



# Association of **Lawyers for Children**

Promoting justice for children and young people

## **Interim report of the Family Justice Review**

### **Response of the Association of Lawyers for Children 22 June 2011**

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**Name:** Association of Lawyers for Children

**Details:** The Association of Lawyers for Children (“ALC”) is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children’s law, and several hold judicial office.

The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

- (i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;
- (ii) lobbying against the diminution of such mechanisms;
- (iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;
- (iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people;
- (v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice.

The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

## INTRODUCTION

A.1 As we made clear in our press release, published 6<sup>th</sup> April 2011<sup>1</sup>, we welcomed the publication of the Family Justice Review's interim report, and made it clear that we regarded a large number of the proposals being put forward as uncontroversial, and extremely sensible. This remains the case.

A.2 We have concentrated, in our response, on those proposals where we either do not agree with the interim recommendations, or wish to set out particular reservations or concerns. We would not wish that focus to be interpreted as indicating a hostile or negative approach to the work that the Review has so far done. On the contrary, we hope it will be clear that we approve much of that is proposed, and that we aim to enter into a constructive dialogue over the summer months, and beyond, in respect of the areas of disagreement and concern.

A.3 The ALC would argue that children's rights and welfare should be a clear and identifying thread running through any proposals for reform of the Family Justice system (i.e. not just children's "interests")<sup>2</sup>. In this context, the United Nations Convention on the Rights of the Child ["UNCRC"] ought to provide a framework within which current and future policy should be determined.

A.4 This response constitutes the full response of the ALC to the consultation (subject to any further submissions we may seek to make, following an opportunity to consider the delayed proposals of the government for the reform of legal aid). We have **not** completed the on-line questionnaire, as we have a number of reservations about the format of that questionnaire. We are concerned that it is not designed to allow a nuanced response to questions which involve quite complex proposals, and that the provision of "Yes" and "No" boxes, for many of the questions, will result in a "skewing" of the data if any attempt is made to rely on those for the purposes of establishing stakeholder views on the proposals.

A.5 The entire membership of the ALC has had the opportunity to see and comment on the draft of this response.

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<sup>1</sup> Copy annexed.

<sup>2</sup> See Interim report, paragraph 3.4.

## RESPONSES TO THE SPECIFIC QUESTIONS

### Toward a Family Justice Service (Chapter 3)

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

1.1 Broadly, yes.

1.2 We do, however, have a number of concerns around the structure, governance and leadership of such an organisation, many of which are indeed flagged up in paragraphs 3.26 to 3.29 of the interim report. Our main concerns are:

- How, in practice, children and family cases are to be rescued from their present low priority within the Ministry of Justice, and subsequently safeguarded (paragraph 3.28 of the interim report);
- Issues around the appointment, and accountability of the proposed Chief Executive Officer of the Family Justice Service;
- The degree to which those who manage the service will give due respect to the need for professional front-line workers to have an appropriate degree of autonomy in exercising their professional judgement.

1.3 Another concern that we have relates to the proposal that, in due course, the Family Justice Service would take responsibility for the administration of family legal aid<sup>3</sup>. Whilst we would certainly welcome the proposal that the Family Justice Service should manage relationships with all relevant providers, including experts<sup>4</sup>, we would like to have a greater understanding about how budgets would be protected, and what lies behind, for example, the

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<sup>3</sup> Interim report, paragraph 3.87 to 3.89.

<sup>4</sup> Interim report, paragraph 3.88. The present failure of the Legal Services Commission to grapple effectively with expert fees, has resulted in a range of difficulties. These include a highly unsatisfactory arrangement whereby solicitors are effectively acting as the agents of the Commission in procuring experts' services, but without any power to bind the Commission, and, since the coming into force of the CLS(Funding)(Amendment) order 2011 (SI 2011.No.1027) on 9<sup>th</sup> May 2011, an entirely predictable difficulty in finding Independent Social Workers willing to undertake publicly funded work,

assertion that “there would be opportunities to shift money between activities, from court work to mediation for example”<sup>5</sup>.

## **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?**

2.1 The UNCRC sets out the relevant responsibilities of party states in this context. The child’s rights under the European Convention on Human Rights [“ECHR”] trump those of the adults concerned, according to established European jurisprudence. Accordingly the existing statutory framework, supplemented by the jurisprudence relating to these two international conventions, already provide a robust framework for achieving this goal. The Welsh Assembly Government has recently incorporated the UNCRC into domestic legislation<sup>6</sup> and provided that Welsh Ministers must take such steps as are appropriate to promote knowledge and understanding amongst the public (including children) of the Convention and Protocols<sup>7</sup>. We consider that, in order to make the voice of the child properly heard, the Review should recommend to Government that it provide parliamentary time to introduce similar legislation in England as soon as possible.

2.2 The most significant additional safeguards, we suggest, are:

- (i) ensuring that the basic principle within section 41 of the Children Act 1989 (namely that, in specified proceedings, a child is normally to be represented on the basis of the *tandem* model) remains in full force;
- (ii) ensuring that there is no dilution of the duties placed on children’s representatives in Part 16 of the Family Procedure Rules 2010 and Practice Direction 16A;
- (iii) ensuring that the FJS continues the work of the Family Justice Council in producing and updating proposals and Guidelines<sup>8</sup>;

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<sup>5</sup> *Ibid.*

<sup>6</sup> With effect from 1<sup>st</sup> May 2012 the Welsh ministers must have due regard to Part I of the Convention when exercising any of their functions: *Rights of Children and Young Persons (Wales) Measure 2011* section 1(2).

<sup>7</sup> *Ibid.* section 5.

<sup>8</sup> i.e. the “Guidelines for Judges Meeting Children who are subject to Family Proceedings” produced by the Family Justice Council and approved by the President of the Family Division (April 2010)

- (iv) ensuring that independent academic research is undertaken as to children and young people's experience of involvement with family justice. By this we mean research carried out according to academic standards as accepted by all university departments, not snapshot surveys, questionnaires to focus groups or consultation days<sup>9</sup>. This is important because changes to the way in which family justice practice and decisions are made should be based on research evidence which is subject to the rigours of ethical and academic review, and peer review<sup>10</sup>;
- (v) ensuring that compulsory multi-disciplinary training for all professionals involved in the family justice system is made available, on an ongoing basis, and that it becomes an essential component both of qualification to work in the system, and of continuing professional development.

2.3 There are, however, broader issues which are capable of having a significant, and indeed, crucial impact on enabling, alternatively disabling children's effective participation. These include:

- (i) the management culture of the organisation which ultimately takes responsibility for the front-line staff who currently work for CAFCASS. The development of a management culture in which the exercise of professional judgement by front line practitioners is encouraged and valued will tend to enable children's effective participation, in our view. By contrast, many of the practices which have developed within CAFCASS over recent years have had precisely the opposite effect, and have disabled children's effective participation. Some examples of this are:
  - a reluctance to permit guardians to interview children under the age of six;

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<sup>9</sup> We would not expect policy decisions to be made on the basis of, e.g. "*Children on Family Justice: A report of children's views for the Family Justice Review Panel, 2010, by the Children's Rights Director for England*". See, by contrast, the recent research commissioned by the Office of the Children's Commissioner – Brophy J (2010) *The Views of Children and Young People regarding Media Access to Family Courts*.

<sup>10</sup> In the same way as decisions to medical practice and decision making are made, for example in paediatrics and child health.

- a lack of understanding of the crucial importance of visiting a young child in its home environment (whether that be with the parent or with foster carers) and seeing a young child without its carer present;
  - A lack of understanding that even a baby needs to be seen with its carer<sup>11</sup>;
  - A failure to recognise the representational role of the guardian (the child, who is under legal disability, has a Children’s Guardian appointed for that very reason);
  - A failure to acknowledge, in its recruitment and retention policies, how important it is, in making that representation effective, that Children’s Guardians have the required depth of experience and training;
  - A failure to acknowledge the importance of seeing a child both as early on as possible, and over a course of visits in order to get to know the child, and understand what may be changing for the child.
- (ii) maintaining the quality of lawyers in family proceedings generally, and lawyers representing the child, in particular. Encouraging lawyers to qualify on to relevant panels, such as the Law Society’s *Children Panel* or one of Resolution panels will likewise tend to enable children’s effective participation. Continuing to move in the direction of fixed fees for this work is bound, in our view, to have a detrimental effect.

2.4 We also think it is important, if children’s voices, wishes and feelings are to be properly heard, that the Family Justice Service has in post someone at a very senior level who will take responsibility for liaising with the many different organisations who have an interest in enabling children’s voices, wishes and feelings to be heard. These would need to include:

- (i) statutory bodies such as the Office of the Children’s Commissioner;
- (ii) organisations within the voluntary sector which are concerned with children’s rights;
- (iii) professional representative bodies (such as NAGALRO and, indeed, ourselves) together with representative IROs ;

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<sup>11</sup> E.g. a 2009 case in which a baby who was identified at a very early stage (which of course was important) as having an autistic spectrum disorder, because the guardian visited the baby and identified signs of development delay which had eluded other professionals, and pushed for appropriate assessment.

- (iv) major children's charities;
- (v) university departments engaged in pertinent research.

2.5 The creation of the Family Justice Service does, in our view, provide an excellent opportunity to appoint a person at a senior level within the organisation to ensure that children's rights are indeed at the heart of the new service, and to play a key role in disseminating research and good practice through multidisciplinary training.

2.6 We are unclear at present as to how the Review anticipates that children who are not involved in court proceedings are to be given information and support. There is only a brief reference to this<sup>12</sup>: "The hub should include support and information for children and young people, to help them through this difficult time". We would like to know more about what is proposed, and, in particular, whether it is intended that there should be a helpline for children. The services that the hub provides for children will be particularly important, given that the great majority of children whose parents separate will not become involved in a court case where specific consideration will be given as to how their voice is to be heard.

2.7 A commitment to providing *support* will, of course, also raise questions of considerable complexity and interest regarding how the hub is to deal with children who want to communicate information and have some input themselves, indeed "have a voice" in what is happening to and around them. Will it be possible for their comments and concerns to be married up with information submitted by a parent? How are any comments and concerns to reach the triage mediator dealing with the family, or any mediator subsequently involved? How are any comments and concerns which raise child protection issues to be dealt with? Will there be a general principle of confidentiality? These are very big questions to which we certainly do not, at this stage, suggest any answers. We do think, however, that they are issues which those who plan the proposed hub will inevitably have to grapple with.

### **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?**

3.1 Broadly, yes.

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<sup>12</sup> Paragraph 5.115 of the Interim Report.



- 3.2 We agree that they should be *informed* about the available options.
- 3.3 Which option or options are actually used is something that the child needs to discuss, at the times which allow the child's views to have an impact on decision making, with the person appointed to represent their interests. Some options, such as writing a letter to the court about their wishes and feelings are relatively straightforward. Others, such as seeing the judge, are recognised as needing more careful planning and management<sup>13</sup>.
- 3.4 With older children who have the capacity to, and are instructing their solicitor direct, their participation in proceedings is evidently a matter for discussion with their solicitor and agreement with the court.
- 3.5 We restate the need for these issues to be left to the professional judgement of those working with children. This, of course, is not to diminish the importance of such people being equipped properly to represent children by way of multi-disciplinary training, continuing professional development and good supervision.
- 3.6 In respect of those children who are not involved in court proceedings, we repeat the observations we made at paragraphs 2.6 and 2.7.

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

- 4.1 Yes. This is long overdue<sup>14</sup>.
- 4.2 It would, however, be very important to ensure that access to family justice is not compromised by a programme of court closures, as part of a process of "rationalisation".

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<sup>13</sup> See, e.g. the current guidance: *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (April 2010) Produced by the Family Justice Council and approved by the President of the Family Division.

<sup>14</sup> The *Report of the committee on One-parent Families*, (Cmnd. 5629, 1974) is generally thought of as the first serious proposal for introduction of a distinct family court, although it was referred to over 45 years ago in a government White Paper: *The Child, the Family and the Young Offender* (Cmnd., 2742, 1965).

We note what is said at paragraph 3.161 as to the reduction of the family courts estate. Travel times for families across metropolitan areas also can currently be very long<sup>15</sup>.

4.3 We note also the reference at paragraph 3.160 to proposals put forward over 25 years ago by The Law Society that “proceedings should be more informal and take place in public buildings such as schools and town halls”. These proposals pre-date the Children Act 1989 and there are considerable implications in terms both of privacy, and security which lead us to question their current practicability.

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

Yes, but the effectiveness of these measures will be significantly compromised unless other changes are also made, e.g.:

- Continuity and improved input from the Guardian;
- Improvements in social work practice (i.e. the Munro reforms);
- Compliance by all parties, particularly local authorities, with the PLO;
- Attention to the current issues around the supply of expert witnesses.

**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?**

6.1 We do not agree that they should be introduced into primary legislation.

6.2 Such principles evolve in the light of practice and experience, as one can see from studying the history of the development of the current Public Law Outline, Private Law Programme, and Practice Direction on the instruction of experts in family proceedings<sup>16</sup>.

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<sup>15</sup> The Review acknowledges the difficulties in rural areas, but MoJ tends to underestimate travel times. This was seen in the recent proposals for closure of a number of courts.

<sup>16</sup> See e.g. in the context of instructions to experts: *Re J* [1990] FLR 193, *The Ikarian Reefer* [1993] 2 Lloyd’s rep 68, Appendix C to the *Judicial Case Management Protocol* (2003), *Protocol for the instruction of experts to give evidence in civil claims* (Civil Justice Council, June 2005), *GMC v Meadow* [2006] EWCA Civ 1390.

6.3 We see no reason why they should not continue to be set out in Practice Directions annexed to relevant rules in the Family Procedure Rules, which can be updated as required from time to time. They can then be accessed readily by all, as part of the electronic information about the Family Justice system which is publicly available.

6.4 To legislate in this way would, we think, result in wholly unacceptable cost, delay and satellite litigation, and would be extremely cumbersome.

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

7.1 We have already referred to the importance of multi-disciplinary training for all professionals involved in family justice<sup>17</sup> and the need to allow professionals to exercise professional judgement<sup>18</sup>. As an organisation, we have always had a commitment to multi-disciplinary training and membership, and both ourselves, the Family Justice Council and Resolution have considerable experience of delivering such training which we hope that the proposed Family Justice Service will be able to build on. This training needs to include those professionals who do not routinely work directly with children. This includes judges (at all levels), who need to feel at ease in speaking to children, and so that they can help children appearing before them to feel at ease in a court setting.

7.2 It is also, in our view, extremely important that people working within family justice are appropriately qualified and experienced. We are concerned at the use of staff and students in carrying out tasks for which they are, in effect, out of their depth. There is a place for such people to carry out supporting roles, such as making arrangements for and facilitating contact, but they should not be interviewing children, or put in a position where they would be subjected to cross-examination unless they are properly qualified to do so.

7.3 The court is capable of being a facilitator of change, where the local authority has not been able, for whatever reason, to achieve this with the families they have been working with. All those who work within family justice need to respect that, and have respect for the role of the

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<sup>17</sup> Above, paragraph 2.2 (v)

<sup>18</sup> Above, paragraph 2.3 (i)

other professionals involved, and accept that this work is being done for the benefit of the children involved. In the current policy debate, our perception is that, at senior level<sup>19</sup>, there is a very negative view of family courts and the legal process as being part of a common endeavour to protect children, achieve change in families, and good outcomes for the children involved. This is not a view, in the experience of our members, held widely by front-line social workers.

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

8.1 We are strongly supportive of the Review's recommendation that charges to local authorities for public law applications and to CAFCASS for police checks should be removed<sup>20</sup>.

8.2 We also support the recommendation that the Family Justice Service should be responsible for contact support services. In taking on this role, it will need to evaluate and respond to the need for *supervised* contact services, the provision for which has always been patchy and underfunded, and which is now increasingly difficult to access.

8.3 We support better use of available technology, but would make the point that formal hearings, with the presence of parties, may be necessary for children's effective participation, and where there are litigants in person.

8.4 A certain level of formality does have a proper purpose in family justice. We have no quarrel with the proposition that places where family justice is administered need to be family friendly, but the courtroom where these important decisions are made, needs to retain a proper degree of formality.

**Public law (Chapter 4)**

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

9.1 We profoundly disagree with these proposals.

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<sup>19</sup> See, e.g. the submission to the Review of the Association of Directors of Children's Services.

<sup>20</sup> Executive summary, paragraph 36.

9.2 We refer to the analysis of this proposal, set out in the annexed article which will appear in *Family Law* for July 2011<sup>21</sup>, which is formally endorsed by the Association, and which sets out our reasoning in detail. In essence, we are of the view that these proposals do not take account of the true state of the law on this issue, which is clearly set out in the 2002 judgment of the House of Lords, *Re S(Minors)(Care order: implementation of care plan);Re W (Care orders: adequacy of care plan)*<sup>22</sup>. The judgment of Lord Nicholls includes a careful analysis of the history and nature of the difficulties, and sets out fully how a court needs to approach this issue in the interests of children. The interim report does not, in our view, take account of this analysis at all, or begin to explain why it should now be abandoned<sup>23</sup>. No one, we think, who has read the Munro report, can regard the condition of social work today as being substantially better than it was in 2002. Nor, at this juncture, can the system have faith in the ability of Independent Reviewing Officers to make good those deficits, given the current system and culture within which they operate<sup>24</sup>. We do not shrink from describing these proposals as misconceived and wholly contrary to the interests of children.

9.3 We would add to what is said in that article, about the inappropriate consequences of removing the ability of a court to look at certain categories of issue<sup>25</sup>, by providing the following case studies. These have been provided by our membership, in order to demonstrate the practical consequences of such proposals:

#### **No need to consider whether residential or foster care is planned**

This can be a critical issue for the child's future welfare. There can be differences of professional opinion which are simply not properly explored by the local authority, and which are only resolved through the intervention of the court.

*Example:*

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<sup>21</sup> We are very grateful to the Editor of *Family Law* for permission to reproduce this material in our response.

<sup>22</sup> [2002] 1 FLR 836, *per* Lord Nicholls, in paragraphs 89 to 102.

<sup>23</sup> In paragraph 4.159 of the interim report the Review Panel observe, of the question of how much detail a court requires "is not an easy line to draw". Lord Nicholls, at paragraph 100 of his judgment puts it this way: "Cases vary so widely that it is impossible to be more precise about the test to be applied by a court when deciding whether to continue interim relief rather than proceed to make a care order."

<sup>24</sup> See paragraph 16.3 below.

<sup>25</sup> Interim report, paragraph 4.162.

*A young boy, aged 8, was at risk of becoming a sexual abuser. Two foster care placements had broken down and he had made an accusation of buggery against the child of one of those carers. No local school could accommodate him due to his sexualised behaviour. The care plan remained one of foster care, despite the advice of the Child and Adolescent Psychiatrist involved in the case. The child's guardian and solicitor were able to use the court process to ensure that this plan was not approved and to persuade the local authority to explore, instead, placement at a therapeutic residential unit. The local authority changed its plan. The boy is thriving in that placement and has hopefully turned a corner as a result.*

### **No need to consider plans for sibling placement**

(i) What if, as frequently happens, siblings who need to be taken into care as a matter of urgency are placed in different foster homes on an emergency basis, but not moved promptly to a foster home where they can all be together<sup>26</sup>?

*Example :*

*In 2009 three children aged between 7 and 10 were removed from their mother's care early in care proceedings because of a perceived deterioration in their circumstances, and placed in two different foster homes shortly before Christmas. They had never been separated from each other. The interim care plan provided for them to be reunited when a suitable placement could be found. They were not placed back together again until May 2010, i.e. six months later. The local authority's explanations as to its planning processes and actions taken were confusing and contradictory. It took two court orders requiring an update and explanation from senior management, and the threat of a personal attendance at court by the Head of Services before this was resolved.*

Is the judge to be advised that such flagrant disregard of the interests of the child, and the local authority's duties are of no concern to the court? Where does that leave the "Timetable for the child"?

(ii) What happens if siblings still remain apart at the time when the court is ready to conclude a case?

*Example :*

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<sup>26</sup> Under section 23(7)(b) of the Children Act 1989 local authorities have a duty to secure (so far as is reasonably practicable) that where the authority are also providing accommodation for a child's sibling they are accommodated together.

*In 2008 4 boys aged between 8 and 12 were removed from their parents' care under police protection orders and soon after a parent signed a voluntary accommodation agreement. They were placed in two separate foster homes. The children had never been separated from each other, and, whilst there were the usual sibling rivalries, they consistently maintained their wish to be placed together. One of the carers indicated within a few months that she was willing to provide long term care for all four children. Care proceedings were not commenced for 14 months. Eight months into proceedings the boys had still not been placed together. They were not placed until shortly before final hearing. It was evident to all parties that the court would not agree to let go of the case until this had been achieved.*

Against such a background, is it surprising that a court and the children's representatives are unwilling to accept at face value a statement of intent to reunite children? There is a real danger of drift. What has become, in such circumstances, of the "Timetable for the child" and what attention would a court be paying to the child's article 6 and article 8 rights if it released a case without such a crucial step being achieved?

### **No need to consider the therapeutic support for the child**

What happens if the unchallenged expert opinion before a court is that, with appropriate therapeutic support for a child (with parallel explanatory work being done with the parent) a child can remain with its parent?

It is not uncommon, particularly in the type of case where care proceedings are coupled with a secure accommodation application, for a case to turn on a child's particular therapeutic needs. Such cases inevitably require expensive and tailor-made packages of support, in which a specialist placement needs to be identified and the relevant support plan to discussed, agreed and funded. Both the funding and provision for these arrangements require tripartite input from Social Services, Health and Education authorities. These arrangements, both because of their complexity and because they are very expensive, would be most unlikely to be put in place if they were left to a local authority to implement under a final care order. It would be difficult to see where an Independent Reviewing Officer would begin, in such circumstances, to put together the kind of plan that can be achieved within proceeding. The child's representatives, whilst the matter is before a court, always have the option to seek, on behalf of the child, a judicial review of the relevant authorities' decisions not to make what appears to be appropriate provision for the child. The reason why these issues are resolved within the care proceedings is clearly because all relevant authorities are on notice that if they do not co-operate to formulate an appropriate

plan, the child's legal team are "in place". This would not, of course be the situation if the matter were left to the local authority to resolve, with oversight from an Independent Reviewing Officer.

In such cases there is generally no issue about the threshold. Frequently it is agreed not to be in issue at all, in the sense that it is manifestly clear that the child is beyond control. The care plan is everything.

*Example :*

*In 2005, a thirteen year old boy required a specialist therapeutic placement. He had experienced a large number of moves. The proceedings were case managed by an experienced High Court Judge. Threshold was not in issue. The child was evidently beyond control. A series of meetings proved necessary, at Director level in order to cut through the organisational and bureaucratic difficulties faced by the local authority social worker. This process took, even then, approximately six months to achieve. An appropriate placement and package of support was identified, and a care order made.*

It is all very well to talk about the "The Child's voice" and the need for the Family Justice Service to ensure that the interests of children and young people are at its heart<sup>27</sup>, but we consider that these types of case highlight very starkly the contradiction between such an aspiration and the plans which are being proposed.

### **No need to consider health and educational provision for the child**

#### **Health**

Where children have complex medical needs, often involving a number of professionals, it is frequently the case that a proper evaluation only takes place as a result of court intervention, whether that is by the route of a court directed professionals meeting, chaired by the guardian and minuted by the child's solicitor, or through the hearing of evidence.

*Example 1:*

*A five year old boy had complex medical needs which included respiratory problems and other issues requiring constant care and attention. His mother had another child to look after, and was not coping. The child had been temporarily in hospital, but was ready for discharge. There was a relative who had provided respite care, but the local authority did not wish to place the*

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<sup>27</sup> Interim Report, paragraph 3.4



*child with her and started care proceedings, with a plan for the child to be discharged from hospital to foster carers. The matter proceeded swiftly to the High Court, where the Judge heard evidence from the medical professionals and relative. He did not approve the care plan. The local authority, with the benefit of having heard the evidence and the judge's reasoning, immediately revised their position and placed the boy with his relative, where he remains.*

*Example 2:*

*A teenage girl was at serious risk of death, due to her inability to recognise and self treat a medical condition. After over a year in secure psychiatric and secure accommodation, she was transferred to an open unit. There was no question that a care order should be made, but communication between the professionals involved with her was poor, particularly between the unit and the medical team. The judge specifically adjourned the proceedings to enable the guardian to hold a meeting to bring together all the professionals, iron out their differences and find a good method of communication which could save the girl's life. This should, of course, have happened before, but it had not. The guardian acted as an "independent chair" helping the professionals involved to exchange quite robustly held views, and to make a fresh and constructive start.*

## **Education**

(i) Clearly the question of whether mainstream school A, or mainstream school B two miles down the road is the best for a particular child is unlikely to exercise a court dealing with care proceedings, as opposed to a private law dispute between parents who have different approaches to educating their child. But education issues do become significant when dealing with children with special needs, because sorting out the right provision for a child can tip the balance and make all the difference between that child remaining in the care of its parent, or coming into permanent public care. In other words, a decision about where the child should live cannot be made until the educational provision issue is sorted out.

*Example:*

*In March 2007 a young teenage child who had Special Educational Needs and spent part of the week at a local authority special school and part at home was removed from the care of her single parent, and from her younger sibling, because of an allegation of over-chastisement. The local authority's plan was permanent care outside the family. A psychological assessment of the child concluded that it was in the child's interests to remain with her mother and sibling, and*

*that what was required to make this work was a package which included modifying the educational provision for the child. The details of a practical plan to facilitate this were thrashed out in two successive, court directed, professionals meetings including the school. The child returned to (and remains in) the care of her parent. In March 2008, the local authority withdrew its application. It was unnecessary to embark on the process of deciding whether the threshold had been crossed. That was not the real issue, and would have resolved nothing.*

(ii) Another issue, frequently encountered in terms of educational provision, relates to the local authority's exercise of its parental rights for children in its interim care who are in their last year of primary education. This is a crucial time in terms of the child's education and in terms of the Timetable for the child, but, unfortunately, our members frequently encounter situations where the local authority is either dilatory in making arrangements or fails to apply its mind, as parent, to what type of school is best suited to the individual child.

*Example:*

*A child had been in long term foster care in one local authority A and, in preparation for his transition to secondary school, authority A began an assessment of his special needs. His placement broke down, he moved to local authority B, and his assessment did not continue. He went to secondary school without that assessment having taken place. Care proceedings commenced. That school was unable to manage his needs. His intended new long term placement was far away, and it was imperative that he had a proper assessment and support in place in good time for starting his new school. Nothing was being done within local authority B to progress that assessment. The Judge ordered B's education authority to indicate to the court whether it would assess, and if not, why not. The authority complied, did the assessment and the child had his statement in time for the new school year. Without that intervention by the court, this would not have happened, with potentially highly disruptive and damaging consequences.*

### **No need to consider contingency planning**

Care plans can appear comprehensive and consistent, when in practice the contingency element, if implemented, would result in a vastly different outcome for the child.

*Example:*

*In 2011 a baby girl of 16 months had spent the whole of her life in foster care, her mother being unable to offer care and her father being unidentified. There were no other suitable family*

*members. The foster carers wished to adopt her, but had to be assessed as suitable and approved as a match. The Local Authority initially proposed to do this after conclusion of the proceedings and sought a final care order with a care plan of adoption, either with the foster carers if approved or with other suitable adopters if not. The Guardian's clear recommendation was that adoption by the foster carers was in the best interests of the child, but that it was imperative for her welfare that she remain in their care (for example under a special guardianship order), even if they were not approved. The court agreed with the Guardian and delayed the final hearing until after approval by the Local authority of the foster carers as adopters. The risk to the child's welfare had of course been that if the foster carers were not approved the child would then be moved from the only carers she had ever known. Thus a care plan which, on its face, reflected the agreed views of the Local authority and Guardian did not do so in its contingency planning. If implemented it could have resulted in an outcome for the child that in the Guardian's view was damaging to her welfare.*

9.4 We are also very concerned about the limits which the interim report proposes on the court involvement with contact<sup>28</sup>. Contact is an essential component of a care plan, because it is vitally important for the child. Legislation envisages that it is considered by a court immediately a child is removed from parental care<sup>29</sup>. At the First Appointment in care proceedings, the court will scrutinise the care plan<sup>30</sup>, and all parties and the court will expect that to include as precise details as possible of the contact arrangements with parents and other family members who are important to the child. These arrangements will be monitored by all parties, the court and the looked after children's reviews, throughout the proceedings. By the time that a final care plan is prepared, there will have been an established pattern of contact with significant people in the child's life. In terms of future contact, where a child is not going to be returned to the parents' care, it is important for all parties, including the children, to have a clear picture of what will change, and what the proposals are. Of course they are not written in stone, and the review process may decide that arrangements need to be modified, but it is difficult to see how any party could be satisfied with a plan which baldly states that contact will be "regular" or "limited". These terms are very imprecise. Monthly contact might be considered by different people to be regular, or limited. Contact, whether regular or limited, might be for one hour at a

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<sup>28</sup> Paragraph 4.161

<sup>29</sup> See, e.g. section 44(13) of the Children Act 1989, where an emergency protection order is granted,

<sup>30</sup> Paragraph 12.3(5) of the Public Law Outline.

social services office, or for five hours outside, based on some activity. The Guardian will have a good idea of what suits the child. The court needs to be told what the plan is, and whether it is appropriate for the child's needs. Another important point to make is that, although this is a very important issue, it is generally capable of being resolved by discussion between the parties and their legal representatives. It is unusual for a court to have to spend time resolving such issues. Frequently amendments are made, either at the Issues Resolution Hearing or Final Hearing. This does not hold matters up. The amended arrangements can be approved there and then by the judge, along with any of the other parts of the care plan that need to be clarified, and a direction made that the local authority file and serve the approved plan, incorporating the amendments. The local authority is not bound by these arrangements, in the absence of a contact order, but it does provide a clear starting point both for the family members concerned, and the chair of the Looked After Review.

9.5 Another concern we have is the potential for the proposed “re-focussing” of the court's role, and consequential division of responsibilities between the court and the local authority to be applied to the court's duty to consider interim care plans (i.e. throughout the life of care proceedings). We see serious issues here, not only in terms of the article 6 and article 8 rights of the child (and other parties) but also in terms of whether it can then be meaningful at all to speak of the importance of the “Timetable for the Child”. We refer to the examples given at paragraph 9.3 by way of illustration.

9.6 Accordingly, we do not shrink from describing these proposals as misconceived, and highly damaging to the rights and welfare of the very children that care proceedings are intended to protect. To legislate in this way, in order to overrule the clear principles set out by the House of Lords in 2002, would mark the triumph of wishful thinking over thirty years of practical experience.

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

10.1 We do not think that a six-month time limit is realistic at this point in time, since we do not agree with the proposals referred to at question 9.

10.2 Further, we do not think it is practicable to include specific exceptions to a time limit in legislation. We doubt that these could be drafted meaningfully in such a way as to cover the myriad reasons why particular proceedings take longer than anticipated. They would need to include (all these are examples from actual cases, they are not hypothetical):

- Discounting the period of time during which a parent disengaged from proceedings (the implications of not taking this into account are obvious);
- Discounting the period of time before a litigation friend was appointed for a parent under disability;
- Discounting the time wasted on a case in which the parent has concealed their true identity, thus rendering most of previous assessment work useless;
- Where a father only emerges, or the issue of paternity arises, during the course of proceedings, discounting the period of time before paternity testing establishes that they are indeed the father;
- Discounting the period of time before a relative carer emerges, in those cases where such carer does not put themselves forward, or is not considered, until such time as the parents have been ruled out.

Our suspicion is that only a small percentage of cases would *not* be affected by whatever wording was ultimately regarded as being necessary to ensure that justice was done in particular cases. Alternatively, there would have to be a catch-all provision, the net effect of which would be to make the time limit discretionary, and not mandatory.

10.3 Furthermore, the interim report observes<sup>31</sup> that “there would need to be significant system change of the type outlined in chapter three if this proposal were to be in any way feasible.” Common sense surely dictates that we need to have the system changes in place, and shown to be working, before such a potentially drastic proposal as a guillotine on legal proceedings is considered, let alone brought into statute law<sup>32</sup>.

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<sup>31</sup> Second bullet point to paragraph 4.179

<sup>32</sup> In criminal proceedings, custody time limits (i.e. the length of time a person could be held on remand pending trial) have been in force for over 20 years, having been introduced by section 22 of the Prosecution of Offences Act 1985 and Prosecution of Offences (Custody Time Limits) Regulations 1987. Being kept in custody prior to conviction constitutes such a gross and obvious infringement of an individual rights as readily to justify such limits. These time limits do not directly affect a prosecution, only the status of the accused. Here, however, it is proposed

10.4 We consider that the introduction of a family court with dedicated family judges, continuity of tribunal and stronger case management, together with the continuation of the Public Law Outline and current initiatives on early identification and assessment of family members and control of experts, will of themselves achieve considerable reductions in the average length of cases, and so address the mischief which these proposals seek to deal with.

10.5 However, there will always be a minority of cases where situations and plans change, and where the child's interests require that further avenues are explored within the proceedings, before control is passed to the local authority, the parent or a relative as the case may be, as to which we refer to the annexed article referred to at paragraph 9.2 above.

10.6 Furthermore, there are types of case which routinely and necessarily take more than six months for the question of whether rehabilitation to parents is an option to be answered – e.g. the type of case dealt by the *Family Drug and Alcohol Court*, as to which the Review reports in positive terms<sup>33</sup>.

10.7 The artificiality of a six month time limit is reinforced when one considers that, in a large proportion of cases, time working with a family has started to run many years before proceedings are actually issued.

**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?**

11.1 We have absolutely no quarrel with the observations at paragraph 4.192. It seems to us to be a matter of common sense that detailed criteria need to be developed, maintained in the sense of being updated, and disseminated to all concerned.

11.2 However, we think it is important to recognise that the *Timetable for the Child* occupies a page and a half of the current, April 2010 Public Law Outline, right at the start, immediately

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to impose a requirement that a decision be made within 6 months, failing which an application for a care order is to be dismissed. Where are the interests of the child left by such a proposal?

<sup>33</sup> Paragraphs 4.286 to 4.290.

after the statement of the main principles underlying court case management<sup>34</sup>. It should accordingly already be at the heart of judicial case management. We agree that it ought to be, and remain at the heart.

11.3 Since it is already the court's obligation to manage cases in accordance with those principles, we are unclear as to the benefit to be obtained by legislating to impose "a stronger obligation on the court"<sup>35</sup>. The problem, as the interim report states elsewhere<sup>36</sup> lies in the need for a culture change, and the fact that the necessary culture change "has not been fully realised". In our view the system changes proposed by the Review, and the specific proposals on case management, will be sufficient to effect appropriate changes in perception about the significance of the *Timetable for the Child*.

11.4 So far as placing "corresponding obligations on other parties to respect the *Timetable*" is concerned, it is not clear to us what sort of acts or omissions impact on the *Timetable for the Child*, as opposed to *the court's case management timetable*, and what sanctions are proposed.

11.5 We can see some merit in providing greater clarity as to the duty on parties' representatives to assist with keeping *the court's case management timetable* on track, for instance by tightening the wording of paragraph 5.6 of the Public Law Outline so as to include a reference to the parties' representatives, as well as the parties, as being under a duty to monitor compliance with the court's directions and to inform the court of any failure to comply with directions or any other delay in the proceedings<sup>37</sup>.

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<sup>34</sup> Paragraphs 3.2 to 3.9 on pages 2 to 4.

<sup>35</sup> Paragraph 4.194 of the interim report.

<sup>36</sup> Paragraph 4.213 of the interim report.

<sup>37</sup> A potential difficulty is the extent to which, at present, professional conduct rules inhibit solicitors giving what would be regarded, objectively speaking, as reasonable co-operation to the court where a parent e.g. is clearly dragging their feet. Although solicitors and others appearing as advocates frequently inform the court, when put on the spot by a judge as to why a direction has not been complied with, about when their client last gave them instructions, or the difficulty they have had in obtaining instructions from their client, what the client's movements have been and where they are now living, in providing such information without the consent of the client the solicitor is acting in breach of rule 4.01 of the Solicitor's Code of Conduct. In practice, this is unlikely to have any consequences, but where the client evidently has an unusual or difficult personality, the risk of a complaint in such circumstances is certainly not fanciful. In the context of criminal proceedings, rule 1.2 of the Criminal Procedure Rules 2010 goes some way (when read in conjunction with a Law Society Practice Note) to resolve the tension between rule 4.01 and a solicitor's duty to the court, in that it specifically provides that:

(1) Each participant, in the conduct of each case, must—

11.6 It is clear, however that with resources stretched as they presently are in all parts of the system, there is little hope of improving focus on the *Timetable for the child* unless there are substantial improvements across the system. Our members are constantly encountering situations where a proposal to focus on a particular child’s timetable is met by the argument that, if this is done, another child’s timetable will slip back e.g. because there will not be time to prepare a statement, or a visit to another child will need to be cancelled. This is the reality on the ground at present.

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

Yes.

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

13.1 We are not convinced that there is a need for “judges to be given clearer powers to enable them to refuse assessments”<sup>38</sup> and note there is no reference in the interim report to the Guidance, issued in December 2010 by the President of the Family Division, as to applications for additional assessments or for expert reports, and applications under section 38(6) of the Children Act. We consider the relevant criteria to be adequately set out in the Children Act itself, case law and Guidance issued from time to time.

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- (a) prepare and conduct the case in accordance with the overriding objective;
  - (b) comply with these Rules, practice directions and directions made by the court; and
  - (c) at once inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by these Rules, any practice direction or any direction of the court. A failure is significant if it might hinder the court in furthering the overriding objective.

**(2) Anyone involved in any way with a criminal case is a participant in its conduct for the purposes of this rule. (our emphasis)**

This goes rather further than the PLO as presently drafted, and rule 12.24 of the Family Procedure Rules 2010.

<sup>38</sup> Paragraph 4.227 of the interim report.



13.2 We are puzzled by the proposal that revision of the current legislation “may involve taking into account evidence available from previous proceedings”<sup>39</sup> Where proceedings have occurred during the recent past it is standard to agree a direction that material evidence from the old proceedings is to stand as evidence in the new proceedings. Even where the previous proceedings took place a long time ago, thought will always be given as to whether there is anything material such as a psychological report, or findings of fact which are relevant to the new situation. What weight is to be attached to the old material is of course a matter for the court. But if, say, a psychologist reported two years ago on a parent, it is likely to be a very simple instruction that goes out this time round.<sup>40</sup> People do turn their lives round unexpectedly, and we would be very opposed to any change which fettered the right of an adult, in fresh proceedings, to demonstrate that they had changed. Indeed such a provision could hardly be HRA compliant.

13.3 We are not entirely clear as to the suggestion<sup>41</sup> that the relevant rules should reflect that “Independent Social Workers should only be employed to provide new information to the court, not as a way of replacing the assessments that should have been submitted by the social worker or the guardian.” Firstly, guardians do not provide assessments. Secondly, we are unclear as to how the Review intends to approach dealing with a social work assessment which is clearly inadequate. Take e.g. this typical scenario – the allocated social worker carries out a brief screening assessment of a grandmother, the conclusion of which is that she would be unsuitable. On this basis the local authority decline to carry out a full assessment. The Guardian points out that the assessment is not adequate, in that it has not dealt properly with certain issues, and has not taken into account certain factors. The Judge considers that those criticisms are valid, and that the screening assessment cannot be considered as fair and balanced. However, the Local Authority have their plan, and do not wish to carry out any further assessment. What does the Review panel envisage happening at that point?

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<sup>39</sup> Paragraph 4.227 of the interim report.

<sup>40</sup> i.e. “has this person changed? Have they dealt with the steps which, in your opinion, were necessary two years ago?”

<sup>41</sup> Paragraph 4.228 of the interim report.

13.4 We raised this issue and specific example at an informal meeting with Review Panel members in May 2011<sup>42</sup>. The way forward suggested by members of the Review Panel was that the court should be given powers to require the local authority to carry out full assessments in accordance with current good practice standards<sup>43</sup>, and to direct that the allocated social worker make good, via a supplemental assessment, any perceived deficiencies. There are, however, two problems associated with such an approach. The two problems are interrelated.

13.5 The first is a matter of perceived fairness – a parent/relative who appears to have been poorly treated in terms of preliminary assessment may well lack confidence in the allocated social worker’s objectivity as a result, and have little more confidence in the fuller assessment directed to be carried out by the court in accordance with this proposal. We accept that, in such circumstances, further *independent* assessment may well be regarded by the Family Justice Review as a luxury that can be ill afforded in the current economic climate. However, it is necessary to look also at the local authority’s current commissioning arrangements in order to understand the position fully.

13.6 The failure in the first place to carry out a proper assessment is much more likely to have been due to pressure of work and time constraints than to a lack of competence on the part of the allocated social worker. This means that s/he is unlikely to have time to do the job thoroughly, even when directed to do so by the court, as is proposed. As workloads and pressures currently stand, social services departments are likely to respond to such requests by sub-contracting the task to an Independent Social Worker<sup>44</sup>. So, if this work is to be done by an Independent Social Worker in any event, what is the mischief in allowing that piece of work to be done by way of joint instruction of the parties? The cost is likely to be the same.<sup>45</sup> The parent or relative, under a joint instruction system, will not be in a position to raise the objections referred to at paragraph 13.5.

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<sup>42</sup> 5<sup>th</sup> May 2011, 2.00 pm session with representatives from ALC, FLBA, Resolution, and The Law Society.

<sup>43</sup> i.e. F2 Family and Friends assessment.

<sup>44</sup> To whom Special Guardianship assessments, and kinship care assessments which the local authority decide to undertake (where the preliminary screening assessment is positive) are already sub-contracted in what appear to be the great majority of cases.

<sup>45</sup> If it is a question of budgets, then it should be made clear where the financial responsibility for such court directed further assessment is to fall.

13.7 Issues relating to the quality of such assessments will inevitably arise from time to time, whether they are assessments commissioned by the local authority under its own commissioning arrangements, or by way of joint instruction. But that is a different matter.

13.8 We are quite content with the proposition that the judge should both *see and approve* letters of instruction, but would strongly disagree with the proposition here advanced that a judge should *draft* such letters. Much of the content of a letter of instruction to experts is concerned with detailed issues which relate to arrangements for payment of the expert fees, which are not matters which judges generally have any experience in dealing with. They need to be drafted by the solicitors involved. Other content concerns the background to the case, some of which may be very recent. A judge would be very hard pressed to summarise the background accurately at this stage of proceedings. Preparing these letters is time consuming, and we cannot see how it could be regarded as a proper or constructive use of judicial time. It would cut down the judge's available time in court, and would lead to delay generally. At the heart of the letter of instructions lies the question or questions which the expert is being asked to address. Here we agree that, as part of judicial case management, the judge has the role of ensuring that the questions asked are relevant, concise, and cover all the issues which the court will require assistance with, from that expert. But this does not mean the judge has to do the drafting. Again, this is something best left to the parties' solicitors, with the role of the judge being to scrutinise and, if necessary, amend the draft<sup>46</sup>.

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

14.1. In the recently published Family Procedure Rules 2010, the "overriding objective" is stated as being to enable the court to deal with cases *justly*, having regard to any welfare issues involved<sup>47</sup>. The term "justly" is broken down further in the next part of the rule, and includes "dealing with the case in ways which are proportionate to the nature,

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<sup>46</sup> As, indeed, many judges routinely do at present.

<sup>47</sup> Rule 1.1 (1) of the Family Procedure Rules 2010.

importance and complexity of the issues<sup>48</sup>”, but there is no attempt to place a gloss on the meaning of “proportionate”.

14.2 What requires to be done by a guardian in a particular case is the work that is necessary to deal effectively with the issues in question. What is *necessary* is a matter for the professional judgement of the guardian in consultation with the child’s solicitor.

14.3 We consider that the core tasks are those set out in rule 16.20 of the Family Procedure Rules 2010 and in Part 3 of Practice Direction 16A.

14.4 The proposals for “proportionate” working were devised by CAFCASS and regrettably they failed to engage in any meaningful discussion or consultation about this. We are appending to this response a copy of the correspondence between our Co-chairs and the Chief Executive of CAFCASS in March 2010 on the subject of proposals for effective joint working between children’s guardians and children’s solicitors in public law cases<sup>49</sup> since the observations there made, in relation to the fifteen points covered in that correspondence, are clearly relevant both to those proposals for “proportionate” working, and to what is described in the Interim Report as being the guiding principles behind the changes to the tandem model which are being proposed<sup>50</sup>.

14.5 Whilst we appreciate that these guiding principles are quite briefly stated, we have a number of observations which are set out in sections 14.6 to 14.9 below:

14.6 We have some difficulty with the expression “court-based activity” and “out of court activity”. The solicitor for the child acts upon instructions which in the vast majority of cases come from the guardian. So work done whilst at court will always require some input from the guardian, whether that is by way of telephone instructions, a fleeting visit by the guardian whilst dealing with another matter in the same building, or by the guardian’s physical presence throughout in appropriate cases. “Out of court activities”

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<sup>48</sup> *Ibid.* rule 1.1(2)(b), which is the same wording as paragraph 2.1(2) of the Public Law Outline.

<sup>49</sup> Anthony Douglas CBE to Piers Pressdee and Alan Bean dated 25<sup>th</sup> March 2010, and Alan Bean and Piers Pressdee QC to Anthony Douglas CBE dated 29<sup>th</sup> March 2010.

<sup>50</sup> Interim report, paragraph 4.248.

include (a) matters which the guardian will always deal with herself, e.g. inspecting the local authority files<sup>51</sup>, interviewing the child(ren), foster carers and relatives; (b) matters which the child's solicitors will undertake alone, e.g. obtaining relevant criminal antecedents and DNA test results, preparing bundles for experts; and (c) matters which require input from both, e.g. preparing position statements, consideration of statements and reports filed, and (subject to the court's directions) preparation of letters of instruction.

14.7 Furthermore, we take the view that it is, to a greater or lesser extent, a matter of professional judgement as to what steps a guardian needs to take in a particular case, in order to fulfil those core tasks.

14.8 It is not possible to state, for example, how often a guardian should see a child, any more than it is possible to state that a case involving a particular type of issue should be completed within so many weeks<sup>52</sup>. There are so many variables and different situations which emerge within family proceedings, which may require the guardian to re-assess the position, or where the child may require the reassurance of a further conversation with the guardian. Children's responsiveness and the time they take to build a relationship vary enormously<sup>53</sup>. We do not see this as something which is amenable to micro-management, either by the court, in terms of the judge taking "a much firmer role in deciding what input is needed and when", or the Family Justice Service, in

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<sup>51</sup> To which the guardian alone has access (section 42, Children Act 1989).

<sup>52</sup> One of our members has provided us with the following example. During 2009 he was dealing with two separate cases, involving mothers who, whilst suffering from mental illness/personality disorder, had attacked their sons, both aged around 7 at the time, with potentially life threatening consequences. In one case, a care order was made in 16 weeks. In the other case, a care order was made only a few days ago, almost 4 years after legal proceedings relating to that child commenced.

<sup>53</sup> A point well understood within CAF/CASS. In a submission dated 17<sup>th</sup> January 2010 to the Joint Committee of the Houses of Parliament on human rights, they wrote: "It is vital that Cafcass practitioners are able to engage effectively with young people in order to ascertain their wishes and feelings and to communicate these to the court, along with Cafcass analysis and recommendations about how the court might best promote their welfare. When undertaking casework, especially involving older children and young people, it is important to establish an open dialogue. This essential work requires care and skill, and may take some time to complete, as many young people are understandably cautious about disclosing sensitive personal information to an adult who has only recently become known to them."

terms of “the operational arrangements ...[it]... develops for the delivery of court-based social work services.”

14.9 Another area of difficulty, which we think can only be resolved by the exercise of professional judgement by the guardian, is the question of when, and in what detail, to scrutinise the local authority files. Quite apart from the difficulties associated with a move to computerised record keeping, and the practical problems that this has resulted in for guardians<sup>54</sup>, it would be similarly difficult for a judge, faced perhaps with a set of papers hastily put together by a local authority in an emergency situation, to direct the scope of the guardian’s preliminary reading.

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

15.1 The difficulty that we foresee in extending these services into public law is the inequality of bargaining power between the state and individual members of the family.

15.2 So far as Family Group Conferencing [“FGC”] is concerned, our membership has extensive experience of their use in public law proceedings. There is certainly a role once the possibility of rehabilitation to a parent or relative, subject to appropriate family support, has been mooted. Such a conference plays a valuable role in formulating a care plan which has sufficient robustness to satisfy the local authority, the Children’s Guardian and the court that rehabilitation is likely to be in the child’s interests.

15.3 In appropriate cases, the appropriate way forward in terms of the letter before proceedings process may indeed be to invite the parents to agree to the holding of a FGC. However, the experience of our membership is that by the time most letters before proceedings come to be written, the concerns are sufficiently serious that the commencement of proceedings can not reasonably be postponed to await the results of such an initiative. Anecdotally, there is a wide range of experiences and practice across the country. Research is currently being

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<sup>54</sup> Recently summarised in the judgment of Mr Justice Baker in *Kent CC v A Mother* [2011] EWHC 402, paragraph 151.

undertaken into pre-proceedings work<sup>55</sup> and this will need to be evaluated when it becomes available in June 2012.

15.4 We agree with the Review panel that there needs to be a robust evaluation on the use and impact of Family Group Conferencing in England and Wales before their potential role in public law proceedings is developed in such a way as to *require* such a step to be taken prior to commencement of proceedings<sup>56</sup>.

15.5 So far as *Child Protection Mediation* [“CPM”] is concerned, our members have no experience of working within this initiative. We see no objection to the Review’s proposal that the feasibility of establishing a pilot programme be explored<sup>57</sup>. However, our members routinely attended Child Protection Conferences, until the funding regime of the Legal Services Commission made this no longer viable, and supported families, where this was possible, to achieve a mediated solution with the local authority and participating agencies involved with the child.

15.6 So far as *the Family Drug and Alcohol Court* [“FDAC”] is concerned, our membership has very positive experience of working within this setting. We agree with the Review’s observation that “The initial evaluation of FDAC shows considerable promise, and potentially justifies a further limited roll out”<sup>58</sup> and hope that the comprehensive cost benefit assessment, and study of long-term outcomes for children and families who have been through that process will now be carried out. The final evaluation has recently been published and is positive. We support its recommendations, and are very much in favour of the proposal to set up FDAC in other suitable sites, in order to test whether the model is replicable, and to develop learning on implementing the model in different circumstances<sup>59</sup>. We are of the view that the advantages to be gained are sufficiently clear that this proposed limited roll out should not be further postponed pending further evaluation of the current project. The advantages are not limited to the

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<sup>55</sup> *Families on the edge of care proceedings : the operation and impact of the pre-proceedings process in children’s social care* by Judith Masson and Jonathan Dickens, funded by the ESRC.

<sup>56</sup> The proportion of cases in those Australian jurisdictions which made FGC’s compulsory is understood to have risen very markedly in the resulting period, from 15% to 40%.

<sup>57</sup> Paragraph 4.285.

<sup>58</sup> Paragraph 4.290.

<sup>59</sup> Page 16 of the Family Drug and Alcohol Court (FDAC) Evaluation Project. *Final Report* May 2011, under **Recommendations**.

substantially higher percentage of children reunited with their parent(s). Children who cannot go home are placed in their permanent alternative home more quickly, and there appear to be substantial savings to local authority foster care budgets, and legal proceedings budgets through the use of the FDAC model.

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

16.1 We support the Review's conclusions that "The tandem model is fundamental to our system", that "the child is rightly a party to proceedings, and must therefore have their own legal representative", and that the role of the guardian remains essential.<sup>60</sup>

16.2 We also support the Review's conclusion that the duty system is undesirable<sup>61</sup>.

16.3 We take issue with the Review's conclusions that "In short, the IRO is much better placed (than the Children's Guardian) to act as the guardian of the care plan. The guardian need not fulfil this role." Our reasons are largely explained in the context of our response to question 9 above. We are certainly in favour of good liaison between the IRO and the Guardian, and practical proposals which are contained, in that respect, in the current IRO handbook. These include<sup>62</sup> paragraphs to the effect that, where a child is to remain looked after, following the completion of the proceedings the IRO and Children's Guardian should arrange to have a final discussion about outstanding issues and particular matters which need to be kept under review, and that a note of these discussions should be recorded on the IRO's case record. However, observance of this sensible current guidance is known to be very patchy<sup>63</sup>, and the guidance has no teeth<sup>64</sup>. The Care Planning, Placement and Case Review Regulations (England) 2010, SI 2010 No.959 add nothing. The time may indeed come, *if* reforms proposed by the Munro report are implemented, and *if* the IRO role develops in the way envisaged in the Review's interim report<sup>65</sup> when "the proper balance between the [court's] need to satisfy itself about the appropriateness of

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<sup>60</sup> Paragraphs 4.243, 4.244 and 4.245.

<sup>61</sup> Paragraph 4.249.

<sup>62</sup> IRO Handbook, Chapter 8, paragraphs 8.7 and 8.8.

<sup>63</sup> IROs do not even receive routinely a copy of the final care plan approved by the court. This is an absolutely basic requirement. How can they be the guardian of a document they do not even have?

<sup>64</sup> We are not aware, e.g., of any action taken by CAF/CASS upon a referral from an IRO since the power to do so was introduced by s.118 of the Adoption and Children Act 2002 (which came into force in September 2004), in particular any referral by CAF/CASS to the court.

<sup>65</sup> Paragraph 4.268.



the care plan and the avoidance of ‘over-zealous investigation into matters which are properly within the administrative discretion of the local authority’<sup>66</sup> may shift considerably in the direction that the Review proposes, with a clearer division of responsibilities between social worker, children’s guardian and IRO emerging naturally as a result of gradual change in practice. The “temperature” of this change could be taken from time to time by way of research carried out on behalf of the Family Justice Service, and appropriate guidelines issued from the President’s office. But, for the time being, it surely cannot be sensible to rely upon the IRO to ensure that an outline care plan is duly fleshed out in a way which is in the interests of the child who is now no longer subject to proceedings. To move now in such a drastic fashion would indeed represent the triumph of wishful thinking over thirty years of experience.

16.4 In so far as better representation of the child pre-proceedings is concerned, we welcome any moves which will strengthen such representation. As an organisation, we have long called for better representation, in order to ensure that the focus is on the child, and to guard against potentially collusive arrangements being made between the parents and the local authority, which are not child-centred but more designed to illustrate that the local authority is “working together” with the parents. We have not, however, had any input into the design or implementation of the Coventry and Warwickshire pilot project<sup>67</sup> and have no access to the “continuous evaluation”, which is apparently being undertaken<sup>68</sup>. We note that a final report on this project is being prepared by independent researchers, and we would appreciate information about these, and the intended timetable, and an opportunity to see this report in order to comment further.

16.5 We note the proposal by CAFCASS to develop a wholly in-house model for tandem support<sup>69</sup>. We have proposed to the DfE that a meeting be held between the DfE, CAFCASS Legal Director, MoJ, The Law Society Children Panel administration and ourselves to discuss how the proposed pilot scheme in the West Country is intended to work. We share the Review’s conclusion that, before going down that route, consideration should first be given to whether the

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<sup>66</sup> Wall J (as he then was) in *Re J(Minors)(Care:Care Plan)* [1994] 1 FLR 253,262.

<sup>67</sup> Paragraphs 4.258 to 4.260.

<sup>68</sup> Paragraph 4.259.

<sup>69</sup> Paragraph 4.261.

idea is feasible on a large scale<sup>70</sup>, since we have considerable reservations both about the relative cost and relative robustness of such a model, compared with the existing private practice model. The representation of children by solicitors requires high quality, experienced and well trained professionals who are members of the Law Society Children Panel. Solicitors in this area of work tend to be senior in their practices, often with a management role. In addition a significant proportion also represent adults and do other areas of work. Any plans for an in house model need to take this into account, since there is a real danger that an in house scheme would attract younger and less qualified representatives and could fall into the difficulties historically faced by the CPS. The levels of experience within CAF/CASS have been seriously diluted due to the exodus of experienced guardians<sup>71</sup>, and there would be considerable risks in children's representation if both solicitor and guardian were to be inexperienced. It would be extremely important to ensure that the core duties imposed upon solicitors by the Solicitors Regulation Authority were not compromised in any way<sup>72</sup>. It would have to be very clearly understood that the duty of the lawyer was to represent the individual child, not the organisation employing the solicitor. There would also be a number of technical issues to be considered. For example, the representation of a child who is of an age and maturity to instruct a solicitor direct<sup>73</sup>.

16.6 We are puzzled by the way in which the “transparency” issue has been dealt with in the interim report. As we understand the position this issue was not included in the Review's terms of reference, and certainly we have not been asked to address it either in evidence to the review or in the questions which we have now been asked to respond to. We are accordingly surprised that the Review Panel has expressed a view “based on our limited consideration of the issue”<sup>74</sup>, particularly where it observes that “the involvement of children makes the difference and they

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<sup>70</sup> Paragraph 4.261.

<sup>71</sup> As to which see the oral evidence of the Parliamentary Under-Secretary of State, Department for Education, to the Justice Committee considering The Operation of the Family Courts, on Tuesday 26<sup>th</sup> April 2011, and our submission to that Inquiry dated 13<sup>th</sup> September 2010.

<sup>72</sup> The core duties are fundamental rules, breach of which may lead to sanctions – see paragraph 2(d) of the Guidance to rule 1 of the Code of Conduct.

<sup>73</sup> The position at present is that the solicitor originally appointed for the child generally continues to act for the child in such circumstances. Rules of court provide for the Guardian to seek separate legal representation in such circumstances, although, in practice, where the child is part of a sibling group, the guardian will appoint a fresh solicitor for those children and will continue to be advised as necessary by that new solicitor in relation to the child who has “split off”.

<sup>74</sup> Interim report, paragraph 3.19

are absolutely clear that they would not want any publicity about their cases”<sup>75</sup>, and the whole thrust of the interim report is the need to ensure that the interests of children and young people are at the heart of policy.

## **Private law (Chapter 5)**

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

17.1 We do not.

17.2 The importance of children having a meaningful relationship with both parents, post-separation is, as a broad general principle, perfectly well recognised by all those who work in the family justice system, in case law, and in relevant research.

17.3 However, it is just that – a broad general principle. It is not a statement of universal application. It is not necessarily in a child’s best interests to be required to have such a relationship with a parent who has, e.g. abused the other parent, committed abhorrent crimes, habitually abuses alcohol or drugs, is a sociopath, or currently suffers from particular mental health issues or personality disorder.

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

18.1 We agree with the promotion of Parenting Agreements. These represent the principles of parenting, and deal with the practical arrangements for a particular child.

18.2 However, in the tiny percentage of cases where there is a dispute which requires the court to adjudicate, the terms “contact” and “residence” do provide a clear framework which is clearly understood. If those terms did not exist, there would be a need for other terms to be used, in order to describe those practical arrangements in the absence, by definition, of an agreement.

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<sup>75</sup> *Ibid.* paragraph 3.17

18.3 We fully support the need for a better understanding of the concept of parental responsibility which guarantees a parent’s continuing legal status post separation. Tinkering with the nomenclature of available court orders will, however, do nothing to discourage the tiny majority who cannot reach agreement from seeking a court order. It is more likely in our view to lead to confusion.

18.4 This confusion would extend beyond the adults concerned to the public authorities with whom they had dealings. We are unclear how it is proposed that agencies, such as local housing authorities and benefits agencies, whose decision making is closely tied in with such labels, would adapt to the proposed changes?

18.5 We would also want to explore how it was proposed to deal with a number of consequences which would follow if contact and residence orders were no longer available. For instance, would there be a new enforcement regime to follow up breaches of specific issue orders, e.g. “specific issue activity orders”? What would the regime be under which a parent could remove a child from the jurisdiction for a holiday?

18.6 It seems likely that there would be a considerable number of unforeseen consequences, and we wonder whether these proposed amendments, to a very well drafted piece of legislation which has stood the test of time extremely well and is widely admired<sup>76</sup>, will be workable.

18.7 Finally, the welfare of the child is of course paramount in private law cases, as with public law cases. Many of the most intractable cases share many of the features of public law cases. Is there a risk that these proposals, which are focussed on adult concerns, will lead to the child’s voice and needs being lost?

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

Yes, other than in the circumstances set out in clauses 4 to 12 of Annex C to Practice Direction 3A (supplementing Part 3 of the Family Procedure Rules 2010) or such other circumstances as

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<sup>76</sup> As the Review recognises, at paragraph 2.21 of the Interim Report.

are from time to time set out as being circumstances in which attendance at a Mediation Information and Assessment Meeting is not expected. To these circumstances should be added a further ground, so as to avoid ambiguity: “risk of immediate removal of the child”. (Paragraph 10(b) of Annex C does refer to delay causing “a risk of significant harm to a child”, but that has a somewhat different emphasis).

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

20.1 We have some concerns as to how children are to be protected in the context of a scheme which seeks to maximise the number of families achieving out of court resolutions. One advantage of the present system, in terms of safeguarding, is the checks that are made upon issue of proceedings.

20.2 In particular, we are unclear as to the how it is intended that the compulsory meeting with a mediator will work<sup>77</sup>, and how this person is to “deal with safeguarding concerns appropriately.”<sup>78</sup>. What will the relationship between such “triage mediators” and the Family Justice Service be? What access will they have to local authority records, and criminal records, and how are they to make known any concerns they may have in the event that the parties indicate to the “triage mediator” that they are able to reach an agreement without going to court? Is the “triage mediator” to have a compulsory face to face meeting in order to gauge whether or not there are child protection issues? If this assessment is carried out by a telephone call only, will they gain a sufficient feel for what is going on inside the family to make a properly informed decision?

20.3 How is it intended to review required standards of training for “triage mediators”, given the level of responsibility and difficulty of this work, to which the interim report rightly draws attention?

20.4 The procedures (except in circumstances where a welfare report is ordered, or the child is made a party) do not enable the voice of the child to be heard. No one is talking to, let alone

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<sup>77</sup> Interim report, paragraph 115 of the Executive summary on page 23, and paragraphs 5.112 and 5.125.

<sup>78</sup> Interim report, paragraph 117 of the Executive summary on page 23, and paragraph 5.125.

meeting the child. We are unclear how it is envisaged that the Family Justice Service will “ensure that the interests of children and young people are at its heart”.

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

See the response to question 19 above.

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

We agree with the analysis set out at paragraph 5.134 of the interim report.

**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?**

23.1 We are unclear as to how this might work, in practice.

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

24.1 Clearly the design, and staffing of the hub with appropriately qualified professionals is one of the keys to the success of these proposals.

24.2 An aspect which is not fleshed out in the report is how it is anticipated that the “emergency route directly to court”<sup>79</sup> will work. Will this decision be taken by a hub employee, and, if so, what training will they have to enable them to make a judgement about this?

24.3 Another key consideration is likely to be the availability and proper training of the “triage mediators”. Presumably there will be a grey area between cases which obviously appear suitable for the emergency route direct to court, and cases which might be suitable, but where a judgement might only be possible after a face to face interview. , This is particularly likely to be the case with pressure to limit exemptions to the assessment process.

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<sup>79</sup> Interim report, paragraph 5.129.

24.4 With regard to contact and maintenance, we note that the Review Panel have concluded that “courts should be able also to order reductions or suspensions in maintenance payments via CMEC, where this is in the best interests of children.”<sup>80</sup> We do not think it would be helpful to establish a linkage, even one which is carefully expressed in that way, between the duty to maintain, and the right of a child to see a parent. We agree with the concerns which are referred to in this section of the interim report.<sup>81</sup>

## **Implementation**

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

25.1 The sequence of implementation is certainly important, as is the extent (as we have stated above in answering question 5). There are clearly some proposals that require further evaluation, and some that are in course of being piloted or will need to be piloted. Independent evaluation of such pilots is essential, in our view.

25.2 We do not feel able to provide a useful response to this question until we have seen the Family Justice Review’s final proposals. We should be grateful for an opportunity to provide our views at that point.

## **ANNEXURES**

A. ALC press release, 6<sup>th</sup> April 2011 (see *Introduction* above, paragraph 1).

B. Article due to be published in *Family Law*, July 2011 (see paragraph 9.2 above).

C. Correspondence in March 2010 between CAF/CASS and the ALC regarding proposals for effective joint working between children’s guardians and children’s solicitors in public law cases (Letter from Anthony Douglas CBE to

Piers Pressdee and Alan Bean dated 25<sup>th</sup> March 2010, and reply from Alan Bean and Piers Pressdee QC to Anthony Douglas CBE dated 29<sup>th</sup> March 2010) (See paragraph 14.4 above).

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<sup>80</sup> Interim report, paragraph 5.166.

<sup>81</sup> At paragraphs 5.164 and 5.165.