with the birth family within the definition of "permanence provisions". Why doesn't the draft clause mirror the Norgrove report recommendations?

Mr Timpson: Mr Llwyd, you are quite right that it is a Family Justice Review recommendation that we have taken forward. We are trying to ensure that the judge's decision is based on ensuring that they can resolve the case justly and, by looking at the care plan, what the permanence provisions are. That doesn't prevent the judge in any case looking at any other aspect of the care plan that they think is necessary for them to do so in order to justly resolve the case. In that sense, there isn't anything to prevent them from looking at the contact arrangements. But I am happy to listen to the views of the Committee when they report back on their pre-legislative scrutiny on the point that you have specifically raised, because it is an important one and we want to make sure that we get it right.

Q186 Mr Llwyd: On a tangential point, my question is: how can a judge approve a care plan purely by scrutinising the permanence provisions, if he or she is being told that the plan will only work if other interdependent non-permanence aspects of the plan work too?

Mr Timpson: I am sorry. Can you just clarify what you mean by non-interdependent aspects of the plan? Can you give me an example of what you mean?

Mr Llwyd: You have got me there, I am afraid.

Q187 Chair: If I can give you some illustrations, for example, the issue will be whether a grandparent can manage in the situation, or whether the relationship with the mother can be maintained in those circumstances. It is all sorts of issues like that, which the judge is not supposed to be looking at if he is looking only at the permanence provisions.

Mr Timpson: To reiterate what I have said, there is nothing to prevent a judge from looking as far and as wide as they like within a case both in and beyond the care plan in order to resolve the case to their satisfaction. In my own experience, there are some cases where it is necessary for a judge to take a more forensic approach to the care plan and other relevant parts of the case because of the particular circumstances. It may be a very complex case. It may involve a multitude of siblings, for instance. The main point is that, if they feel it is necessary for them to do so, they have the complete discretion in order for that to take place.

Q188 Mr Llwyd: But, given the 26-week target, will there not be a temptation from the point of view of the judge perhaps not to look too widely in order to get the case moving?

Mr Timpson: I wouldn't want to cast aspersions on a judge trying to go through the slipstream in order to resolve the case in the way that you suggest. We have to have confidence that all our judiciary will be ensuring that at the point they make their decisions they are satisfied enough to be able to make the order that they make.

Q189 Mr Llwyd: Let me ask one final question, which I understand, so that is going to be helpful. A number of witnesses to our inquiry have raised concerns about the role of IROs—independent reviewing officers—and in particular their workloads and their position within local authorities. In light of these concerns, what assurances can you provide, please, that the quality of care plans will be maintained if the judge's scrutiny role is "refocused" on the permanence provisions of the care plan only?

Mr Timpson: The independent reviewing officers have an extremely important role in scrutinising and challenging care plans for children in care. We know that and it is, therefore, imperative that they feel that they have the necessary clout in order to carry out that role. I am anxious to make sure that they are in a position to do that and that they have the support of DCSs to effectively challenge where it is necessary to do their work. We have commissioned some work with the NCB to look at how they are performing and how we can improve and strengthen their performance. Ofsted are going to be doing a thematic review as well, and both will be reporting back to me in April of next year. On the back of that, I will be holding a round table with local government representatives, independent reviewing officers and others to see how we can ensure that the very important point that you raise is not lost in the other changes that we are making.

Q190 Chair: Before we end this session, I would like to point out that in another Committee, at the same time this morning, the Presumption of Death Bill completed its Commons Committee stage. We are very pleased because it was a proposal that this Committee developed and put forward, and we are very grateful to the Ministry of Justice for giving active support to that Bill and assisting it in its progress today.

Lord McNally: I take credit wherever I can.

Chair: Thank you very much, Lord McNally and Mr Timpson, for your help this morning.