Improving Access to Justice for Separating Families

A Report by JUSTICE

Chair of the Committee

Professor Gillian Douglas

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The views expressed in this report are those of the Working Party members alone, and do not reflect the views of the organisations or institutions to which they belong.

Observers to the Working Party contributed individual and organisational insight but the recommendations of the report are not necessarily reflective of the positions of those individuals or organisations.

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EXECUTIVE SUMMARY

The family justice system is under pressure. In particular, private family justice in England and Wales has become the site of numerous, interrelated, access to justice problems.

This report focuses on private child matters – disputes which arise between private individuals concerning the upbringing of children. Almost ten years after legal aid was significantly cut in England and Wales, the family courts are struggling to support and case manage a high proportion of litigants in person. These difficulties occur alongside other significant challenges the courts face in administering justice for families, including the fair, safe and proportionate response to domestic abuse and hearing the child's voice in proceedings in which they are very rarely a party.

Meanwhile, individuals who find themselves with a child arrangements problem face a confusing and disaggregated landscape. These families are disproportionately economically deprived, mental health difficulties and domestic abuse are more prevalent for them than the population at large, and some ethnic minorities are overrepresented in court proceedings. For these families, affordable and trustworthy legal advice is scarce, while the court process can be slow, alienating, adversarial, and lacking in coordination with other support services. For the children at the centre of the dispute, the process can too often leave them unheard and unsupported, feeling like the object of an adult dispute rather than an individual with their own perspective about their past and their future.

This report considers how to tackle these issues using an 'access to justice' perspective, considering the procedural and substantive rights of families, including children. In doing so, we have identified a number of assumptions are often made about private child proceedings: that family disputes are 'not about law' and therefore should not be dealt with by courts; that parents who insist on going to court are selfish; that child 'welfare' and 'justice' are incompatible goals; and that children's knowledge of and participation in these cases should be kept to a minimum. The Working Party rejects these assumptions and adopts three key principles.

i) The rule of law requires access to forms of dispute resolution – including access to the court system.

ii) The family justice system must be designed around the needs of families, not the expertise of legal professionals; and

iii) The child's perspective must be at the heart of every stage of dispute resolution in the family justice system

For these families, we have concluded that access to justice means access to safe and sustainable child arrangements as a result of a fair and accessible process, in which:

i) the child's welfare is the paramount consideration,

ii) necessary information relevant to the child's welfare is available; and

iii) all those who wish to, including children, can effectively and meaningfully participate.

This report provides ambitious but realistic recommendations which seek to improve access to justice for separating families. We have done so with due regard to the resource constraints within which the family justice system operates, while insisting where it is truly necessary and proportionate that funding be made available to protect the rule of law and the rights, freedoms and obligations of family members. The recommendations are designed to be read alongside other reforms already underway including the piloting of 'pathfinder' courts in North Wales and Dorset, which we consider an essential first step towards system-wide reform.

I. Beyond the Court: The Wider Family Justice System

Information and Advice

Navigating help when a child arrangements problem arises can be stressful and difficult. There is limited free legal help, and while the internet can provide excellent resources, the volume of information online can be overwhelming and the quality variable. The Working Party, therefore, recommends the creation of a **single**

authoritative online information platform for families going through separation. This should feature both legal and non-legal information to help families understand their problems and solutions holistically, and provide assistance to those out of court as well as those in proceedings or leaving court. It must anticipate children as unique users, not just adults, and we urge those producing resources to prioritise accessibility – for different ages and users' other vulnerabilities, characteristics and needs.

While general information can be an important first step for families, when problems arise individuals want, and often need, legal advice. Access to early legal advice has significant benefits: the opportunity to correct wholly unrealistic expectations of what courts can do, assess and discuss non-court options, provide potential litigants with a basic legal understanding of their rights and obligations as well as their legal aid entitlements, and ensure those who need the court can do so efficiently and safely. We therefore recommend that **publicly funded early legal advice on child arrangements should be piloted without delay.** We add that some children will also want to access advice, and we call for **review of whether the current legal aid provisions are accessible for childre**n who are isolated but unhappy, even unsafe, in their child arrangements.

Coordination of Services

The Working Party also considers there is a need for better co-ordination of services for separating families. We support the **creation of networks, alliances or hubs which provide access to multidisciplinary support and multiagency services** for separating families. We recommend that the court is understood as part of that multidisciplinary support for families, not separated from it, while supporting better integration of legal and non-legal help for families.

This also requires **better funding for non-court resolution options, including packages of support featuring legal and non-legal help,** for example counselling, legal help, and mediation. A 'mediate or litigate' binary choice for families is unhelpful, given the benefits of different dispute resolution processes for different families, including solicitor negotiation, collaborative law.

To support a better-coordinated family justice system and ensure safe and proportionate responses to risk in each case, we stress the importance of systematic risk screening. We recommend this is done with **a single structured tool which screens for overall risk in the family, used systematically and consistently throughout the family justice system** by different professionals – mediators, lawyers, family hub professionals, and the court – wherever a family may go for help.

A Child Participation Presumption (in and out of court)

To ensure children can access their right to be heard throughout the family justice system, we are clear that court reform alone will not suffice. Children should have the opportunity to be heard if they want to be, wherever their parents choose to go for help. The view that children's participation conflicts with their protection is a significant barrier to effective participation; as is the assumption that a child below a certain arbitrary age should not be brought into the process. To secure children's participatory rights we recommend **a system-wide presumption that all children should be offered the opportunity to participate in processes which concern them, both in and out of court, in an age-appropriate way**. The presumption can be rebutted if it would cause harm or the child is too young, but this must be determined on a case-by-case basis.

To implement this presumption, practical barriers to child participation, such as parental resistance and financial barriers, also need to be addressed. The Working Party therefore recommends various ways that **non-court dispute resolution processes be supported to be child inclusive**, including by ensuring parents have access to trustworthy information about the benefits of child participation.

II. Going to Court

Some families will not be able to resolve their child arrangements problems out of court. In such cases 'access to justice' means access to a formal justice process. This ensures that when questions of children's upbringing are in dispute, they are not resolved in favour of the most powerful, or against the least capable, but in the best interests of the child.

However, the way the family courts currently deal with these cases is unsustainable. Too many come before the court not having had their merits nor their risk assessed, legal advice has not been given, expectations have not been managed, the law is unknown or misunderstood, the court is an unfamiliar and potentially frightening process, and an individual's capacity to handle litigation may be further compromised by particular vulnerabilities. Meanwhile, children are too often marginalised and treated as the object of proceedings, rather than as individual rights holders. What results can often be a process in which adults and children cannot effectively participate, risking unfair and unsafe outcomes.

A collaborative and problem-solving approach

We recommend that radical change is required to ensure the family court delivers the service that families need from it. This requires in our view a **collaborative problem-solving approach** to private child disputes, in which the role of the court is relieve rather than inflame the emotional intensity of the dispute and help the family find safe and sustainable solutions, including non-legal support with the underlying and co-existing problems the family are experiencing.

The Court Team and the initial investigation

We recommend this would start with **an investigatory stage**, conducted by a Court Team, allocated to the case. The core **Court Team would be multidisciplinary, consisting at a minimum of a legally trained 'case progression officer' and a Cafcass officer, and including any additionally required professionals such as domestic abuse support workers**. The investigatory process would proceed collaboratively with the family before they come anywhere near a courtroom, providing information about the process, screening for risk, and making enquiries with the family and third parties about their circumstances. This would result in a far clearer picture for the judge or magistrates of the family's problems, and better engagement for the family than an adversarial start to proceedings, with 'allegations' and 'responses' and the current limited safeguarding checks. Critically, we **strongly support the inclusion of the child at the investigatory stage**. They should be given information at the start, about the court, their right to be heard, and the process, and

be given the opportunity to be consulted on their views and experiences. Their views can focus the attentions of the adults on their welfare, and ensure their wishes, feelings and experiences are not overlooked.

The result of the investigatory process need not be a judicial hearing. The Court Team may identify with the family's consent that a non-court process would be a better way to resolve the dispute. Regardless of whether the family continue in court or out of court, the **Court Team would make appropriate referrals to support for any identified needs of the adults and/or the children**.

Case Progression

For those continuing in court, we recommend a **tailored process,** with no one-size-fits-all first hearing in every case, nor any set menu or progression of hearings.

We propose the **case progression officer's role is key to progressing the practical and evidential needs of the case between hearings**. Ensuring cases and litigants are ready in advance of judicial hearings would not only make the most efficient use of the court's resources, but also enhance the effective participation of litigants in person. The officer would be available to explain the process, any directions or orders made, and what next steps need to be taken. This will enable litigants in person to understand what is happening, what they are expected to do, and what additional support is available for them. At the end of the case, the officer would assist with queries about the outcome, and provide any consequential information required, such as information about appeals.

We have sought to identify some areas in which the accessibility of evidence and/or professional assistance is crucial and requires urgent attention. These include cases eligible for **exceptional case funding**; **children who require separate representation**; **cases requiring expert assessments or testing;** and **cases in which litigants in person are conducting contested hearings regarding factual allegations** (in which we acknowledge but go further than the recent provisions for court-appointed advocates in the Domestic Abuse Act 2021). These recommendations

were made pragmatically, not aspirationally, and are areas which risk serious injustice if improved access, mostly by way of funding, is not urgently secured.

Children's ongoing participation in court

There should be **an explicit duty upon the court to provide children with the opportunity to participate in cases concerning them** and the overriding objective updated as such.

When children are heard, their voices must be **accurately and fully relayed to the court, without being reinterpreted or selectively quoted, and separate from any adult opinion about what weight should be given to the child's voice**. More children should have the **opportunity to meet the judge or justices in their case**, with training and facilities available to facilitate such meetings and clear information given to children about it. For the children who give evidence, we strongly support **the widespread availability and funding of measures to minimise harm while facilitating children being directly heard**, particularly facilities to enable pre-recorded cross examination as are available in all Crown Courts.

Beyond being heard the child's participation must be understood as a process, not a one-off event. We identify several improvements to how the process can better respect the child as a rights-holder before and after they have been heard, or if they have chosen not to share their views but wish to otherwise be involved. Underpinning these recommendations is the principle that the court should proactively consider whether the child's ongoing participation is effective and meaningful. We recommend **the identification of a named professional whom the child can contact for information and updates** during the case; **proactive consideration of sharing professional recommendations with the child and whether the child will want to respond**; and **ensuring the child has access to feedback when an order is made.** Feedback is particularly absent in current court processes; we urge that the **child's right to feedback should be respected whenever there is an order, be it through agreement or judicial determination**. This should include how the decision was reached and what weight their voice was given.

Review

Finally, the Working Party is concerned by the lack of oversight the court has over private child arrangements after an outcome has been determined or agreed. The current 'cliff edge' does not work for families leaving court, particularly children subject to new court-ordered arrangements.

Instead, we recommend a system whereby the court follows up on its own orders. This would help ensure that court-ordered arrangements are in fact working for the child and would provide parents with an opportunity to remedy problems which emerge, without having to re-apply to the court. To facilitate this, we **recommend a review mechanism: an enquiry (not a hearing), after a period of time determined by the court, into whether the order is working in the best interests of the child and if any alteration to the order is required**. Adults and children would be spoken to by Cafcass (or the relevant local authority social worker) and a short report written. Only if the order is not working in the child's best interests would a hearing be held, namely a review hearing with the same judge or panel chair. This review would not replace more substantial forms of post-order support, such as family assistance orders, but is in our view a proportionate way of ensuring court-ordered child arrangements are sustainable and safe in all cases.

In making our recommendations, we invite all the professionals whose hard work and dedication enables the family justice system to operate to consider our proposals and ponder how far they might offer a better way forward in helping families to reach positive outcomes for their problems, including those that do require the help of the family courts to resolve.

PART ONE: BACKGROUND AND CHALLENGES

Chapter I: Introduction

A system under pressure

1.1. The family justice system is under pressure. A myriad of investigations, reports and recommendations have been issued over more than a decade, in response to its perceived challenges and shortcomings. In 2011, the government published the report of the independent *Family Justice Review,* chaired by David Norgrove ("***the Norgrove Review***").[1] *The Norgrove Review* was set up in response to criticisms regarding both the substantive law governing family disputes and the procedural operation of the courts dealing with them. It provided a thorough analysis of a range of issues relating to family justice, from the administration and governance of the court system through to the approach taken to best determine children's welfare in both public and private law disputes. Several recommendations made in the report were duly implemented. Yet despite these, the search for reform has continued and the determination to find a better way of handling matters that may come to the family courts has been unwavering among practitioners, the judiciary and policy-makers alike.[2]

1.2. In particular, private family justice in England and Wales[3] has become the site of numerous, interrelated, access to justice problems. The removal of legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("**LASPO**"), save in cases with specified evidence of domestic abuse or child abuse, has dramatically changed the litigation landscape since the Norgrove *Review*. It has resulted in a decline in the previous trend of disputes being diverted away from the courts to settlement via mediation, and an increase in the number of cases going to court which involve litigants in person, who may

[1] The Family Justice Review Panel, *Family Justice Review: Final Report* (Ministry of Justice ("MOJ"), Department for Education ("DfE"), Welsh Government, 2011).

[2] In the past three years alone: R. Hunter, M. Burton and L. Trinder, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases* (MoJ, 2020) (the "MOJ Harm Panel Report"); Private Law Working Group, *Second Report: the time for change, the need for change, the case for change* (March 2020); Family Solutions Group (sub-group of the Private Law Working Group), *What About Me?" Reframing Support for Families following Parental Separation* (November 2020) ("the FSG report").

[3] While JUSTICE is a UK organisation, this Working Party examines the position in England and Wales only.

be ill-equipped to navigate their way through legal procedures. These changes have combined with limited resources within the court system and, more recently, the disruption to processes and case-flow caused by the pandemic. The result is a system at breaking point in which many of the failings identified by *the Norgrove Review* have been exacerbated while families, arguably more than ever, are struggling to access satisfactory processes and outcomes for their child arrangements problems.

1.3. Our Working Party confined its focus to private children matters, that is the kind of problems which arise between private individuals concerning the upbringing of children. We did not extend our scope to cases between the state (the local authority children's services) and the family, known as public law cases. Nor did we look at other areas of private family justice, such as divorce, child maintenance, or financial remedy proceedings, albeit we acknowledge the substantial overlap of these areas for separating families.[4] When private child matters are dealt with in court, this is usually through applications made under section 8 of the Children Act 1989. These concern the person(s) with whom a child lives and/or spends time and when (child arrangements orders); deciding a specific question in connection with parental responsibility (specific issue orders); prohibiting a parent from acting in a specified way (prohibited steps orders); or related enforcement proceedings of a section 8 order.[5] By referring to these matters as 'problems', rather than as disputes, we recognise that they originate as relationship problems before any court proceedings are started, that they can have both legal and non-legal elements, and that many find resolution outside of court.

1.4. The purpose of this Working Party's deliberations, and of this report, is to consider how these problems might be addressed, using an 'access to justice' perspective (see **Chapter 2**) which highlights the procedural and substantive rights that families, including children, have to a fair resolution of issues in dispute between them. In particular, this perspective is concerned to recognise

[4] The Centre for Child and Family Law Reform is currently engaged in a review as to whether the effective segregation between child and financial issues in current family law practice in England and Wales serves the interests of parties engaged in the Family Courts. The Centre has interrogated practice in other jurisdictions including USA, the Commonwealth and Europe as well as Scotland and Eire. It hopes to publish its recommendations in early 2023.

[5] In this report, we use the phrase 'child arrangements' to encompass all these types of problems, not solely live with or spend time with orders.

and control imbalances of power between family members and to ensure that each has a proper opportunity to be 'heard' – and listened to.

1.5. It is important here to define what we mean by the 'family justice system'.[6] We mean the mechanisms that exist to determine the legal rights and obligations that individuals possess, and how these may be exercised, by virtue of their family relationships. The system includes the provision of information, advice and assistance before any access to the family courts may be decided upon; such provision while court proceedings may be ongoing (and after they have ended); and alternative or additional methods to the courts to facilitate dispute resolution.

1.6. We should bear in mind that the *vast majority* of parents (and other relatives)[7] who may disagree over how children should be cared for following parental separation, resolve their disputes without going near a court. While there is no agreed figure of how many separating families go to court,[8] previous estimates suggest it is around 10%.[9] But the burden that a growing number of cases, engaged in by unrepresented parties, has placed on the system, and most particularly on the judges and magistrates who deal with them, has become acute.

1.7. Alongside this pressure on the system, research has highlighted major shortcomings in the *culture* of the family justice system, with inadequate regard paid to the multiple vulnerabilities of litigants and to power imbalances between parents, most obviously where domestic abuse is an aspect of their

[6] The term 'family justice system' was coined by M. Murch and D. Hooper in their study, *The Family Justice System* (Family Law, 1992).

[7] In this report, we regularly use the term 'parents' when referring to adults with child arrangements problems. However, we acknowledge a minority of cases involve other adults, such as grandparents, aunts and uncles, or step-parents. Our use of the term parents is used as shorthand and is not intended to exclude such cases.

[8] And some may not be "separating families" at all. For example, when two people have a child but were never a couple.

[9] See the discussion of the existing evidence and the challenge of establishing a figure for the proportion of families using the courts in L. Cusworth et al, *Uncovering private family law: Who's coming to court in England?* (Nuffield Family Justice Observatory ("NFJO"), 2021), pp. 17-20.

relationship. [10] Moreover, the multi-faceted nature of many of the problems that families face is not adequately recognised in the wider family justice system, including beyond court; as well as the legal issues, families frequently experience physical and mental ill-health, educational under-attainment, economic deprivation and social disadvantage.[11] And despite all the rhetoric regarding the importance of hearing the 'voice of the child', the perspectives and views of the children whose welfare is being determined in these cases still go unheard in too many cases.[12]

1.8. Much time and effort has gone into proposing reforms to the system, particularly as regards encouraging the diversion of disputes to non-court resolution. Our Working Party fully accepts the desirability of facilitating access to ways of resolving problems apart from adjudication by the courts. However, we consider that many matters will – and *should* – continue to be brought to the courts for resolution, and our focus has been on how those cases can be better managed through the family justice system in order to deliver better outcomes for children – and their families – as they live through the disruption and distress associated with the breakup of adult relationships.

1.9. All too often in debates regarding how to handle these kinds of disputes, a number of assumptions may be made. The first is that family disputes 'are not about law' and therefore should not be dealt with by the courts. One can of course appreciate that being asked to decide in a court of law whether a child should be handed over for contact at one particular motorway services rather than another must be both frustrating for the judge and seem like a misuse of scarce resources within a hard-pressed court system. But parental responsibility is a legal matter covered by the Children Act 1989 and subject to the control of the courts. If parents cannot – or will not – reach decisions by themselves regarding its exercise, then the courts exist to give them – and the child – a final and definitive answer.

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[10] The MOJ Harm Panel report, see fn 2 above. See further the literature review accompanying the MOJ Harm Panel report: A. Barnett, *Domestic abuse and private law children cases: A literature review* (MOJ, 2020)

[11] R. Moorhead, M. Sefton and G. Douglas, *The Advice Needs of Lone Parents* (One Parent Families, Cardiff University, 2004). See further discussion of the disproportionate economic deprivation of families in private children proceedings in **Chapter 2**.

[12] C. Hargreaves et al, '*Uncovering private family law: What can the data tell us about children's participation?*' (NFJO, 2022), pp. 8-11. Discussed further in **Chapter 2** and **Chapter 4**.

1.10. A related second assumption is that parents who insist on going to court rather than reach a settlement via negotiation or mediation are selfish and unable to put their children's interests first. This view can often tip into treating parents rather like badly behaved school children who need to be set straight, and who must not be 'indulged' by giving in to their wish for their day in court. It fails to consider why a parent might genuinely (and rightly) believe that they and their children need the protection of the court to counter a dominant ex-partner, or the authority of the court to secure an outcome to their dispute that the other party will (feel obliged to) accept. It also fails to acknowledge that many out of court options are paid for services that parents simply cannot afford. Far from the court being 'the first port of call' for parents, for many it will be the only avenue for redress that is available to them, a matter that we explore further in this report.

1.11. Thirdly, section 1 of the Children Act 1989 requires that in reaching a decision regarding the upbringing of a child, the court's paramount consideration must be the child's welfare. A related assumption is that resolving family disputes has nothing to do with 'justice'; indeed, that 'justice' and 'welfare' are incompatible goals. The Law Commission long ago sought to remove the idea that orders determining child arrangements (or residence and contact as it then described them) should be about 'winning' or 'losing'.[13] But it does not follow that fairness of process and due balancing of the rights and interests of both parties are irrelevant. Nor should it be forgotten that the *child* is also entitled to fair consideration of his or her interests. Access to justice for the child, as well as the adults, underpins the accepted importance of the right of the child who is capable of forming his or her own views to be heard in any proceedings affecting them under Article 12 of the United Nations Convention on the Rights of the Child ("**UNCRC**").

1.12. This leads to the fourth assumption: that children's knowledge of, and participation in, these cases should be kept to a minimum. Despite broad acknowledgement of the *principle* that children have a right to be heard, bringing that principle into *practice* and involving them in a skilful way provokes concern and caution at the difficulty of the exercise. The key concern can be simply summarised: no one wants to make things worse for that child. And by 'worse' we mean burdening the child with the adult conflict, from

[13] Law Commission, Review of Child Law, Guardianship and Custody No. 172 (1988).

which they should be shielded. However, while this assumption stems from an understandable and genuine wish to protect the child, it fails to acknowledge the damage which can be done by ignoring children and the risk of disenfranchising them should they not feel heard in a process which, above all else, is about them and their life.

1.13. In framing our proposals, we have rejected these assumptions, and instead three key principles have emerged from our thinking. These principles are concerned with promoting fairness to all of those involved in disputes, as well as enhancing the chances of securing an arrangement for the child which better meets their welfare needs in a sustainable way.

Our principles

i) The rule of law requires access to forms of dispute resolution – including access to the court system

1.14. In his seminal work, *The Rule of Law,* the late Lord Bingham wrote:

> *In Utopia, it may be, civil disputes would never arise: the citizens would live together in amity, and harmony would reign. But we live in a sub-utopian world, in which differences do arise, and it would be false to suppose that they only arise when there is dishonesty, sharp practice, malice, greed or obstinacy on one side or the other. Those qualities are not, of course, unknown among litigants. But it is possible for perfectly reasonable and well-motivated people to hold very different views on the meaning of a contract or a conveyance or a will, or about the responsibility for an accident, or about the upbringing of children following their parents' separation, or about the use of a footpath, or the application of an Act of Parliament or the decision of a minister or local government officer. And then the need is for a binding decision. It is not in the interests of those involved in the dispute or of society as a whole that victory should go to the stronger (in modern terms, the party who can send in the best-armed heavies).*[14]

[14] T. Bingham, *The Rule of Law* (2010) p. 85.

1.15. It does not follow that because parental disputes may involve practical matters, such as where a child is to live, what time they are to be delivered for contact visits or transfers of care, whether they should have a vaccination, or whether they should join the Brownies, these decisions do not involve the law and sometimes require legal resolution.

1.16. On the contrary, these decisions all entail the exercise of what the law calls "*parental responsibility*". Section 3 of the Children Act 1989 defines "*parental responsibility*" for a child as "*all the rights, duties, powers, responsibility and authority which by law a parent of a child has in relation to the child and his property*." Section 8 enables a court to make a variety of orders to determine the exercise of these rights, duties and so on. Although section 1(5) of the Act provides that a court should "*not make [an] order […] unless it considers that doing so would be better for the child than making no order at all"*[15] this does not create a legal presumption that an order should not be made, still less that all disputes should be resolved outside court. Indeed, it can sometimes be considered helpful, where disputes are settled through negotiation or mediation, to embody the parties' agreement in a binding order of the court (known as a 'consent order'), as a proportionate means of ensuring that the settlement is treated seriously by the parties and so reduce the risk of having to return to court later in the event of a disagreement.[16]

1.17. Thus, while a range of means of resolving problems regarding children other than resort to a court should of course be available, it must be recognised that they exist within a framework of family law which lays down the rights and obligations of those involved. Those rights and obligations are ultimately to be protected by the State through its justice system and there must be access to that system for all litigants, not just those who can afford it, either financially or through sheer determination (some might say bloody mindedness) to press on regardless.

ii) The family justice system must be designed around the needs of families, not the expertise of legal professionals

[15] Including orders under other sections of the Act.

[16] *A v A (Shared Residence)* [2004] 1 FLR 1195; *Re G (Children)* [2005] EWCA Civ 462.

1.18. In a system where there is now very limited access to legal aid, it cannot be expected that parents (or their children) can readily find authoritative information, advice or assistance to deal with the problems they may be encountering, still less find their way through a justice system that assumes a high level of legal knowledge and expertise. The family justice system should not be experienced by parents or children as an obstacle course or endurance test.

1.19. When a child falls seriously ill or suffers a significant accident, we do not expect a parent to diagnose their illness or treat their injuries. When they take their child to their GP or A & E, we do not tell them to decide for themselves what the treatment should be, still less to administer it themselves. Yet we expect lay people to navigate the forms, the processes, the vocabulary and the culture that lawyers and judges have been trained over several years, and often decades of experience, to be able to handle, and for which magistrates have legal advisers to assist them. We expect them to cope with the detailed rules, with expectations regarding how to make submissions, and how to cross-examine, without help, or, if they are lucky, with some help from volunteers. Failing that, the judge is expected to step in and somehow make up the shortfall of expertise, without jeopardising his or her neutrality and at the risk of greatly extending the duration of the proceedings.

1.20. The primary response to this situation has been to encourage parents to look away from the family courts for a remedy (such as through mandatory attendance at a Mediation information and Assessment Meeting ("**MIAM**")),[17] or to attempt to deter them using the courts by removing legal aid. However, a response is required which considers how to improve the system's efficiency and effectiveness for the significant number of private law cases that will still come to the courts. In the absence of a commitment from government to provide legal aid and legal representation for these cases, the system must be reformed to operate in ways that litigants in person, litigants with particular needs, and children, can cope with and understand.

1.21. This means that the family justice system cannot simply sit back and wait for litigants in person to do what it has always required of legal professionals, in

[17] MIAMs were introduced in 2011 through the Family Procedure Rules ("FPR") but made mandatory (for applicants only) in 2014. See s.10 of the Children and Families Act 2014 and FPR r.3.6 and Practice Direction ("PD") 3A.

the ways that legal professionals are trained to deliver. The courts must operate proactively, to investigate and identify the problems the family are facing which have resulted in the dispute and work collaboratively with families and multi-disciplinary agencies and services to find ways of addressing those problems both for the immediate resolution of the dispute and the longer-term welfare of the children involved.

iii) The child's perspective must be at the heart of every stage of dispute resolution in the family justice system

1.22. In 1987, Dame Elizabeth Butler-Sloss, who presided over the Cleveland child abuse inquiry, famously noted that "*the child is a person and not an object of concern"*.[18] Children have their own views, wishes, feelings and perspectives on the matters that affect them, and these are worthy of proper consideration before decisions that will affect them for the rest of their lives are taken by the adults responsible for their care. As the Law Commission observed in 1988 in the report which led to the enactment of the Children Act, the child "*is a person whose life, and to some extent liberty, is affected by the decision and who may have an independent point of view which should properly be put before the court*."[19]

1.23. The central importance of this point is recognised in section 1(3)(a) of the Children Act 1989, which provides that a court considering any question regarding the upbringing of a child must "*have regard in particular to— (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)*". The Act also reflects the ethos of the UNCRC, ratified by the United Kingdom in 1991. Article 12 of the UNCRC provides that

> *1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

[18] E. Butler-Sloss, *Report of the Inquiry into Child Abuse in Cleveland 1987,* (His Majesty's Stationery Office (HMSO), 1988), Cm 412, p. 245.

[19] *Review of child law*, see fn 13 above, para. 6.25.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

1.24. Despite these requirements, recent data analysis suggests less than half of children currently have an "*opportunity to be heard*" in private proceedings in court,[20] whilst we have limited insight into how many children are heard in non-court resolution methods. Research evidence confirms that children wish to be involved, consulted and heard when their future is being decided, both by their parents, and by the justice system.[21] The same message has been delivered, loud and clear, on numerous occasions, by the Family Justice Young People's Board ("**FJYPB**").[22] The Working Party has been determined to ensure that reforms to the family justice system properly see children as persons, not as 'objects of concern', and that due and appropriate consideration is given, at every stage of dispute resolution, to their views and perspectives. This is a duty that should lie with all the professionals involved in dealing with a private law dispute – including lawyers, mediators, Cafcass officers,[23] court staff, and the judiciary and magistrates. It should be a continuing process of engagement and communication, rather than a one-off event, and must recognise that children's perspectives can change over the course of a case, just as the position of adults may do. Children, as much as adults, therefore, require access to appropriate information, advice and assistance from the family justice system.

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[20] Hargreaves (2022), see fn 12 above.

[21] I. Butler, L. Scanlan, M. Robinson, G. Douglas and M. Murch, *Divorcing Children: Children's Experience of Their Parents' Divorce* (London: Jessica Kingsley, 2003); J. Fortin, J. Hunt and L. Scanlan, *Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth* (University of Sussex, 2012).

[22] The FJYPB is a group of 50 children and young people aged between seven and 25 years old who live across England and Wales. All members have either had direct experience of the family justice system or have an interest in children's rights and the family courts. The FJYPB supports the work of the Family Justice Board to improve the family justice system, by ensuring its work is child-centred and child-inclusive. See further: Family Justice Young People's Board – Who are we?.

[23] Cafcass stands for "*Children and Family Court Advisory and Support Service*", an independent advisory service established by Criminal Justice and Court Services Act 2000. Cafcass and Cafcass Cymru operate in Family Courts in England and Wales respectively, and provide qualified social workers to advise on children's welfare and represent them in proceedings where appropriate. See further: Cafcass and Cafcass Cymru.

Our method of working

1.25. The Working Party convened in January 2021 and met over the course of 16 months, meeting alternately as a full group and in sub-groups: Before Court, During Court and After Court. The process of identifying key barriers and possible solutions was iterative, as we consulted externally, discussed ideas and shared our own professional experiences at each stage of the process.

1.26. We consulted with a wide range of professionals, the majority with considerable experience of private children proceedings in England and Wales. Others offered useful comparative experience (such as the multi-disciplinary professionals we consulted including social workers, paediatricians, criminal justice practitioners, and psychologists). We looked at several cross-jurisdictional comparisons, through a combination of desk-based research and interviews with professionals in those jurisdictions.

1.27. In addition, we were grateful for the opportunity to speak to several individuals with lived experience of proceedings as represented adults, litigants in person, and children from the FJYPB. We are very grateful to FJYPB members who not only shared their experiences with us during the formulation of our ideas, but also thereafter provided feedback on our recommendations towards the end of the process.

The rest of our report

1.28. In **Chapter 2**, we set out what we mean by 'access to justice' in the private child law context and summarise the barriers to such access that family litigants and their children may currently experience. These include the way the system operates, and the obstacles deliberately or accidentally placed in the way of litigants securing redress. These include incomprehensible legal rules, procedural complexities, delay and cost, with much of such obstacles being due to a lack of adequate resources – both financial and human – devoted to the system. We also discuss the vulnerabilities experienced by many users of the system – both adults and children. These vulnerabilities include those relevant to the individual, such as intellectual capacity, mental health issues, age, ethnicity and cultural background which may create obstacles to full participation; situational vulnerabilities including exposure to domestic abuse, power imbalances within the family's dynamics and lack of support (including legal support) in progressing a case; and structural vulnerabilities, including

socio-economic circumstances. We also outline the barriers to children's effective participation in what are likely to be the most important decisions affecting their future lives and wellbeing.

1.29. Our recommendations, set out at **Part Two** of the report in **Chapters 3 and 4**, are intended to be ambitious, but realistic. We understand that there is not going to be a return to the days of generally available legal aid. Nor would it currently be feasible to expect that the public law model of automatic separate representation for all children could be adopted uniformly in the private law sphere. We of course share the view that the family justice system *must* operate efficiently, effectively and with due regard to cost. But we have taken heed of the numerous and repeated calls for fundamental, cultural as well as organisational, change in the handling of family disputes.

1.30. Our recommendations are furthermore not intended to be read in isolation from initiatives and reforms already underway. Out of court, we endorse many of the proposals that others have put forward, including the Family Solutions Group in their November 2020 report.[24] Our deliberations have not sought to duplicate or in any way undermine such recommendations and reform efforts. As regards reform *in* court, there are two 'pathfinder' courts, in North Wales and Dorset, which are currently piloting new ways of working in these cases. These pathfinder pilots are pursuant to several recommendations made in the June 2020 report by a panel of family justice experts convened by the Ministry of Justice ("**the MOJ Harm Panel**").[25] There are many ways in which these pathfinders align with this Working Party's conclusions, and our recommendations seek to build upon such reform, not replace it. Indeed, the Working Party considers that the pathfinder courts will provide the essential first steps towards reform for all family courts in England and Wales, the further progress of which we hope will consider the suggestions in this report, as well as be informed by evaluation of pilots and initiatives thus far.

1.31. We invite all the professionals whose hard work and dedication enables the family justice system to operate to consider our proposals and ponder how far they might offer a better way forward in helping families to reach positive

[24] The FSG report, see fn 2 above.

[25] The MOJ Harm Panel report, see fn 2 above.

outcomes for their problems, including those that do require the help of the family courts to resolve.

Chapter II: Barriers to accessing justice for separating families

'Access to justice'

2.1 'Access to justice' is the key concern of this Working Party. The concept is a broad one, which cannot be narrowed to one solution or process. *Improving* access to justice therefore does not mean solely improving access to the formal justice system of the family courts. It is important to recognise that access to non-court dispute resolution forms an important part of our wider understanding of what a 'just' response to a problem is. For the Working Party, 'access to justice' means solving child arrangement problems in a safe, fair and effective way. Of course, for many, indeed most, families, it will be possible to resolve (or manage) these problems without outside help. For others, non-court processes will be successful. But for a significant number, as we discuss below, non-court processes will not be the safe, fair or effective option. For example, when power imbalances result in a party agreeing to an outcome in order to bring the dispute to a close,[26] the result is one governed not by justice but by power. In this sense, the aspects of non-court dispute resolution which are heralded as its strengths – the confidentiality, the freedom, the neutrality as to outcome – can in fact lead to an injustice.[27] The family dynamics and safeguarding issues in a case can mean that what a 'just' process looks like will be different for different families.

2.2 For families who cannot or should not try to solve their child arrangements problems privately, their access to justice *does* mean access to the formal justice system. This is a common law right as well as being enshrined in Article 6 of the European Convention of Human Rights ("**ECHR**"), which provides that: "*In the determination of his civil rights and obligations […] everyone is entitled to a fair and public hearing within a reasonable time by an independent and*

[26] N. Semple, 'Mandatory Family Mediation and the Settlement Mission: A Feminist Critique' (2012) 24 *Canadian Journal of Women and the Law* 207.

[27] As A. Barlow *et al* have noted: "To the extent that autonomy in dispute resolution entails freedom from law and its values, freedom from social obligations, freedom to pursue one's own interests and exert one's own power regardless of the disadvantage to others, or simply reconciling the weaker party to an unjust fate, then this, in our view, is the antithesis of justice." A. Barlow, R. Hunter, J. Smithson and J. Ewing, *Mapping Paths to Family Justice: Resolving family disputes in neoliberal times* (Basingstoke: Palgrave Macmillan, 2017), p. 7.

impartial tribunal established by law." The common law concept of access to justice includes the right to be heard;[28] to have notice of the case against you;[29] to have a hearing free from bias;[30] and access to the courts.[31] In addition, the quality of the access is important: it must be practical and effective, not theoretical or illusory.[32] This does not extend to requiring states to provide legally aided representation, but it does require that those without representation can effectively access the court "*in the sense of presenting a case properly and satisfactorily*"[33] under conditions that do not place them at a substantial disadvantage vis-à-vis the other party.[34]

2.3 Article 8 ECHR is also engaged in child arrangements cases. Article 8 not only protects individuals from arbitrary state interference in their private and family lives but also contains positive obligations inherent in effective "*respect*" for family life "*in the sphere of relations between individuals*".[35] It requires decision-making processes to be fair and sufficient to afford due respect to the family interests safeguarded by it,[36] requirements which "*essentially overlap*"[37] with Article 6.

2.4 The child must not be forgotten as also having a right to a fair process. Their "civil rights and obligations" are being decided, per Article 6, and their Article 8 rights are engaged; the case will impact their family lives most of all and their

[28] *Ridge v Baldwin* [1963] UKHL 2, [1964] AC 40.

[29] *R v Secretary of State for the Home Department ex p Doody* [1993] UKHL 8, [1994] 1 AC 531.

[30] *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759, (1852) 10 ER 301.

[31] *R v Secretary of State for the Home Department ex p Leech (No 2)* [1993] EWCA Civ 12, [1994] QB 198. Steyn LJ held at 210A that: "It is a principle of our law that every citizen has a right of unimpeded access to a court."

[32] *The Belgian Linguistic case (No. 2)* (1968) 1 EHRR 252, paras 3-4; *Golder v United Kingdom* (1975) 1 EHRR 524, para. 35.

[33] *Airey v Ireland* [1979] ECHR 3, para. 24.

[34] *Regner v the Czech Republic* (2015) ECHR 1042, para. 146; *Dombo Beheer B.V. v. the Netherlands* [1993] ECHR 49, para. 33.

[35] *Glaser v the United Kingdom* (Application no. 32346/96) [2000] ECHR 419, para. 63.

[36] *Petrov and X v Russia* (Application no. 23608/16) 23 October 2018, paras 101 and 112.

[37] *X v Croatia* (Application no. 11223/04) 17 July 2008, para. 59.

views must not be ignored.[38] As Sir James Munby has stated, children "*are not the largely passive objects of more or less paternalistic parental or judicial [...] decision-making. A child is as much entitled to the protection of the Convention – and specifically of Article 8 – as anyone else.*"[39]

2.5 Alongside this protection is the very full recognition given by Article 12 of the UNCRC to children's right to be listened to, adding to the understanding of what the child's 'access to justice' involves procedurally. For the process of hearing the child to be fair, it must also accommodate consideration of their vulnerability; basic requirements of participation under Article 12 include that the participation processes should be transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, safe and sensitive to risk, accountable and adults should be given the skills and support to involve children.[40]

2.6 Access to substantive justice in these cases is highly dependent on the facts of the case and the dynamics of the family. The Court has a positive obligation to protect and support the Article 8 rights of the parents and the children.[41] Section 1 of the Children Act 1989 indicates that the paramount consideration must be the child's welfare, including but not limited to the specific considerations listed in section 1(3) of the Children Act 1989, otherwise known as the welfare checklist. These include the child's wishes and feelings, in light of their age and understanding, their needs and characteristics, any harm the child is at risk of or has suffered, and parents' capability to meet their needs. Parental involvement, which can be direct or indirect involvement, is presumed to further the child's welfare unless there is evidence showing that involvement would put the child at risk of harm.[42] Access to a just and safe outcome therefore requires that the relevant information necessary for determining the best outcome for the child is available to the court. When parties are relied upon

[38] Recently reiterated in *Warwickshire County Council v the Mother & ors* [2022] EWHC 2146 (Fam), para. 85.

[39] *CF v Secretary of State for the Home Department* [2004] EWHC 111 (Fam), [2004] 2 FLR 517, para. 158.

[40] UN Committee on the Rights of the Child, *General comment No. 12 (2009): The right of the child to be heard* (20 July 2009) CRC/C/GC/12, para. 134.

[41] *Glaser v UK*, see fn 35 above. In recent domestic case law, see *Re S* [2020] EWCA Civ 568 paras 12-13; and *Warwickshire County Council v The Mother & Ors* [2022] EWHC 2146 (Fam) para. 86.

[42] S.1(2A), s.1(2B) and s.6 of the Children Act 1989.

for such information, especially in relation to harm, their effective participation is vital to a just solution.

2.7 While not seeking to define the wider concept of 'access to justice', the Working Party proposes a working definition of our understanding of it in this report, to assist readers and contextualise our discussions. **We consider access to justice for separating families means access to safe and sustainable child arrangements as a result of a fair and accessible process, in which i) the child's welfare is the paramount consideration, ii) necessary information relevant to the child's welfare is available; and iii) all those who wish to, including children, can effectively and meaningfully participate.**

The withdrawal of legal aid and attempts to divert families from court

2.8 Legal aid was removed from a large proportion of private family cases in 2013 as part of an overall strategy of cost reduction by LASPO. The withdrawal of legal aid for all those who could not evidence either child protection concerns or domestic abuse was intended to discourage private children proceedings from coming to court at all and to encourage people to "*take responsibility for resolving such issues themselves […] this is best for both the parents and the children involved.*"[43]

2.9 It was intended that mediation would replace litigation as the primary method of resolving disputes. MIAMs, which provide for a proposed litigant to meet a mediator before a court hears the case, were made mandatory for applicants in 2014.[44] The purpose of the meeting is to inform parties of their mediation options and assess the suitability of the dispute for mediation.

2.10 However, the legal aid statistics suggest the MIAM has not been the diversionary intervention it was intended to be. The total number of publicly

[43] MOJ, *Proposals for the Reform of Legal Aid in England and Wales* (Cm 7967, 2010) paras 4.210–4.211.

[44] See fn 17 above.

funded MIAMs has dropped by 60% since before LASPO.[45] Furthermore, fewer people are deciding to start mediation: in 2020/21 there were half as many legally-aided mediation starts as there were a decade ago in 2011/12.[46]

2.11 This cannot be explained by an overall decrease of need. The number of private children cases reached an all-time high in 2019 with a total of 54,920 applications. This exceeded the previous peak in 2013 of 54,620, which was probably due to a rush to issue proceedings before the withdrawal of legal aid. Since 2019 there has been a sustained level of demand, including through the Covid-19 pandemic, with a total of 54,638 case starts in 2021.[47]

2.12 The policy therefore appears to have achieved the opposite of its intention: it reduced legally-aided mediation and increased court use. The Government acknowledged in their post-implementation review of LASPO that the changes were "*not entirely successful*".[48]

2.13 Recent evidence has also suggested the proportion of cases coming to court which may be suitable for diversion is 20% or less.[49] In 2018, the Ministry of Justice ("**MOJ**") and Cafcass conducted a 'proof of concept' pilot in Manchester: the *Support with Making Child Arrangements Programme.* It was designed to understand whether it was possible and appropriate to divert people from court by offering them a set of structured interventions after they had

[45] From 31,336 in 2011/12 (pre-removal of legal aid) to 10,508 in 2018/19 (a fall of 66.5%) and subsequently a modest rise to 12,690 in 2020/21 (60% lower than 2011/12). This is despite their becoming mandatory in this time for applicants. It is not clear whether the drop in attendance is in respondents, applicants or both; nor whether those still attending are disproportionately represented litigants who have been advised to attend by their legal representative (although the Working Party would hypothesise this is the case). See MOJ, *Legal Aid Statistics Quarterly: October to December 2021*, Table 7.1.

[46] Legally aided mediation starts reached a low of 6,302 in 2017/18, since then there has been a modest rise to 7,699 mediation starts in 2020/21. However, this is half the number of mediation starts recorded in 2011/12 (15,357). Throughout, the proportion of successful mediations (those reaching full or partial agreement) is constant at between 60-64%, however there is no data on the longevity of these agreements and if those cases go to court. See MOJ, *Legal Aid Statistics Quarterly: October to December 2021*, Table 7.2.

[47] MOJ, *Family Court Statistics Quarterly: October to December 2021*, Table 1.

[48] MOJ, *Post-implementation review of Part 1 of LASPO* (CP 37, 2019) paras 1143-44.

[49] The figure of 20% was used recently by the President of the Family Division, Sir Andrew McFarlane, BBC Radio 4, 'Broadcasting House' (24 July 2022).

made a private law application to court.[50] Overall, across the 6-month period of evaluation, only 14% of the cases (171 out of 1190) were deemed suitable for diversion. 86% were found to have too high a level of risk or legal need to be manageable out of court, in the judgement of the assessing Cafcass family court advisers.[51] The last month of the pilot saw this reduce to 80%, which perhaps signalled assessors' growing confidence in the interventions but even taking this into account, the findings suggest that 80-86% of cases were appropriately in court.[52] The majority of those which were deemed suitable for diversion featured lower levels of high conflict, domestic abuse, and highly conflicted parents, and a minority involved domestic abuse and children known to the local authority. Most of the suitable cases nevertheless dropped out of the Programme (68%), mainly due to parties preferring the court process, wanting an enforceable agreement, inability to agree and communication issues.

2.14 Overall, the evidence from the past decade suggests that reducing access to legal aid and early legal advice for those with family disputes does not render them more likely to try non-court dispute resolution methods; rather, the significant majority of cases that do end up in the family court are there for good reason.

[50] Interventions offered were one or a combination of the following: a MIAM, mediation, a Separated Parent Information Programme session, Child Contact Intervention (CCI), a Parenting Plan meeting with a Cafcass Family Court Adviser (FCA) and access to online resources. MOJ and Cafcass, *Support with Making Child Arrangements Programme – Six-month Pilot Evaluation Report* (2020).

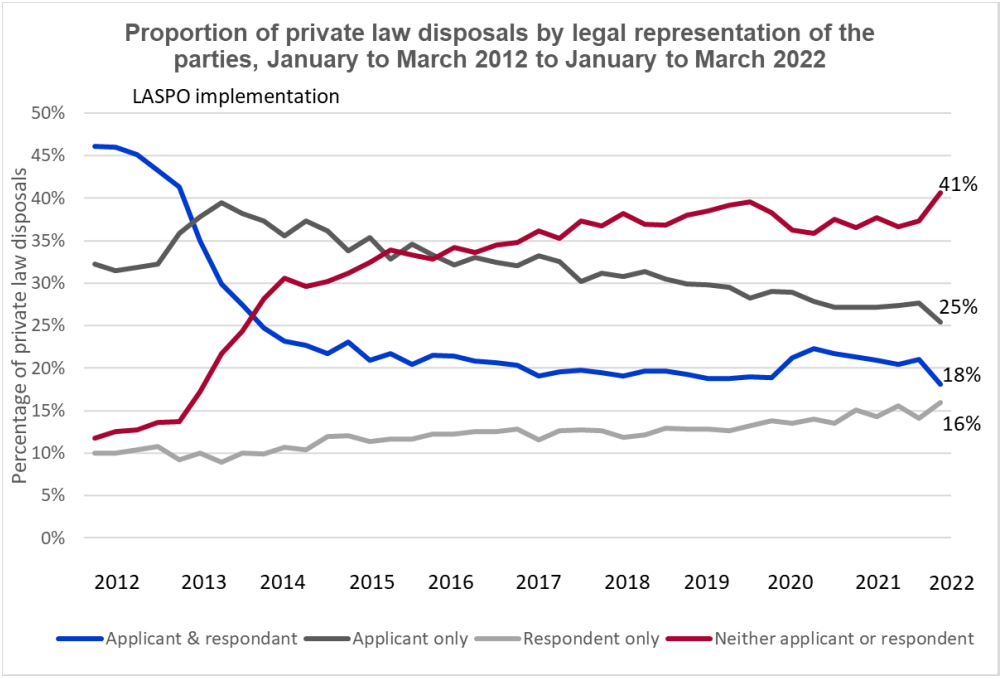
[51] Ibid. This included cases in which safeguarding risks were raised, including domestic abuse, parental drug or alcohol misuse, other violence, child protection concerns, and children known to the local authority; cases which were too conflicted to be diverted, both those deemed "high conflict" and cases of implacable hostility; cases featuring other issues of parental vulnerability such as physical/mental health issues and parent learning difficulties; and cases which had a legal need requiring court.

[52] This was noted in the evaluation to be consistent with other studies which identified safeguarding concern, including but not limited to domestic abuse, at between two-thirds and 85% of private law cases. Citing L. Trinder, J. Connolly, J. Kellett, C. Notley and L. Swift, *Making contact happen or making contact work? The process and outcomes of in-court conciliation* (London: Department for Constitutional Affairs, 2006); G. S. Macdonald, Domestic violence and private family court proceedings: Promoting child welfare or promoting contact? (2016) 22:7 *Violence Against Women* 832; and B. Hamlyn, E. Coleman and M. Sefton, Mediation information and assessment meetings (MIAMs) and mediation in private family law disputes (MOJ, 2015).

The difficulties faced by litigants in person

They [the judges and lawyers] would talk among themselves in legal-type language, and I was just sat there waiting for it to be translated.[53]

2.15 Rates of representation in private children proceedings have been completely transformed in the past decade. In 2012, before LASPO, only 12% of cases were unrepresented on both sides, while both sides were legally represented in 45% of cases. Ten years later, the statistics show a near-reversal: only 18% of cases are fully legally represented, while 41% have no legal representation on either side.[54]



[53] J. Mant, *Litigants in Person and the Family Court: The Accessibility of Family Justice after LASPO* (Hart Publishing, 2022), p.156.

[54] See MOJ, Family Court Statistics Quarterly: January to March 2022, Table 10.

2.16 Litigants in person face significant challenges in the family court. A large study of their experiences in private family justice in 2014 found that the majority experienced fear and anxiety, confusion, marginalisation, and frustration with a slow, time-consuming process.[55] This was not simply a matter of education or self-confidence. The study found almost all litigants in person studied, from various social backgrounds and with various levels of education, fell between being "*procedurally challenged*" and "*vanquished"* with those at the vanquished end of the spectrum being clearly out of their depth, with limited capacity to participate in any effective way, often due to vulnerability.[56] The study identified an "*overwhelming need*" for practical support, emotional support, tailored legal advice, and more and better information for litigants in person at every stage of the court process.[57]

2.17 Volunteer agencies attempting to meet this need are often swamped by demand. Support Through Court (previously called the Personal Support Unit), who provide information, practical support and emotional support to litigants in person in family and civil cases, have seen demand increase by 752% between 2012 and 2020,[58] yet find themselves operating in a precarious funding environment.[59]

2.18 Support can be invaluable for litigants in person who can face high levels of stress and "*emotional turmoil*" when they attend hearings and have to cope

[55] L. Trinder, R. Hunter, E. Hitchings, J. Miles, R. Moorhead, L. Smith, M. Sefton, V. Hinchly, K. Bader and J. Pearce, *Litigants in person in private family law cases* (MOJ, 2014) pp. 80-83. This study looked at both children and finance cases.

[56] Ibid, pp. 24-25.

[57] Ibid, p. 25.

[58] From 9,217 service users in 2011/12 to 78,506 in 2019/20, 'Reopening Support Through Court Ensure vulnerable court users can access justice' (Support Through Court, 2020). Of this number, around half (39,190) were family cases involving child welfare considerations; see 'Our Charity' (Support Through Court, 2020).

[59] The MOJ cut funding to Support Through Court in June 2022, sparking concern across the legal profession and the advice sector. The following month, the Ministry of Justice announced a new grants scheme for which Support Through Court will be eligible, however such volatility in funding makes planning resources efficiently and effectively to meet demand all the more difficult for such services. See E. Duggan, Court Support Service Under threat as Ministry of Justice pulls funding' *The Guardian* (19th June 2022); and MOJ, Legal Aid Agency and Lord Bellamy KC, 'Extra support for thousands navigating the legal system' (12th July 2022).

"*with the unknown*".[60] As JUSTICE has previously argued, one of the key ways in which lay users can feel alienated is when well-embedded conventions within the justice system go unexplained.[61] Several unknowns present themselves to litigants in person in family proceedings: the law, and how to legally translate the case in court documentation;[62] what to expect in the building and the courtroom;[63] how to prepare for a hearing;[64] the conduct of the hearing itself and the roles of different actors within proceedings.[65]

2.19 Moreover, the justice system's response to litigants in person can vary considerably. For example, in a substantive hearing with live evidence, there is evidence of significant judicial variation. Some judges may try to fill the role of the missing lawyer, effectively cross-examining witnesses for the litigant in person; some may guide their case, giving prompts as to questions and their phrasing; while others may adopt a "*sink or swim*" approach, treating the LiP as a trained lawyer.[66] The potential for serious injustice in the latter approach has led some to conclude simply that, after LASPO, "*the traditional neutral arbiter role of the judge is not sustainable*."[67]

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[60] R. Moorhead and M. Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Department for Constitutional Affairs, 2005), pp. 164-5.

[61] JUSTICE, *Understanding Courts* (2019), p. 47.

[62] "Litigants in person can struggle to translate their dispute into legal form, understand the purpose of litigation, confuse law with social and moral notions of 'justice', and identify which legally relevant matters are in dispute." R. Moorhead and M. Sefton, see fn 60 above, p.256.

[63] Mant's study of litigants in person indicated that an important factor in feeling prepared and confident when going into hearings is the ability to envisage the space in which those hearings will happen. Expectations of a formal or informal space however were created by advice from friends, or other sporadic sources, rather than from any authoritative source. See Mant, fn 53 above, p. 145. See further evidence of some litigants in person basing their expectations on examples like courtroom dramas. K. Leader, *'Fifteen stories: litigants in person and the civil justice system'* (PhD thesis, London School of Economics 2017) p. 169.

[64] See evidence of over-preparation causing difficulties for litigants in person in their relationships with judges, in Trinder et al, fn 55 above, pp. 117-18.

[65] See the range of judicial approaches to organising the order of hearings in Moorhead and Sefton, fn 60 above, pp. 181-7; Trinder et al, fn 55 above, p.62. In a case which has one litigant in person and the other side is legally represented, there can be heavy reliance on the lawyer. While this has been noted to be helpful in making hearing work if the lawyer is supportive (see Trinder et al, fn 55 above, p. 68) Mant's study found hearing from lawyers first, regardless of if they were the applicant or respondent, often to be exclusionary to litigants in person. See fn 53 above, p. 224.

[66] Trinder et al, see fn 55 above, pp. 74-75.

[67] Ibid, p. 119.

2.20 However, even the most proactive and inquiring judge may struggle to ensure efficient access to justice when litigants in person have not received support, advice or information:

> *They'll tell you everything in case it might be relevant and you don't want to shut them up in case they might come on to a relevant point. But you've got to, eventually. And it's very difficult to be able to get them to be focused on what's relevant. They just don't know what's going to be relevant.*[68]

The vulnerabilities of system users

Vulnerability does not fit neatly into a single definition. While vulnerabilities for special measures (due to age, incapacity or fear or distress) are defined in statute, all vulnerabilities […] should be recognised, and suitable steps taken to ensure the person's needs are met.[69]

2.21 Across the justice system, there are duties in place to ensure that those who are vulnerable can participate fairly, in light of any disadvantage they are experiencing in participating in proceedings, be it personal or situational, permanent or temporary.[70] The family court's list of factors to consider is vast, including personal factors such as physical and mental disorders, as well as factors specific to the context of the case, such as "*concerns arising in relation*

[68] Ibid, p. 72.

[69] The Advocates Gateway, Toolkit 10: 'Identifying vulnerability in witnesses and parties and making adjustments'.

[70] The phrase "personal or situational, permanent or temporary" is used in the Civil Procedure Rules at PD 1A at para. 3. This provision came later than the FPR provisions which deal with vulnerability (Part 3A and PD 3AA) and was inspired by them. The phrase captures perhaps more succinctly the breadth of understanding which is required to deal with vulnerability. However, personal, situational, permanent and temporary examples of vulnerabilities are all included in the understanding of 'vulnerability' in the FPR and in Part 3A and PD 3AA.

to abuse";[71] "*if the matter is contentious*" and "*actual or perceived intimidation*".[72]

2.22 The fear, anxiety, confusion and frustration experienced with an alien process by the majority of litigants in person is a clear example of vulnerability. However, being unrepresented is only one of many factors which can result in vulnerability for individuals in private children proceedings. An additional 17 other indicators of vulnerability were identified in the large study of litigants in person in 2014 discussed above.[73] Half of the litigants in person in that study experienced at least one of the following additional indicators of vulnerability: being a victim of violence, suffering from depression; alcoholism; being a young lone parent; drug use; history of imprisonment; mental illness; living in temporary accommodation with children; illiteracy; terminal illness; involvement with social services; physical disability/ill-health; neurodiverse conditions including Attention Deficit Hyperactivity Disorder, Autism Spectrum Disorder and dyslexia; learning difficulties (including those with borderline mental capacity to make decisions on their own behalf); difficulty controlling emotions; extreme nerves and anxiety (causing sleeplessness, vomiting and panic); and language difficulties (ranging from those who spoke moderate to no English, two of whom appeared in court without interpreters). Multiple vulnerabilities were particularly associated with experiences of violence, abuse and harassment, and with mental health problems.[74]

2.23 Our knowledge of the extent and types of indicators of vulnerability in private family proceedings has been furthered in recent years, with several substantial reports having been published. These recent reports have established several

[71] However, this consideration has now been largely superseded by r.3A.2A which has recently made those who allege domestic abuse automatically considered 'vulnerable' for the purpose of participatory directions, as a result of the Domestic Abuse Act 2021.

[72] The full list is at r.3A.7 (a)-(m), which includes a catch-all at (j): "*any characteristic of the party or witness which is relevant to the participation direction which may be made*". PD 3AA para. 3.1 specifies that the question of whether the individual's participation is diminished should include consideration of the individual's ability to understand the proceedings, and their role in them, when in court; put their views to the court; instruct their representative/s before, during and after the hearing; and attend the hearing without significant distress.

[73] Trinder et al, see fn 55 above.

[74] Ibid, p. 28.

key findings about the families in court and questioned the sufficiency of the current processes to respond to them.

i) Deprivation is higher amongst those who use the Family Court

2.24 Demographic data has recently identified a link between deprivation and private law proceedings. Across England and Wales, families in private children proceedings have been found to be disproportionately from the most deprived areas. In 2019/20, 29% of applicant fathers and 31% of applicant mothers making a private law application lived in the most deprived quintile, with 52% of fathers and 54% of mothers living in the two most deprived quintiles.[75]

ii) Health issues and domestic abuse are more prevalent

2.25 In the year prior to proceedings, adults involved in private children proceedings in Wales were found to have higher rates of health service use (GP and hospital admissions) than their peers.[76] They were around two to three times more likely to have recorded mental health problems including anxiety, depression and substance use, than their peers, and four to five times more likely to self-harm. Meanwhile, domestic abuse (no differentiation of perpetrator or victim) was 20 times more likely to be mentioned in the healthcare records of women and almost 30 times more likely for men.[77]

2.26 In addition, there is evidence of overwhelmingly higher rates of anxiety and depression in children involved in private law proceedings compared with their

[75] In 2020-21, the NFJO published a series of reports from a newly formed Family Justice Data Partnership between the Universities of Lancaster and Swansea, using anonymised data from a SAIL (Secure Anonymised Information Linkage) Databank. The Data Partnership linked population-level demographic data to the administrative data held by Cafcass to provide a picture of the families coming to court, finding disproportionate deprivation in both Wales and England. See respectively: L. Cusworth et al, *Uncovering private family law: Who's coming to court in Wales?* (NFJO, 2020) and L. Cusworth et al, *Uncovering private family law: Who's coming to court in England?* (NFJO, 2021).

[76] A further report by the Data Partnership, which linked NHS healthcare data with Cafcass Cymru data, then contrasted the results with a comparison group of adults in Wales who had not been involved in a private law application, matched on their age, gender, local authority and deprivation quintile. L. Cusworth et al, *Uncovering private family law: Adult characteristics and vulnerabilities (Wales)* (NFJO, 2021).

[77] However, the total number of men with domestic abuse recorded was less than the total number of women.

peers: rates of depression were 60% higher and rates of anxiety were 30% higher in the private law cohort compared with those who are not subject to court proceedings. Children involved in private law proceedings were also found to be more likely to go on to develop depression or anxiety.[78]

iii) Domestic abuse is inadequately dealt with by the system

2.27 Adults and children at risk of harm, and the sufficiency of the family court's response to them and treatment of them, were the subject of the MOJ Harm Panel report in June 2020.[79] The MOJ Harm Panel received over 1,200 responses, with most of the evidence focusing on domestic abuse. The submissions highlighted a systematic minimisation of abuse, inadequate assessment of risk, traumatic court processes, risks of unsafe child arrangements, and the abusive use of repeat litigation as a form of continued control. The Panel concluded that nothing short of structural and cultural change was sufficient to address systemic barriers for domestic abuse victims. Systemic barriers identified were: the court working in a silo, separate from other courts and agencies; adversarial processes; a pro-contact culture despite issues of harm being raised; and resource constraints. Recommendations included increased use of powers to curb abusive repeat applications,[80] automatic eligibility for participation directions for victims of abuse,[81] and a new problem-solving approach to cases – consisting of an initial investigation, adjudication if needed, and a follow up stage. This 3-stage approach has guided the design of the 'pathfinder courts' currently being piloted in North Wales and Dorset, which we build upon in our recommendations in **Chapter 4.**

[78] L.J. Griffiths et al, *Uncovering private family law: Anxiety and depression among children and young people* (NFJO, 2022).

[79] See fn 2 above.

[80] By way of s.91(14) of the Children Act 1989, which permits a court to order that further applications must be subject to leave, intended to make barring orders more accessible to victims of abuse to prevent the court process itself being used as a way of continuing abuse.

[81] Adjustments to improve participation and/or evidence, which can be specific measures such as separate entrances and waiting rooms, giving evidence remotely by video and audio links, screens and intermediaries (communication specialists who assist participation). However the rules also acknowledge they can also be general case management directions, incorporating the court's case management powers to make other adjustments to how a hearing is held and who is allowed to be in attendance, for example McKenzie friends or specialist support workers. See FPR r.3A.1 and r.3.8.

iv) Some ethnic minorities are overrepresented in the family court in England

2.28 Across all regions in England, a disproportionate number of children and adults of ethnic minorities are involved in both public and private family law proceedings in comparison to population levels.[82] 'Black, African, Caribbean or Black British'; 'Mixed or multiple'; and 'Other' ethnic groups are over-represented in both public and private law proceedings; 'Asian and Asian-British' groups are proportionately represented in the private law group; while 'White' groups were in the majority in public and private law, but at a lower proportion than the population at large.[83]

2.29 Taken together, this new information adds to the growing picture of what we know about the individuals who come to court. It also highlights the importance of understanding that vulnerability can take various forms and some may experience intersectional vulnerability as a result of multiple disadvantages. For example, those who are unable to afford representation may also be struggling with poor mental health; the mental health toll of separation and any disagreements about children thereafter was a significant issue raised by support groups we consulted. Such individuals may not be selfishly or recklessly using the family court, but rather resorting to its authoritative help when negotiation feels impossible, and they find themselves with no other affordable alternative than to go to court without any advice or professional support. Others may have poor literacy or neurodivergence which requires additional support, but find themselves navigating proceedings alone when unable to afford representation.

2.30 Children, who may be anxious or depressed, for example due to exposure to domestic abuse or mutual parental conflict, may have a significant need for information, reassurance and support with the processes which will help decide their upbringing. This can be made more challenging if they have additional needs, for example if their first language is not English. The intersectional

[82] B. Alrouh et al, *What do we know about ethnicity in the family justice system in England* (NFJO, 2022).

[83] However, within the White ethnic group there are significant differences, most notably for people in the 'Gypsy or Irish Traveller' group who were over-represented in both public and private law. 'Gypsy or Irish Traveller' was a sub-category of 'White'. 'Roma' was added as another sub-category for the first time to the 2021 census, therefore data is currently minimal for that ethnic group. Ibid, report footnote 11 at p. 4.

vulnerabilities of the parents may in turn disadvantage the child too: if they result in a parent being uninformed, unadvised and unsupported through proceedings it cannot be safely assumed that the child is receiving accurate information and reassurance.

2.31 Some victims of abuse from ethnic minorities may experience significant social and cultural pressure, within families and within communities, not to disclose domestic abuse and to reconcile and agree contact.[84] In court, there are accounts of magnified disadvantage when cultural stereotyping can intersect with sexism and classism, for example when a woman victim of abuse from an ethnic minority is in proceedings against a perpetrator who is white, well-educated and well off.[85]

2.32 These are just a handful of examples; multiple vulnerabilities can intersect in many different ways. This recent evidence, in our view, underlines the importance of giving sufficient attention to the multitude of experiences and characteristics which may cause vulnerability, consider how they may intersect, what impact that may have on the individual, and what they may need as a result to access a fair, safe and effective process.

Children's (non-)participation

2.33 As outlined in **Chapter 1**, Article 12 of the UNCRC, which the UK Government has ratified,[86] recognises a right of the child to be heard in all matters affecting the child, with due weight being given to the child's views considering their age and maturity. In particular, the child must be provided the opportunity to be heard in any judicial and administrative proceedings affecting that child.

[84] MOJ Harm Panel report, fn 2 above, pp. 46, 64 and 145. See further an in depth qualitative study of the intersection between domestic abuse, post-separation child contact and women of South Asian and African-Caribbean Women: R. Thiara and A. Gill, *Domestic Violence, Child Contact, Post-Separation Violence: Experiences of South Asian and African-Caribbean Women and Children* (NSPCC, 2012).

[85] MOJ Harm Panel report, fn 2 above, p. 64.

[86] Wales has, in addition, passed the Rights of Children and Young Persons Measure 2011 which imposes a duty on Welsh ministers to have due regard to the Convention when developing policy and legislation.

2.34 The five implementation 'steps' outlined by the UN Committee on the Rights of the Child ("**the Committee**") to realise the right of the child to be heard effectively are:

- preparing the child through information provision;
- hearing them;
- taking their voice into account, in light of their age and understanding;
- providing them with feedback about how their views have factored into any decision made;
- giving them access to redress mechanisms.[87]

2.35 These steps are not an all-or-nothing package: children who do not want to express a view may still wish to participate in other ways, by receiving information or hearing the judge's reasons for a decision, for example. Nor do these 'steps' dictate a certain type of process which must take place. Processes must be flexible to children participating in different ways and having different levels of engagement; this has been likened to various rungs on a ladder of participation, ranging from children having no input whatsoever to litigating on their own behalf.[88]

2.36 However, participation is facilitated, the 'basic requirements' emphasised by the Committee are:

- States must avoid tokenistic approaches which limit children's ability to express their views or which fail to give their views due weight;
- if children's participation is to be effective and meaningful it must be understood as a process and not a one off event;
- processes should be transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by trained adults, safe and sensitive to risk, and accountable.[89]

[87] UN Committee on the Rights of the Child, General Comment No. 12 (2009), see fn 40 above, para. 40 onwards.

[88] J. Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009) p. 248.

[89] General Comment No.12 (2009), fn 40 above, paras 132-34.

2.37 Research on children's views has identified that young people want information, communication and consultation and they believe strongly in their right to be heard but do not want sole decision-making authority to decide post-separation child arrangements.[90] Experiences of being ignored, or treated with indifference, can cause children distress and fear, particularly when they have spoken about their experiences of violence and abuse but feels like they have not been listened to.[91] Children who are involved in making decisions about contact are likely to have a more positive experience of contact.[92] We agree that inclusion of the child's voice can also benefit the process as a whole; it can improve the focus on children's needs, wishes and safety rather than placing "*excessive focus on adult allegations and counter-allegations, the burden of proof, technical procedural requirements, and suspicions of parental self-interest*".[93]

2.38 That is not to say that securing the effective participation of children in child arrangements matters is a simple task; separation can already be a distressing, traumatic and confusing experience for children, both for those whose parents do and do not go to court.[94] Many children are young when they experience private court proceedings,[95] and can be at risk of harm from one parent, for example when domestic abuse features in the case, or suffering harm from both parents associated with frequent, intense and poorly resolved conflict.[96]

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[90] See summary of research in A. Roe, *Children's experience of private law proceedings: six key messages from research* (NFJO, 2021); and A. Barnett, MOJ Harm Panel literature review, fn 10 above, p. 70.

[91] The majority of children in an Australian study felt the court was indifferent to their views, while children and young people reported distress when their experiences of violence and abuse had not adequately informed post-separation arrangements. R. Carson, E. Dunstan, J. Dunstan and D. Roopani, *Children and young people in separated families: Family law system experiences and needs* (Australian Institute of Family Studies, 2018), pp. 34-35, 59-61, 79, 90.

[92] J. Fortin et al, *Taking a longer view of contact*, fn 21 above, p. xi.

[93] MOJ Harm Panel report, fn 2 above, p. 176.

[94] See Roe's summary of research, fn 90 above, p. 4.

[95] Two thirds of the cases in court feature children under the age of nine. See L. Cusworth, et al. *Uncovering private family law: Who's coming to court in Wales?* (London: NFJO, 2020) and L. Cusworth, et al. *Uncovering private family law: Who's coming to court in England?* (London: NFJO, 2021)

[96] There is strong evidence that frequent, intense and poorly resolved parental conflict can impact children's mental health and long-term life chances. See D. Acquah, R. Sellers, L. Stock, and G. Harold,

However, such challenges are not bars to participation but rather serve to underline the importance of child-friendly, skilled, voluntary and safe processes in which all children, including those who are very young or otherwise vulnerable, can equally access their right to be heard and their views be given weight.[97]

What we know about how children participate

2.39 How children are currently heard or otherwise involved in private proceedings is extremely varied. Children are not automatically a party to the proceedings, as they are in public law cases between the state (the local authority children's services) and the family. And while the "*ascertainable wishes and feelings*" of the child must be taken into account "*in light of their age and understanding*", as one of the factors the court must consider in determining the child's welfare,[98] domestic legislation does not impose a proactive duty upon the court to ensure those wishes and feelings are in fact ascertained, nor to ensure their participation.[99] This is different to Scotland, for example, where primary legislation imposes an obligation on the court itself not just to take any ascertainable wishes and feelings into account, but "*taking account of the child's age and maturity, shall so far as practicable i) give [the child] the opportunity to indicate whether he wishes to express his views; ii) if he does so wish, give him an opportunity to express them; and iii) have regard to such views as he may express.*"[100]

Inter-parental conflict and outcomes for children in the contexts of poverty and economic pressure (Early Intervention Foundation, 2017).

[97] As recently reiterated by the Civil Society Committee on the Rights of the Child at the Conference of International Non-Governmental Organisations of the Council of Europe. See M. Grangeat, *Evaluation and determination of the best interests of the child in parental separation and care proceedings: Exchange of views and knowledge among specialists and professionals - General Conclusion* (21 June 2022), p. 2.

[98] At s. 1(3)(a) of the Children Act 1989.

[99] In their review of the law before the Children Act 1989, the Law Commission provisionally recommended imposing a duty on the court 'to ascertain and consider the wishes and feelings of the child' (Law Commission, *Custody*, WP No 96 (1986) para. 6.44). However, their report, *Guardianship and Custody*, LC No 172 (1988) did not directly address the point, simply recommending that the child's wishes should be included in the welfare checklist (para. 3.24).

[100] S. 11(7)(b) of the Children (Scotland) Act 1995.

2.40 Only rarely will children who are the subject of private law proceedings be made a party and allocated a Guardian and legal representative; Cafcass statistics suggest only 6% of children are separately represented in this way.[101] Even when a child is made a party, it is rare for the child to give evidence.

2.41 Otherwise, children may have a welfare report written about them, under section 7 of the Children Act 1989. This is written by a social worker, either from Cafcass/Cafcass Cymru or the local authority. Unlike a Guardian, the report writer will not make ongoing welfare assessments throughout the case. Their section 7 report is in the majority of cases a one-off welfare analysis to the court.[102] Their analysis involves considering the child's "*ascertainable wishes and feelings, in light of their age and understanding*" as part of their welfare recommendations to the court, and therefore should involve consultation with the children, as well as other relevant individuals.[103] However, section 7 reports are only provided in around 43% of cases.[104] Consultees reported that ordering section 7 reports can incur long delays due to a shortage of Cafcass officers.

2.42 In addition, a very small proportion of children may also participate through a section 37 report from a local authority, which investigates whether it might be

[101] Cafcass, *Annual Report and Accounts 2020/21*, HC 213, pp. 22-23. The recent review by Hargreaves et al of the data on children's participation looked at all private law children cases in England which started between 1 April 2019 and 31 March 2020 (a total of 40,753 cases). This found only 4.6% of cases featured a Guardian appointment under FPR r.16.4, however the study limited itself to looking at the first 12 months of a case. Cases in which a Guardian is appointed after one year may account for the disparity between this figure and the 6% total figure recorded by Cafcass. The data also show the tiny minority of Guardian appointments accepted by the National Youth Advocacy Service (NYAS) (the only organisation to do so other than Cafcass) at 0.1% of all cases. See fn 12 above, pp. 10-11.

[102] A small number of cases receive an 'addendum' section 7 report. Of all private law children cases reviewed by Hargreaves et al at 12 months, 7.5% had an addendum section 7 report. Hargreaves et al, fn 12 above, p.8.

[103] The existence of a section 7 report in a case was taken Hargreaves et al's review as an indicator of the child having participated. However more information is needed to know if this is the case, and the quality of that participation. Cafcass has recently begun to record if the child was seen in the court of writing the section 7 report, however it is not clear if this includes children observed but not consulted, and the degree of consultation involved.

[104] One third conducted by Cafcass while a further 10% are conducted by local authorities. Hargreaves et al, fn 12 above, pp. 8-9.

appropriate for care proceedings to be issued.[105] In total, just under half (48%) of children have some record of participation in private law proceedings, with therefore just over half of cases having no record of the child having had an opportunity to have their voices heard while the court makes important decisions about their future.

2.43 Other means for the child to communicate with the court, of which there are no data, include sending a letter to or meeting the judge. Guidelines for judges meeting children were issued in 2010:

> *to encourage Judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives and to give them an opportunity to satisfy themselves that the Judge has understood their wishes and feelings and to understand the nature of the Judge's task.*[106]

2.44 However, since there are no data we do not know the prevalence of children meeting judges, whether it has increased since 2010, or the impact of meetings on children.

2.45 Children with no other means to communicate with the court do so through their parents, receiving information about the case through them and giving the parents information about their wishes and feelings to inform the court. While in some cases this may be effective, the Working Party notes the significant difficulty for the court in hearing the child's authentic voice and judging the appropriate weight to be attributed to it when they only hear the child through a partisan adult in the dispute.

2.46 In 2014, a Vulnerable Witnesses and Children Working Group was set up by the then President of the Family Division, Sir James Munby. The Working Group heard evidence from the FJYPB of dissatisfaction with current processes and an underlying belief that they were not being listened to and heard. In its conclusions, the Working Group recommended that a fresh approach to the

[105] 2.9%, however the Working Party notes that majority of cases in which there is a section 37 report will have previously featured a section 7 report. Hargreaves et al, fn 12 above, pp.10-11.

[106] Family Justice Council, *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (2010).

evidence of children and young people, including the expression of their wishes and feelings, was long overdue.[107]

2.47 It is likely that children have even fewer opportunities to participate or be consulted outside of court processes. A survey in 2015 found that only around a third of mediators registered with the Family Mediation Council had the necessary training in direct consultation with children, of whom most engaged with fewer than ten children each year.[108] A smaller 2019 survey by the Family Mediation Council found that 33% of cases involved children aged 10 or above still living at home, and of those cases, children were consulted in 26%.[109] There is no data on the rates of children's participation in other private processes, such as arbitration or collaborative law, or indeed when families informally make their own arrangements.[110]

Challenges to achieving reform

2.48 Having outlined several difficulties and barriers for those seeking access to justice within the current family justice system, we conclude by noting four interrelated challenges that in our view need to be addressed in proposing reform of the system.

i) Helping families navigate the system

2.49 Firstly, families who separate are very often in what is, for them, uncharted territory. The landscape of legal and non-legal information and support for families is disaggregated and confusing.[111] We consider the first challenge is

[107] Vulnerable Witnesses and Children Working Group, *Final Report* (2015), p. 15.

[108] The Voice of the Child in Alternative Dispute Resolution Advisory Group, *Final Report* (March 2015), pp. 9-10

[109] The survey sought data only on those ten years old and over since a presumption of offering children the opportunity to participate in child inclusive mediation is currently predicated on such a threshold. Family Mediation Council, *Family Mediation Survey Results* (2019), p. 3.

[110] For the ways in which children are involved in every day decision-making within their families, see I. Butler, M. Robinson, L. Scanlan, *Children and Decision Making* (London: National Children's Bureau, 2005).

[111] A matter which has concerned others preceding us. The Private Law Working Group used as one of its core assumptions an "*incoherent network of support services for separating families*", reporting unanimity in its consultation responses in favour of improved coordination of services (see fn 2 above,

therefore the navigation of that territory, for which families need accessible information, advice and support. This is not limited to the law; families may seek information on how children adjust to separation, and children may seek someone to speak to confidentially. However, when a problem with child arrangements arises, families need to be able to understand their legal rights and obligations, without which it is extremely challenging to navigate towards a solution. Navigation is not solely a challenge for the families themselves; how professionals involved in the family justice system can better assist families in a coordinated, consistent, and most importantly safe way is crucial, wherever families go for help.

ii) Ensuring effective participation for the parties

2.50 The second challenge is how to ensure that adults can effectively participate in processes to resolve their child arrangements problems. This means accessing the right process initially, and then ensuring that whichever process that is enables all individuals, including those with vulnerabilities, to participate. This challenge makes several demands of the family justice system: better supporting those at risk; helping facilitate litigants' understanding of an alien process; ensuring that the processes themselves do not cause or exacerbate harm; and providing opportunities to participate which are tailored to their particular needs.

iii) Ensuring meaningful participation for the child

2.51 The third challenge is to properly embed the child's right to participation, wherever the child's parents go for help. This goes beyond a one-off opportunity to be heard by a professional, but needs to apply at every stage, from accessing information to understanding why and how decisions were made. Vulnerable children should not be cut off from the opportunity to participate; the challenge to the system is to accommodate their needs through mechanisms which respect the child's right to participate in a transparent, informative, voluntary, respectful, relevant, child-friendly, inclusive, safe, accountable, and skilful way.

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pp. 12 and 22). Its subgroup, the Family Solutions Group, identified a "patchy and poorly signposted" landscape of support other than Court, leaving a "a void for separating families at a time of great need" in their report, see also fn 2 above, p. 5.

iv) Making efficient and effective use of resources

2.52 The final challenge is the efficient and effective use of resources; challenges are easily met with unlimited resources. An efficient and effective system is not one which is simply fast and cheap, but one which achieves quality outcomes without wasting resources. To do so, family justice actors need to be able to elicit relevant information to inform safe decisions about the processes they will follow. The family court meanwhile needs to be able to access information, from family members and from third parties, relevant to the issues for the child, in an efficient manner. Post-LASPO, the challenge is to do this in many cases without reliance on lawyers. Only with prompt and reliable access to such information can the court deploy its judicial resources effectively. And of course, the system needs to make optimal use of the skills and expertise of its professionals – judges should not have to devote excessive time and effort to making sure that litigants in person can put their case forward effectively if others can more appropriately do it outside of the courtroom. Cafcass officers and other experts should be able to gear their resources to where these are best utilised. And family justice services and infrastructure, both within and outside the court system, should be adequately resourced to enable timely and responsive handling of the problems families bring for resolution.

2.53 Each of these challenges affects how the system operates and is experienced by its users. In **Part Two** we set out our recommendations for addressing them at each stage in the family justice system – before any court proceedings, in non-court processes, within the court process, and after the process has finished. We do not seek to suggest that each individual recommendation we make is cost neutral: we make recommendations for improved information, advice and support which will require investment. We also acknowledge that the enhanced role for Cafcass during and after proceedings which we propose will require more funding. However, we consider our proposals to be necessary, proportionate to the rights and needs of the families involved, and we identify various ways in which they may achieve cost savings elsewhere as a result.

PART TWO: OUR CONSIDERATIONS AND PROPOSALS

Chapter III. Beyond the court: the wider family justice system

Authoritative and accessible information

Online access

A lot of websites came up, but I didn't know which ones were relevant. So I just looked at a few. A lot of information did come up but I didn't like really go out of my way to sort of like go through a lot of information.[112]

[…] When we started looking at family laws and this stuff, you can read one website and it can contradict in other way, sort of thing. So, yes, it was complicated at first, that's why I decided just to go and talk to a solicitor straight away.[113]

3.1 As we have noted in **Part One**, navigating the complexity of the family justice system is a key challenge. For those who are economically deprived – a disproportionate number of whom we know end up in court[114] – paid, personally delivered, legal information and advice from a legal professional is unlikely to be affordable.[115] Limited free legal help delivered in person, from pro bono and not for profit services, is far from universal and there are significant concerns

[112] R. Lee and T. Tkacukova, *'A Study of Litigants in Person in Birmingham Civil Justice Centre,'* 2017, at pp. 11-13.

[113] I. Pereira, C. Perry, H. Greevy and H. Shrimpton, 'The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems' (MOJ Analytical Series, 2015), p.43.

[114] See fn 75 above.

[115] We heard from solicitors who regularly receive desperate phone calls from parents, unclear where they should go or what to do when presented with a child arrangements problem, but unable to afford legal services. All those we spoke to would try to provide some help, be it signposting to websites, advice agencies or offering some free legal assistance by phone despite there being no legal aid funding for legal help in this area.

about the funding of the sector and its ability to meet demand across all areas of social welfare law, not limited to private family law.[116]

3.2 The internet is therefore an important tool to help families find the information they need and navigate their options.[117] Excellent online resources exist, such as the AdviceNow website from Law for Life, and some people are finding and using those resources.[118] However, the Working Party is concerned by the sheer volume of information online of varying quality, amongst which users do not know what or whom to trust. The use of online forums by those who cannot afford personally delivered advice is unsurprising: they offer emotional support and much needed interaction with peers tailored to their problem.[119] However, they are unregulated environments which lack quality-control, providing fertile ground for misleading information and advice.[120]

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[116] Coram Children's Legal Centre's Child Law Advice Service provides free general legal advice on child, family and education law in England. It has managed to increase its capacity by 240% since 2012, however the scale of provision has not been able to keep up with increased demand; see Coram Children's Legal Centre, *Rights without remedies: Legal aid and access to justice for children* (Coram Children's Legal Centre, 2018). The reliance on short term grant funding to fund free legal advice rather than government legal aid funding has caused concern about sustainability of law centres, with the Law Centre Network reporting in 2020 that 76% of its remaining 45 centres had 6 months' reserve funding or less (the total number of centres having reduced by 11 from 54 since the legal aid cuts in 2013); Law Centres Network, *Law for All* (2020). See further the Law Society, *Civil legal aid: a review of its sustainability and the challenges to its viability* (2021) pp. 24-25.

[117] The *Legal Problem and Resolutions Survey* found that 46% of those who had recently experienced a family problem used the internet, either alone or in combination with another source of advice, to find information and advice on how to solve the problem. This was high in comparison to almost all other civil and administrative problems they looked at. See R. Franklyn, T. Budd, R. Verrill and M. Willoughby, *Findings from the Legal Problem and Resolutions Survey 2014-15* (MOJ, 2017), p. 81.

[118] This has recently been boosted, with some funding from the MOJ going towards search engine optimisation of Law for Life's Guides. That funding however ended in June 2022. P. Welham and W. Dugdale, Legal support for litigants in person mid-grant report (MOJ, 2022) p. 23.

[119] L. Smith suggests the act of contributing to an online discussion is likely to increase trust in the information shared in that discussion. See L. Smith, 'Representations of Family Justice in Online Communities of Experience' in M. Maclean and B. Dijksterhuis (eds), *Digital Family Justice: from alternative dispute resolution to online dispute resolution* (Hart Bloomsbury, 2019).

[120] Working Party members have observed advice about substantive law shared on such forums which was plainly wrong. Furthermore, linguistic analysis of the use of online forums by paid-McKenzie friends to advertise their services identified overwhelmingly adversarial and negative descriptions of family justice, creating "a non-conciliatory contextual framing for the advice then provided". T. Tkacukova, 'Changing Landscape of Advice Provision: Online Forums and Social Media Run by McKenzie Friends' (2020) 4 *Child and Family Law Quarterly* 397.

3.3 Other JUSTICE Working Parties, government research and other research have highlighted the value of a single authoritative online platform.[121] We consider that those experiencing child arrangements problems would similarly benefit, and **we recommend a single authoritative online information platform for separating families.** An authoritative website will not provide a panacea for all those struggling to find, coordinate and take in information, particularly those facing cultural or practical barriers to accessing such information. However, we consider it an important tool to improve navigation, alongside access to information and advice in the community which we discuss further below.

3.4 Before the Covid-19 pandemic in 2020, the MOJ developed a pilot website called "*Get Help with Child Arrangements*".[122] The focus of the website is to provide a brief overview of different options for the resolution of disputes. It clearly advertises the current £500 mediation voucher scheme,[123] and gives some price estimates of other options, such as informal negotiation tools, solicitor negotiation and court, as well as some 'pros' and 'cons' of each. It signposts to legal advice centres and support charities, and other agencies which can assist with locating a service provider. There are postcode finders for mediators, lawyers, free legal advice clinics and counsellors, with a section dedicated to emotional support. Sections on mediation, lawyer negotiation, collaborative law and court also have videos which introduce the processes.

3.5 While this website is an initial step in the right direction, the Working Party consider significant further development is required. In the short term, we consider further legal information on the substantive law needs to be included, with better signposting to quality third sector websites such as AdviceNow and Citizen's Advice. The current site has very limited information for those who are already engaged in court proceedings. It is not designed to help with writing statements, administrative tasks, or post court support such as information about appeals**. The Working Party considers that the legal information needs of all**

[121] JUSTICE, Delivering Justice in an Age of Austerity (2015); Understanding Courts (2019); Solving Housing Disputes (2020); I. Pereira, C. Perry, H. Greevy, and H. Shrimpton, *The Varying Paths to Justice: Mapping problem resolution routes for users and non-users of the civil, administrative and family justice systems.* (MOJ, 2015); A. Barlow, J. Ewing, R. Hunter, and J. Smithson, *Creating Paths to Family Justice: Briefing Paper and Report on Key Findings* (2017) pp. 11-12 (based on findings of *Mapping Paths to Family Justice* at fn 27 above).

[122] MOJ, Get Help with Child Arrangements.

[123] Introduced in 2021 and extended in 2022. MOJ, *Guidance: Family Mediation Voucher Scheme*. Discussed further below in **Chapter 3**.

families, before, during and after any resolution process, not just those initially considering options, need to be catered for in a single authoritative online platform.

3.6 The Working Party also supports the single authoritative site including non-legal information and signposting to non-legal services, such as counselling, information about which is included on the pilot website. Locating such information for families in the same place as legal information will help families see their problems holistically as having legal and non-legal elements and facilitate access to support with such elements through a 'one stop shop', be they seeking resolution out of court, looking for legal advice before court, or going through court proceedings.

3.7 Multiple justiciable problems can also cluster, with money and debt problems often identified as "*central elements in cascades of justiciable problems*"[124] which can also include child arrangements issues. Indeed, researchers have observed that "*problems which involved relationship breakdown/children, home ownership, mental health, domestic violence, employment and homelessness g[i]ve rise to the most complex, and arguably the most serious, problems*".[125] We also consider therefore that integration of signposting to specialist information and advice about other legal problems which may cluster with child arrangements issues, including domestic abuse, child maintenance, mental health, debt, housing, divorce, immigration and asylum, would be of benefit to the families using the online platform.

3.8 **The Working Party also recommends that any online platform should be designed for children to use it, independently of adults.** The disruption to children's lives through parental separation can cause distress, trauma and confusion for children,[126] for which they may need information and support at different times, about various aspects of their experience. There are pre-existing barriers to children asking for support around separation, such as children's fear

[124] P. Pleasence, N. Balmer, A. Buck, A. O'Grady, H. Genn, 'Multiple justiciable problems: common clusters and their social and demographic indicators' (2004) 1(2) *Journal of Empirical Legal Studies*, 301, quoted in the Low Commission, *Tackling the advice deficit. A strategy for access to advice and legal support on social welfare law in England and Wales* (2014) para. 1.4.

[125] R. Moorhead, R. Lewis, and M. Robinson, *A trouble shared: legal problems clusters in solicitors' and advice agencies* (Department of Constitutional Affairs, 2006), p. 91.

[126] See research summarised in A. Roe, fn 90 above, p. 4.

of stigmatisation and concerns about family privacy.[127] The Working Party, therefore, considers that information for children needs to be as accessible as possible online. While Cafcass and Cafcass Cymru have accessible and child-friendly resources on their websites, they are understandably targeted at children whose parents are at court. They feature good non-legal resources,[128] which could benefit a wider group of children. However, it is unlikely that children who have no involvement with Cafcass – or know what Cafcass is – will be able to find them online.[129] A single authoritative online platform for all children experiencing separation, not just those whose parents are in court, would in our view be more accessible than the Cafcass website. Other websites could also signpost more children to it, such as Childline.

3.9 The online platform should therefore include an opportunity for the user to identify themselves as a child on the landing page, and thereafter access tailored information and links to support and advice. The landing page of "*Families Change*" websites, used throughout Canada and in some US states, is a useful example.

[127] See the Irish study, A. M. Halpenny, S. Greene, and D. Hogan, 'Children's perspectives on coping and support following parental separation' (2008) 14:3 *Child Care in Practice* 311, quoted in A. Roe, fn 90 above, p. 8.

[128] The resources available on the Cafcass website include the leaflet "My Family's Changing", which contains games and worksheets about emotions children may be feeling, explains separation is not the child's fault, and provides links to helplines such as NSPCC and Childline. Further resources include different children's perspectives (e.g. Kelly's story); explanations of the court professionals and their roles, in html and as a downloadable factsheet; links to helplines; and a glossary. Cafcass Cymru's website has similar content but also lays it out differently for "children" (those under 11) and "young people" (11 and over). Their resources are available in a pack for children, but again such a pack is designed for children with whom Cafcass Cymru will be working, i.e. conducting a section 7 report.

[129] Children whose parents are not in court may not know what Cafcass is or be put off by the landing pages which are clearly about court. However, simple online searches like "*my parents are divorcing*" and "*my parents are splitting up*" on search engines produce very few authoritative resources aimed at children (while there are many resources aimed at adults).

Parents

Help your kids deal with separation. Make decisions in the best interests of your children.

VIEW PARENT GUIDE

Teens

Guidance to help teens cope with a family break-up and move beyond the grief.

VIEW TEEN GUIDE

Kids

Kids ages 6-12: Learn about separation, divorce and the feelings you are having.

VIEW KIDS GUIDE

3.10 In the longer term, as the content of the website develops and provides more access to useful information, it will need to be skilfully ordered and easily navigable, to prevent information overload for users. The Working Party therefore considers that the platform should develop to be an interactive tool rather than simply providing digitised written information, videos and hyperlinks. An interactive tool would give users the opportunity to 'self-triage'

through a series of questions and decision trees, thereby tailoring information to their specific needs.

3.11 JUSTICE's *Delivering Justice in an Age of Austerity* first recommended such self-triage be integrated into online civil justice in 2015.[130] An example can be seen in the MOJ's housing disrepair tool, which provides a series of questions to help narrow the relevant information for the user, such as the type of housing, the urgency of the problem and the effect on the tenant's health. This then produces a curated page of information and links based on what the user has said.[131]

3.12 For an interactive tool to navigate a range of legal and non-legal information and support effectively, the Working Party considers cross-governmental collaboration would be beneficial, including between the Department of Health, the Department for Education, the Department for Work and Pensions, the MOJ, the Department for Levelling Up, Housing and Communities. and devolved Welsh Government Departments of Health and Social Services, and Education, Social Justice & Welsh Language.

3.13 The Working Party acknowledges that the above recommendations are considerably more ambitious than what currently exists. **They will require significant investment, time and user-testing, as well as ongoing maintenance to ensure information is kept up to date.** But we consider the investment to be more than justified, and indeed potentially offset by downstream savings, if people are better informed, enabled to know what to do, whom to ask and where to go, and empowered to address their problems sooner rather than later, be that through legal help, non-legal help, or a combination of the two.

Accessible materials

3.14 The authoritative online platform website above will not be accessible to everyone, and consideration should be given to how any digitally excluded individuals can have access to an online platform, including via a telephone

[130] Inspired by the British Colombia Civil Resolution Tribunal online portal and the Dutch Rechtwijzer system. See JUSTICE, *Delivering Justice in an Age of Austerity* (2015) p. 33 onwards.

[131] MOJ, *Check how to get repairs done in your rented home*.

line.[132] We make further recommendations below about accessing recourses in the community.

3.15 However, once families find information, particularly written information, it must be in an inclusive and comprehensible format to be of any use. Complex language should be avoided,[133] and further adaptations for additional needs must be available. The Working Party notes the benefits of easy read versions of documents not only for those with learning disabilities, for whom they are principally designed, but also for non-native English speakers and those with low literacy.[134] Furthermore, the Working Party urges consideration of how legal information can be made available in users' first language if it is not English or Welsh, particularly information for children being directly delivered to them by Cafcass. One of the children we spoke to from the FJYPB had recently moved to the UK when family proceedings began for him; he had found it extremely challenging to understand what was going on during his family court proceedings, with all information he was given and could find being in English.

3.16 Finally, information also needs to be adapted for different ages of children. The Working Party is aware that getting such information right for younger children is a challenge, and any information tools should always be the result of expert development and user testing. However, very difficult topics in other areas have been successfully communicated to very young children; for example the NSPCC's "*Talk PANTS"* campaign, which uses cartoons of a Pantosaurus dinosaur, videos and supportive learning materials for use by parents and professionals to teach children about sexual abuse and "*the Underwear Rule*".[135] The Working Party urges ambition in the ages which can be reached with information at all stages, including general information about parental

[132] See further consideration of design principles behind an information and advice phoneline to accompany an online platform *in* *Delivering Justice in An Age of Austerity* at p. 34 onwards. For further information about digital exclusion, see JUSTICE, *Preventing Digital Exclusion from Online Justice* (2018).

[133] For example, the Government Digital Service guidance suggests written content be aimed at a reading age of 9. See *Content Design: Planning writing and managing content* (2016, updated 2022).

[134] See acknowledgement of the usefulness of easy read beyond users with learning disability in Government Guidance. Cabinet Office (Disability Unit), *Guidance: Accessible communication formats*.

[135] NSPCC, *Talk PANTS.*

separation, information about different processes which children may be subject to including court, and information about children's rights.

3.17 In summary, **we recommend that maximising the accessibility of information for separating families should be a priority for all those providing such information, be they individuals, Government, non-governmental organisations or courts. This should include adapting information for different ages of children as well as in light of current and future understanding of users' vulnerabilities, characteristics and needs.**

Legal advice

Early Legal Advice

3.18 A clear message from our consultees, lay, professional and volunteer, was that while general information can be an important first step for families, when a problem arises individuals want, and in many cases need, legal advice from a professional. For those who seek to understand their legal rights and obligations, general information cannot enable them to ask questions and apply the law to their individual circumstances. Those who can afford personally delivered legal advice will pay for it privately, however, we now know that the private family proceedings cohort is disproportionately deprived compared to the population at large.[136] Therefore, the Working Party considers the funding of legal advice demands urgent consideration.

3.19 A recently established "*Affordable Advice*" service from Law for Life provides a demonstration of the benefits of legal advice. The service is aimed at addressing a range of barriers to parents seeking advice, including fear and confusion about prices, the high cost of advice, and a lack of confidence. Throughout pages of online legal information on the AdviceNow website there are regular opportunities to receive advice from a Resolution lawyer at a fixed rate, known as unbundled advice. The benefits for those using the service are clear: the pilot evaluation identified enhanced levels of legal capability including knowledge of rights and obligations and improved confidence and trust. Users also reported high levels of confidence and stress reduction after having received advice. Furthermore, the evaluation noted the potential for the service to reduce conflict while also empowering users to get a better grasp of

[136] See research at fn 75 above.

the parameters of family law proceedings when the individual was able to access the service at an earlier stage. The service continues to be available at a fixed fee, which improves accessibility of advice for some but of course not the most economically deprived.[137]

3.20 The Working Party is aware that some continue to fear that legal advice drives people towards courts and does not help families resolve their problems out of court. Indeed, this was part of the rationale behind the withdrawal of legal aid in 2013. The Working Party considers that restricting the availability of legal advice for the most economically deprived undermines rather than assists the early, safe and fair resolution of disputes, for two main reasons. First, the evidence does not support the idea that legal advice encourages unnecessary court applications; quite the opposite. As we outlined in **Chapter 2**, since legal aid was largely withdrawn from legal representation in 2013, but retained for mediation, legally-aided mediation starts have nevertheless halved between 2011/12 and 2020/21.[138] Moreover, more litigants resorting to court in person are unadvised, unassessed and have not benefitted from a 'reality check' in their case, with the judge or legal adviser in the first hearing sometimes being the first legally-qualified person with whom they have spoken. The Working Party cannot see this as an efficient model, nor one which is designed to reduce unnecessary conflict for families. Indeed, as others have observed,

> *[i]n the absence of a reliable stream of referrals from solicitors, mediators now have to do their own recruitment. Many clients arrive at MIAMs un-screened and un-encouraged by a lawyer, and un-advised as to their legal position. More challenging parties and cases are entering mediation.*[139]

3.21 The opportunity to correct wholly unrealistic expectations of court, assess a client's suitability for mediation, and give legal advice which they will trust, would in our view result in significant efficiencies in both mediation and court processes.

3.22 Secondly, the Working Party notes the significant benefits that early legal advice provides for those who do need the family court. It provides litigants

[137] Law for Life, *Affordable Advice Service pilot evaluation report: Final Report* (September 2021).

[138] See fn 46 above.

[139] Barlow et al, *Mapping Paths,* see fn 27 above, p. 211.

with a basic legal understanding of their rights and obligations before they come to court, while also providing access to legal aid entitlements for those eligible, both under the existing domestic abuse and child abuse gateways, as well as better identification and assistance with exceptional case funding applications.

3.23 We therefore consider publicly funded early legal advice to be a vital tool within the family justice system: it can help separating families access the right solution, it can help focus resources on the families who need court most, and can better prepare those families for court. **We recommend that publicly funded early legal advice on child arrangements should be piloted without delay**.[140]

3.24 We add to this recommendation two observations about current MOJ pilots. Firstly, the MOJ has been funding and evaluating a limited number of legal support services for litigants in person over the past two years, in partnership with the Access to Justice Foundation. This grant funded the above-mentioned Law for Life Affordable Advice pilot, alongside other national, local and regional grants.[141] Its aim has been to establish an evidence base for early intervention services which provide support, information and legal advice at different stages of clients' problem resolution. The evidence in the interim report suggests improved client outcomes in all areas; however, early specialist legal advice in relation to family problems had a particularly successful impact on out of court resolution.[142] Any new pilot would not therefore be starting from

[140] The Working Party is not the first to suggest early legal advice should be reintroduced in this area. We are grateful to both the Law Society and Resolution who shared with us their policy recommendations for the reintroduction of early legal advice for private family disputes, which they have been making for some time. It has also been recently recommended by the Westminster Commission on legal aid and the House of Commons Justice Committee. The latter discussed possible models, including Resolution's "family law credit" scheme, which would combine assessment of legal aid eligibility with other options in an early advice session, and an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. House of Commons Justice Committee, *The Future of Legal Aid : Third Report of Session 2021-22,* (21 July 2021) HC 70, pp. 43-44. See also *Westminster Commission on Legal Aid, 'Inquiry into the Sustainability and Recovery of the Legal Aid Sector* (All-Party Parliamentary Group on Legal Aid, October 2021), p. 25.

[141] Three national, five local and three regional grants, covering a range of areas in England and Wales. MOJ, *Legal Support for Litigants in Person (LSLIP) Mid-Grant Review: Summary of Key Findings*, see Map at slide 4.

[142] 79% of the family sample who received generalist advice, casework and early specialist legal assistance *before engagement with the formal court system* (stages 1 and 2 in the evaluation) resolved

scratch but building upon this evidence base, and could further explore the most effective combinations of support and assistance which can enhance the impact of early legal advice.

3.25 Secondly, the MOJ is currently piloting early legal advice in social welfare law, to test the hypothesis that "*early legal advice relating to housing, debt and welfare matters minimises negative housing-related outcomes (for example, loss of home) and results in measurable downstream savings across government"*.[143] There should be similar consideration of what cross-governmental "*downstream savings*" can be measured in a private family law early legal advice pilot, both when the result is early resolution and when it is a prompt court application. The Working Party notes these savings would not be limited to short-term court costs but could include better long-term child welfare and parental wellbeing outcomes.

Legal advice for children

3.26 The Working Party is concerned at the dearth of accessible legal advice available for children.[144] While most children may have a parent who represents their interests, some may not. Those children are some of the most vulnerable and isolated and they should have some route to accessing legal help so they can be informed of their options. These options include applying with leave of the Court for a child arrangements order under section 10(8) of the Children Act 1989. The Working Party does not consider such applications to be preferable to parents applying if they are available and willing to do so. However, when they are not, s.10(8) is an important backstop if a child does not have an adult to seek an order for them, but they are stuck in arrangements making them seriously unhappy or unsafe.

3.27 An interesting international comparison is Denmark, where children over the age of ten have a 'right of initiative' to request a meeting about their own child arrangements with the state administration (the Danish Agency of Family Law, or *Familieretshuset*). If resolution is not reached, the *Familieretshuset* makes a

problems avoiding the need to go to court, as opposed to 11% of the employment sample and an average of 62% across all areas of law. Welham and Dugdale, fn 118 above, Table 20 at p. 80.

[143] Quoted in Chris Minnoch, *Early Legal Advice Pilot: missing the point?*, (April 2022).

[144] The Working Party identified one service only, Coram Children's Legal Centre, which provides online guidance and advice – on their Lawstuff website and advice by phone via their Child Law Advice Service – about a child changing child arrangements.

referral to the family court.[145] Even accounting for the different organisational structure of the Danish system,[146] the recognition of the child as a rights holder in the pre-court space is a stark contrast to the position in England and Wales.

3.28 So too is the difference in legal assistance available to looked after children in this jurisdiction. Independent Reviewing Officers must inform children, in light of their age and understanding, of their right to bring proceedings for child arrangements or to discharge their care orders. When children do wish to challenge their arrangements as decided by the local authority, for example by having more or less contact with family members, Independent Reviewing Officers have a duty to establish whether an appropriate adult is able and willing to assist the child to obtain legal advice or bring proceedings on their behalf, and if there is no such person, they must assist the child to obtain such advice.[147] Looked after children in the local authority's care and those in their family's care are of course in different situations. However, the Working Party notes the similarity in their need for legal advice in these narrow circumstances: when a child opposes their current arrangements and there is no appropriate adult able and/or willing to assist the child to change them.

3.29 In practice, children's applications for child arrangements are rare.[148] Others have suggested this is because the bar for being granted leave is too high; section 10(8) only allows for leave when the child has "*sufficient understanding"*, which in practice will be assessed by the solicitor. However, the Working Party add to this its view that there is also an accessibility issue to consider, namely children being able to access legal advice about an application in the first place, before any assessment of their competence takes place. There is no equivalent for these children to the *Familieretshuset* to go to for a meeting, nor a professional like an Independent Reviewing Officer to oversee their access to legal advice; instead such children are on their own.

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[145] S. 35 of the Parental Responsibility Act; see further I. Lund-Andersen and C. Gyldenløve Jeppesen de Boer, *Parental Responsibilities National Report – Denmark* (Commission on European Family Law).

[146] The Familieretshuset has a mandatory role before court in all cases, and will invite most parties to a meeting about a disagreement in child arrangements upon one of the parties issuing an application to them.

[147] Reg. 45 of The Care Planning, Placement and Case Review (England) Regulations 2010.

[148] The number is not included in the MOJ's published Family Court Statistics. The Family Solutions Group stated "*The numbers are so small that the MOJ does not keep the figures but likely to be under 10 annually*", see the FSG report, fn 2 above, p. 95.

3.30 We are further concerned by potential financial barriers. To access legally aided legal services, the Civil Legal Aid helpline informed us that a child would have to evidence their financial eligibility, which as dependents would in practice require them to produce their parent's financial information. This is a particularly difficult burden in the particular circumstances of such applications. Furthermore, the helpline informed us that a child would have to evidence their eligibility for legal aid under the same gateways as adults, i.e. for domestic abuse or child abuse.[149] We later identified there is a separate legal aid provision available for children to access legal aid before a child arrangements application in LASPO: schedule 1 paragraph 15 provides for civil legal services for a child who "*is, or proposes to be, the applicant or respondent*"[150] of family proceedings.

3.31 We are unable to determine decisively whether the current funding provision is being accessed sufficiently in practice, since we do not know what the demand is from children, nor do we have data on the use of the provision. However, the incorrect information given by the MOJ's own Civil Legal Advice helpline, and the lack of practical experience of the provision from the several children's solicitors we contacted, gives us cause for some concern. **We therefore recommend a review into whether Schedule 1 para 15 LASPO is effectively providing children who seek legal information and advice about a s.10(8) Children Act 1989 application with that advice**. Matters we consider to be relevant to this review include: the legal professional awareness of Schedule 1 para 15 LASPO; any means test and evidential requirements imposed on children; and referral routes in the community (see next section on below).

Coordination of services for separating families

Community coordination and access

3.32 A single authoritative website would improve the experience of families by collating information in one place. However, improved coordination *between* services themselves on a local level is also required. We are aware of recent

[149] Under Schedule 1, paras 12 and 13 of LASPO.

[150] Emphasis added.

innovations to do so, such as the Supporting Separating Families Alliance in Kent, which seeks to create "*under one umbrella a local, comprehensive, shared support system for parents and children who are going through a family breakdown"*. The range of services in the Alliance reflects this ambition, including contact centres; courses and workshops; domestic abuse support; legal support; mediation; mental health support; mentoring support; parenting plans; family law solicitors; support for children; and other support groups.[151]

3.33 The Working Party considers that such networks and alliances are to be strongly encouraged. Local alliances and partnerships go beyond listing services together on a website. They have the potential to cultivate knowledge, trust and referral routes between local services, to ensure families can receive help with their problems as easily as possible. The most developed model of such coordination the Working Party identified was that of CLOCK,[152] which provides service users with a volunteer 'Community Legal Companion' to coordinate their multi-agency support, from law firms, mediators, the Citizens Advice Bureau, Domestic and Sexual Abuse survivor support services and others.

3.34 A further innovation in Dorset seeks to coordinate such services within a 'family hub' model. Family hubs aim to provide access to whole-family, joined up, family support services, and have received growing attention during the life of the Working Party, with investment in and coordination of a national network in England announced during 2021.[153] They are a Department for Education initiative and therefore devolved, meaning family hubs are only available in England at present, and not in Wales. While there has been particular focus from government on their ability to deliver early years

[151] See *Supporting Separated Families Alliance.*

[152] *Community Legal Outreach Collaboration Keele* (CLOCK) is a University-based public, private and third sector partnership model (originating in Keele University, now operated by 9 University Law Schools in 8 court centres) providing navigation and coordination of legal and support services for litigants in person, through a "Community Legal Companion" role.

[153] £82 million of further funding was announced to be allocated to help 75 local authorities in England to develop their services, while a transformation fund of £12 million has been announced for 12 local authorities without any family hubs to open them. See DfE and Will Quince MP, *Children's Minister address to National Centre for Family Hubs* (November, 2021); DfE, *Family Hubs: Local Transformation Fund Application guide* (November 2021). The Anna Freud Centre now leads the new National Centre for Family Hubs, in collaboration with the Early Intervention Foundation. See *National Centre for Family Hubs - About us*.

support,[154] family hubs are intended to deliver family support services for families with children up to 19 (or up to 25 for young people with special educational needs and disabilities). They are intended as a universal front door to families, which can be a physical place in a community and/or a virtual space, offering a one-stop-shop of family support services across their social care, education, mental health and physical health needs.[155]

3.35 In Dorset, the Working Party understands that separating families are a focus of their Family hub design, with the range of services to be incorporated into the model based on the needs of local communities but likely to include mental health, child contact services, substance misuse support, housing, benefits advice and support, early years and education support, support and counselling for children and parents/carers, parenting programmes and education, child maintenance help, legal information, legal advice, and mediation and links to other local sources of support.

3.36 **We support the creation of networks and alliances, particularly those featuring a multi-agency navigator role, such as CLOCK's 'Community Legal Companion'. Where family hubs are available, we strongly support the inclusion of the various legal and non-legal needs of separating/ed families.**

3.37 With respect to family hubs, we consider they have the potential to simplify greatly the landscape for separating families when trying to understand what help they can access with their child arrangements and other related problems, in a way that will benefit families by being holistic, quality controlled and visible in communities. However, we have several further suggestions intended to enhance the accessibility of family hubs for separating families.

3.38 Firstly, the Working Party notes the Children's Commissioner for England's observation about the accessibility of family hubs:

> *Encouraging the most vulnerable families into a Family Hub is often a challenge due to lack of confidence or their having had previous bad experiences. The model needs to include a 'hub and spoke' element that can*

[154] HM Government, *The Best Start for Life: A vision for the first 1,001 critical days,* CP 419 (2021).

[155] See *the National Centre for Family Hubs - Why family hubs*.

proactively target the families who most need support and reach those who will not attend a centre.[156]

3.39 The Working Party considers that community outreach to create 'spokes' in marginalised communities is particularly important. Spokes can be created through partnerships with trusted people within those communities, and by encouraging support organisations who work with those communities to become part of the hub services.[157]

3.40 Secondly, a 'spoke' of particular importance is schools. Schools can be local community touchpoints for some of the most isolated families. We heard from several consultees that they can be a trusted source of information about what to do when a problem concerning children presents itself. Indeed, schools are a particularly important access point for not only adults but also children. We consider that children should be anticipated as discrete users of hub services, especially those children who will not receive, or do not want to ask for, help from their parents in accessing information and support. This will require support for schools to enable them to function as an effective spoke, through providing information about hub services and/or hub liaisons with schools.

3.41 Thirdly, the Working Party notes that the Dorset family hub model is intended to work in partnership with the family court, by ensuring there is liaison between the hub and the court, including Cafcass supporting the family hub team with the provision of training for staff and resources for children and families. The Working Party considers such liaison to be vital to maximising the benefits of the family hub model, with the court effectively acting as a further 'spoke' to hub services. Understanding the Court as part of any network, alliance, or hub and spoke model, and not separate from it, is crucial, in the Working Party's view, to ensuring that families can access the multi-disciplinary help they need *wherever* they present with their problem. This

[156] Children's Commissioner for England, *Family Hubs Policy Paper* (2021), p. 4.

[157] Southall Black Sisters highlighted several intersecting barriers presented to Black and minority ethnicity (BME) women accessing the legal information and advice they need, particularly those suffering abuse, including immigration insecurities, fear of reprisals from family and community, shame, isolation, fear of court as a punitive authority, and lack of awareness of where to go for help. The importance of community outreach was stressed to us in our conversations with Forward UK, an African women-led organisation working to end violence against women and girls, with specialisation in female genital mutilation (FGM). It supports individuals and families to access support and legal assistance, and uses a model of engaging with community champions to reach out to marginalised members of communities, rather expecting people to find their service on their own.

means families can be assisted to access hub services during and after their court proceedings; those who present at court may be assisted to access alternative ways of resolving their dispute where safe to do so;[158] and families who seek hub services and who in fact need the court's protection can access that protection without barriers.

3.42 Fourthly, **we recommend that any networks, alliances, hubs or any other collaborations of services should not be segregated into legal/court-based and non-legal/court alternatives. Instead, the aim should be to provide access to multidisciplinary support and multiagency services for adults and children, whether or not they also are involved with the court.** Legal and court-related services for families include support and information services such as Support Through Court, as well as legal advice. For children, we suggest hubs could facilitate children to access legal advice from children's panel solicitors, a much needed community access point, as discussed above. However, the co-location of both *legal and non-legal help* in the community is essential, in our view, if families are going to holistically address their child arrangements problems.

3.43 The Australian experience of Family Relationship Centres ("**FRCs**") provides a useful lesson: FRCs were originally supposed to exclude legal and court-related services, to be a "*non-adversarial source of assistance to replace (emphasis added) lawyers and courts*".[159] However, after three years, the evaluation of the reforms noted legal and non-legal professions had the capacity to complement each other in assisting families, and it was decided that legal help should be incorporated into FRCs. The 'Legal Assistance Partnerships Program' commenced in FRCs in 2009, and evaluators found it to be successful in improving the focus of parents on the best interests of children; addressing power imbalances between parents; and assisting less adversarial dispute resolution. Evaluators further identified that coordination, communication, mutual respect and high levels of trust were the key characteristics identified to

[158] We consider how this can happen in the court process below in **Chapter 4.**

[159] House of Representatives Standing Committee on Family and Community Affairs. *Every picture tells a story: Report of the Inquiry into Child Custody Arrangements in the Event of Family Separation*. (Canberra: Commonwealth of Australia, 2003) p. 89.

successful partnership working between legal and non-legal family relationship professionals, including lawyers, mediators and family counsellors.[160]

3.44 We finally add that for services to be coordinated, and for the initial investment in time and money to establish partnerships to be worth it, those services must have sustainable funding. MOJ funding for regional advice partnerships working to support litigants in person lasted for two years only and ended in June 2022, with grantees reiterating that stable, longer-term funding was needed to retain skilled advisers.[161]

Consistent risk screening

3.45 The presence of risk, to the child or a parent, needs to be at the forefront of professionals' consideration wherever they are assisting families. This ensures families get the right help and are not channelled through processes which could exacerbate risk rather than account for it. Identification of abuse victims (adults and children), or other risks, for example substance misuse, can inform a prompt identification of available support services such as specialist support groups for parents and children, or in the context of a dispute, identify appropriate dispute resolution processes. The Working Party notes that traditional mediation is unsuitable for cases in which there are significant imbalances of power or other complex risk factors.[162]

3.46 When identifying such risk, it is internationally recognised that relying on the individual to identify risk and advocate for themselves is inappropriate and

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[160] See R. Kaspiew, M. Gray, R. Weston, L. Moloney, K. Hand, L. Qu & the Family Law Evaluation Team, *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies, 2011); and L. Moloney, R. Kaspiew, J. De Maio, J. Deblaquiere, K. Hand and B. Horsfall *Evaluation of the Family Relationship Centre legal assistance partnerships program Final report* (Australian Institute of Family Studies, 2011).

[161] Welham and Dugdale, fn 118 above, pp. 95, 105-6.

[162] Evidence has shown that mediation can function as a continuation of the abuse, resulting in traumatic processes for the victim, unfair outcomes as a result of the victim capitulating to the more powerful person's demands, or no outcome at all. Barlow et al, *Mapping Paths*, fn 27 above, p. 108. Other risk factors may further impact the likelihood of a mediation being effective and/or the balance of power, and recent evidence suggests mediation, even when combined with legal information and counselling, is unlikely to secure agreement in cases involving drug or alcohol addiction, mental health issues or where there were issues of domestic violence or coercive control. See A. Barlow and J. Ewing, *An Evaluation of Mediation in Mind – Final Evaluation report* (University of Exeter, 2020), p. 2.

ineffective. Evidence from the United States and England, for example, shows the importance of mediators using objective, structured screening tools. Without such tools, relying on victims to self-identify risk and self-advocate, and on professionals intuitively to judge severity of risk, can lead to under-reporting by victims, and false negatives by mediators.[163]

3.47 Of course, the systematic and objective benefit of screening tools is undermined if they are only selectively used. This means screening everyone, not only those who arouse suspicion or volunteer worrying information. It also means that professionals across different services should ideally be using the same screening tool, so that risk is identified and responded to in a systematic way wherever the person at risk presents for help.

3.48 Currently in England and Wales, there is an inconsistent and unsystematic approach to risk identification by family justice professionals for separating families. Screening is mandatory for those working under the Family Mediation Council's Code of Practice.[164] However, there have been concerns about the consistency and quality of screening in practice.[165] There is no one tool that is consistently used, nor a menu of recommended or approved tools, although there is advanced training available on the various tools available and the importance of screening. By comparison, the Working Party heard that it is not

[163] A randomized trial in the US found even those experiencing high violence risks may not report it unless proactively asked by mediators, see F.S. Rossi, A. Holtzworth-Munroe, A.G. Applegate, C.J. Beck, J.M. Adams, & D.F. Hale, 'Detection of intimate partner violence and recommendation for joint family mediation: A randomized controlled trial of two screening measures' (2015) 21:3 *Psychology, Public Policy, and Law*, 239. Another randomised trial found under-reporting of other potentially harmful behaviours, such as mental illness and substance misuse, that occur alongside the primary risk factors such as domestic abuse, and a high level of false negatives reported by mediators when they were unsupported by a structured tool and training, see R.H. Ballard, A. Holtzworth-Munroe, A.G. Applegate, & C.J. Beck, 'Detecting intimate partner violence in family and divorce mediation: A randomized trial of intimate partner violence screening' (2011) 17:2 *Psychology, Public Policy, and Law*, 241. Research in England has further found relying on individuals' subjective perception of risk is inadequate, since some lack of recognition of their own experiences as being abusive, for example those who have normalised their abuse. See Barlow et al, *Mapping Paths*, fn 27 above, pp. 100-1.

[164] "*The Mediator must seek to discover through a screening procedure whether or not there is fear of abuse or any other harm and whether or not it is alleged that any Participant has been or is likely to be abusive towards another"*, para. 5.4.2.

[165] One study found an average of just three minutes was given to screening, concluding clients were not given enough opportunity to disclose the abusive behaviour. P. Morris, 'Mediation, the Legal Aid, Sentencing and Punishment of Offenders Act of 2012 and the Mediation Information Assessment Meeting' (2013) 35 *Journal of Social Welfare and Family Law* 445. See further discussion in *Mapping* Paths, fn 27 above, pp. 100-101.

commonplace at all for lawyers to screen their clients, with the level of domestic abuse knowledge and experience of lawyers conducting cases varying considerably.[166] Furthermore, there is little systematic coordination between professionals, even when risk is identified.[167]

3.49 At court, Cafcass must conduct safeguarding checks in all child arrangements applications concerning contact and residence, but not for specific issue or prohibited step order applications, unless allegations are made, or other evidence prompts enquiry.[168] Furthermore, while Cafcass safeguarding interviews follow a structure, and are conducted in light of objective evidence, they are conducted solely over the phone and can suffer from significant time constraints, a particular limitation raised by the Cafcass officers with whom the Working Party consulted. The rules furthermore explicitly prevent the Cafcass officer from speaking to the child during the safeguarding checks before a first hearing.[169]

3.50 The Working Party considers a better coordinated family justice system, in and out of court, is one which provides consistent and systematic screening of risk, to ensure a safe and proportionate response to risk in each case, wherever a family go for help.

3.51 The Working Party found an example of a tool which could significantly assist such coordination in Australia. The Family Law Detection of Overall Risk Screen tool ("**FDOORS**")[170] is a whole-of-family, first level risk screening framework designed specifically for use across the family law sector, including by mediators, family relationship professionals such as counsellors, and lawyers.[171] It is also currently being piloted as part of a court intake

[166] See Safelives, *Hit and Miss: family lawyers' understanding of domestic abuse* (March 2022). The Working Party is aware of a current pilot being conducted by Safelives to train lawyers in domestic abuse.

[167] Without which the FSG were concerned that: "*mediators […] may be more inclined to offer mediation (in their desire to help) especially if the client seems willing*"." FSG report, fn 2 above, p. 115.

[168] FPR PD 12B, para. 13.1.

[169] FPR PD 12B, para. 13.6.

[170] Previously known as FL-DOORS.

[171] J. E. McIntosh, J. Lee, & C. R. Ralfs, '*The Family Law DOORS Research and practice updates*' (2016) 98 *Family Matters* 34, 35.

procedure.[172] FDOORs screens for overall risk, including violence (victimisation and perpetration risks), infant and child developmental and safety risks, conflict and communication, parenting stress and collateral stressors.[173] Similar to screening processes in public health contexts, it systematises a universal screening as the first stage (DOOR 1): this limits more invasive assessments to those who need them while ensuring full assessments are triggered by identification of overall risk, even when isolated matters are seemingly minor.[174] Red flags are then identified for a practitioner's enquiry with the individual (DOOR 2) which will elaborate issues and identify if a fuller assessment is required, as well as identify support services and facilitate referral to such services if needed. Full assessment may then take place (DOOR 3) in appropriate cases, with further consideration of referral to support services.[175] In Sweden, the FDOORS model has been adapted to include at least one individual session with the child, during which the child can receive information and get an opportunity to express their need for support.[176] The Working Party strongly supports this approach.

3.52 **The Working Party therefore recommends the systematic use of a common structured risk screening tool by professionals throughout the family justice system, including mediators, legal professionals, any professionals conducting family hub intake assessments, and Cafcass in court, to ensure a consistent and proportionate response to risk, wherever a family go for help. Such a tool should be a universal initial screen for overall risk, not limited to domestic abuse, for every person, which will identify the need for fuller assessment if a risk is identified, along with suitability for referral for support services.**

[172] Federal Circuit and Family Court of Australia, *The Lighthouse Project*.

[173] J. E. McIntosh, J. Lee, & C. R. Ralfs, '*The Family Law DOORS Research and practice updates*' (2016) 98 *Family Matters* 34, 37; and Family DOORS, 'About - Family DOORS screening tool'.

[174] J. E. McIntosh et al, '*The Family Law DOORS Research and practice updates*', see fn173 above, at 37.

[175] Ibid 39-40.

[176] M. Eriksson, & M. Gabrielsson. '*Supporting Children and Parents in Sweden through Collaboration Teams*' (2019) 57:3 *Family Court Review*, 362, 365.

Funding for non-court resolution processes

3.53 Better coordination of services can only help individuals navigate such services as are available to them. Currently, affordable alternatives to court for the resolution of disputes are limited. Mediation continues to be the only non-court process for which there is public funding available, through legal aid and most recently through a voucher scheme which provides up to £500 to help meet the cost.[177] The voucher scheme is a welcome innovation with less bureaucracy than legally aided mediation, and less potential for perceptions of unfairness when only one party is eligible for legal aid and the other party has to pay. However, the scheme awaits full evaluation of its outreach and impact on families and the resolution of their disputes.

3.54 The Working Party does not consider that there should be such singular focus on financially supporting one type of non-court process. Research has shown that mediation, solicitor negotiation and collaborative law all have strengths and weaknesses for different clients, based on their flexibility, speed, incorporation of legal advice, their ability to overcome imbalances of power, or ability to pause in case parties need time to be emotionally ready.[178] Even when mediation may be the right option, it may be less attractive for those who cannot afford legal advice to go alongside it; the decrease in legally aided mediation since LASPO certainly indicates this may be the case. This has led some to suggest that mediation needs to adapt to providing the kind of advice that separating couples seek, and to propose legally-assisted mediation, with room to advise the parties, as a useful addition to the post-LASPO dispute resolution market.[179]

3.55 Further non-court innovations instead of, or in addition to, mediation include a one-couple-one-lawyer model[180] and packages of legal and non-legal support,

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[177] See fn 123 above.

[178] Barlow et al, *Mapping Paths*, fn 27 above, pp. 149-152.

[179] M. Maclean and J. Eekelaar, *Lawyers and Mediators: The Brave New World of Services for Separating Families* (Hart Publishing, 2016), p.80.

[180] The Divorce Surgery provide a one-couple-one-lawyer service for both finances and child arrangements, see. Resolution, a membership organisation for family justice professionals who share a constructive approach to resolving family issues, is preparing principles and standards for the one couple one lawyer model for practitioners, including a step-by-step flowchart from initial meetings to draft

such as adding the assistance of counsellors.[181] **The Working Party recommends that, in addition to the mediation voucher scheme, consideration should be given to how other non-court dispute resolution processes can be financially supported, such as collaborative law and solicitor negotiation, and other 'packages' of legal and non-legal support.**

3.56 For families with complex problems involving domestic abuse, mental illness or substance misuse, any innovations which are designed to assist safe out of court dispute resolution for those families would need to be carefully structured, likely to need substantial funding and multi-disciplinary and multi-agency collaboration, and careful piloting and evaluation, with nothing of such a description being yet available in this jurisdiction.[182]

Children's right to participate throughout the family justice system

3.57 Children's right to participate in decision-making does not start at the court door. Article 12(2) of the UNCRC states that the opportunity to be heard should be *particularly* afforded in judicial proceedings, but Art 12(1) is not specific to any process: the standalone right to be heard applies wherever decisions are being made. However, the Working Party is concerned that child inclusion is currently inadequate, with several cultural and practical barriers to effective participation for children. This is particularly so in out of court processes.

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agreements. See N. Rose, 'Resolution embraces 'one lawyer, one couple' approach to divorce' *Legal Futures* (8 July 2022).

[181] For example the London-based Family Law in Partnership ('FliP') provides lawyers, mediators and arbitrators alongside in-house counsellors and family consultants. See further the *Mediation in Mind* pilot which found that a combination of legal information, mediation and counselling resulted in a higher agreement rate than mediation alone when cases did not involve complexities such as domestic abuse, substance misuse or significant mental illness, see fn 162 above.

[182] An Australian pilot, *Coordinated Family Dispute Resolution*, attempted to create a safe mediation process which heard vulnerable parties' and children's voices in cases in which there had been a history of domestic violence. The process required a team of professionals, including lawyers for each parent, domestic abuse workers, a mediator, a specialist children's practitioner, and other specialist workers depending on the families' needs. The model with these safeguards and professionals was evaluated as safe, however it was not rolled out for "*political, resource and funding*" reasons. See R. Field and A. Lynch, 'Hearing parties' voices in Coordinated Family Dispute Resolution (CFDR): An Australian pilot of a family mediation model designed for matters involving a history of domestic violence' (2014) 36:4 *Journal of Social Welfare and Family Law*, 392.

Protection from participation

3.58 As discussed in **Chapter 2**, we identified amongst some consultees an underlying cultural presumption that children's participation conflicts with their protection. Many we spoke to emphasised the fear of burdening the child the adult conflict, from which it was felt they should be shielded.

3.59 Working Party members entirely understand and agree with this sentiment. The need to consider the welfare impact of the child's participation is unquestionable and fundamental to the right, which must be practised in a manner which is respectful, voluntary, skilful, safe and sensitive to risk.[183] However, we are concerned that professional anxiety about child participation, particularly when combined with resource constraints and a desire to encourage settlement, can lead to a presumption that not engaging with the child is a neutral practice.

3.60 The Working Party considers that, to the contrary, failing to provide children with the opportunity to participate effectively and meaningfully itself poses risks to their welfare. It can lead to traumatic experiences in which the child is disenfranchised from a process in which they feel ignored. As Australian researchers have concluded,

> *steps taken to shield children and young people from their parents' litigation, while benevolent in their intention, may be associated with the experience of harm on the part of the young person where their agency and capacity to participate in decision making affecting them is not acknowledged and accommodated.*[184]

3.61 Moreover, such approaches risk missing cases in which children have something very important to say about their protection from harm. As the UN Committee on the Rights of the Child has observed "*Much of the violence perpetrated against children goes unchallenged both because certain forms of*

[183] Some of the UN Committee on the Rights of the Child's basic requirements for all child participation, General Comment No.12 (2009), fn 40 above, paras 132-34.

[184] R. Carson et al (2018), fn 91 above, p.67.

abusive behaviour are understood by children as accepted practices, and due to the lack of child-friendly reporting mechanisms."[185]

3.62 The Working Party agrees with the conclusion of the Voice of the Child in Alternative Dispute Resolution Advisory Group ("**the VoC in ADR group**") in their 2015 report:

> *Concerns about burdening children further should not preclude them from having a voice but serve to underline the importance of all practitioners having appropriate training and the skills necessary to reassure parents and facilitate the process for parents and for their children.*[186]

Age

3.63 There is often an assumption (or even presumption) in England and Wales that ten years old is the right age at which children can begin to be brought into dispute resolution processes. For example, the Family Mediation Council's Code of Practice provides that "*All children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during the Mediation, if they wish*".[187] This age was adopted by the Minister of State for Justice and Civil Liberties who defined the remit of the VoC in ADR group in 2014. He considered it an appropriate age, due to its use in the criminal justice system as the age of criminal responsibility. However, he did add that "*children younger than ten should also have this opportunity if they wish. In other words, younger children should not be disenfranchised but, by the age of ten, there should be an expectation that the child's voice would be heard.*"[188]

3.64 It is trite to say that children's rights do not accrue at the same point as criminal responsibility; the Working Party considers any analogy between participation rights and criminal responsibility to be unhelpful.[189] Furthermore, the UN Committee on the Rights of the Child has been very clear "*[c]hildren's levels*

[185] General Comment No.12 (2009), fn 40 above, para. 120.

[186] VoC in ADR Group, (2015) see fn 108 above, p. 32.

[187] FMC Code of Practice, para. 6.6.1.

[188] The Rt Hon Simon Hughes MP, quoted in VoC in ADR Group, (2015) see fn 108 above, p. i.

[189] It is also unclear what is envisaged as the difference between giving all children over ten "*the opportunity to have a say*" and offering younger children "*the opportunity if they wish*". To know if a child wishes to have an opportunity, the opportunity must first be offered.

of understanding are not uniformly linked to their biological age […] the views of the child have to be assessed on a case-by-case examination".[190] As Lord Scarman observed in the landmark case of *Gillick*:

> *If the law should impose upon the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.*[191]

3.65 The Working Party considers that a presumptive age of 10, even with caveats relating to children under that age, is arbitrary. We have considerable concerns that an arbitrary age threshold of presumed participation will risk the converse presumption that children under the threshold do not need access to their participatory rights.

3.66 The Working Party considers a whole-system approach towards child participation is required. A child's right to participate exists however their parents chose to determine post-separation arrangements for them. **The Working Party therefore recommends a system-wide presumption that all children should be offered the opportunity to participate in processes which assist in the resolution of a dispute which concerns them, both in and out of court, in an age-appropriate way.** This includes:

- Providing them with information and answering questions about the process
- Giving them the opportunity to be heard (including sharing their experiences of the past as well as their feelings and wishes about the future)
- Taking into account what they have said and giving it due weight
- Giving feedback about the outcome and the way their views were taken into account
- Allowing for complaints, review or redress.[192]

[190] General Comment No.12 (2009), fn 40 above, para. 29.

[191] *Gillick v West Norfolk and Wisbech Area Health Authority and another* [1986] AC 112 at para. 129.

[192] Per the five steps laid out in General Comment No.12 (2009), fn 87 above.

3.67 Others have previously called for a participation presumption in out of court processes.[193] We agree with their conclusions about a presumption but reject the suggestion of an age threshold. We consider the presumption should apply to all children, but would be rebuttable, in or out of court:

- if the child is too young to be consulted, for example a pre-verbal infant. There must still be a recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children can demonstrate understanding, choices and preferences. Whether and how a very young child could be consulted will depend on each individual child, and we consider the use of age thresholds for a presumption to be unhelpful and to risk producing arbitrary distinctions.
- if greater harm would be done by involving the child than not. Again, this must be considered on the facts affecting the individual family, not based on a general assumption.

3.68 If the presumption is rebutted, the decision and the reasons for it should be noted down, and subject to review during the process. In more simple processes, such as a straightforward mediation with few issues, this may be unlikely to lead to any change in approach. In other out of court processes, however, as well as court proceedings, it may well do. Further observations about children's ongoing participation in court, and the need for it to be under review, are made in **Chapter 4**.

Practical barriers to child inclusion in non-court dispute resolution

[193] In 2015 the VoC in ADR Group recommended a non-legal presumption that all children and young people aged ten and above should be offered the opportunity to have their voices heard directly during dispute resolution processes, including mediation, if they wish. (See fn 108 above, p.ii). In 2020, the FSG supported this recommendation, but remarked it had not brought about the change in culture required in the five years since it was made, questioning if a statutory footing was necessary, but not questioning the presumption only applying to those ten and over. See FSG report, fn 2 above, pp. 30-31 and Annex 2 at p.94.

3.69 There are several practical difficulties in the way of non-court processes consistently securing the child's right to participation, not the least of which is the fact that Cafcass and Cafcass Cymru are not available to provide assistance.

Skills and safety

3.70 As discussed above, surveys have identified that only a minority of mediation practitioners are trained to consult directly with children, while an even smaller proportion do so regularly.[194] The ability to provide a safe and skilled consultation with the child is clearly a pre-requisite for any child-inclusive process, wherever it is taking place. Some mediators in the survey conducted by the VoC in ADR group expressed a lack of confidence about their skills to talk to children about sensitive issues in a safe and supportive manner.[195] There are challenges for regulators too; we note with concern that the Family Mediation Council cannot currently require Disclosure and Barring Service ("**DBS**") checks from its child inclusive mediators.[196]

3.71 For mediators who may prefer not to conduct child consultations themselves, the VoC in ADR group highlighted the benefits of an alternative model of child inclusive mediation, conducted with a second professional, such as a child counsellor or a second child-inclusive mediator, to conduct the consultation. It recommended a pilot (which has not yet taken place) with the National Youth Advocacy Service ("**NYAS**") for independent children's advocates to consult with children and feed their views into mediation.[197] The Working Party supports this recommendation, while also observing the benefits of such a model to other out of court processes, such as solicitor negotiation.[198]

Funding

[194] See fns 108 and 109 above, and related discussion.

[195] VoC in ADR report, fn 108 above, p.20.

[196] Contrary to the VoC in ADR group's recommendations. The recommendations were considered by the Family Mediation Council but rejected on the basis that it could not require such of mediators. See FMC Code of Practice, *News*, (14 May 2018).

[197] VoC in ADR report, fn 108 above, pp.19-20.

[198] Collaborative law can already incorporate child consultation however there is no survey data to the Working Party's knowledge of how often this is done.

3.72 However, if any child inclusive mediation, conducted by one professional or two, is to be reliably available to children, it must be adequately funded. We agree with the VoC in ADR group's recommendation that mechanisms should be put in place urgently to provide for appropriate new funding levels for publicly funded child inclusive mediation.[199]

3.73 Additionally, we note that family arbitration was expanded to include private children matters in 2016. Beforehand, it was intimated that it could involve arbitrators meeting with children,[200] however, no such meetings are currently possible. In fact, arbitrators are expressly prohibited from meeting with children to ascertain their wishes and feelings, and they are also not able to discuss or explain to the child any determination made after the event, unlike judges.[201] Instead, children can be heard through the appointment of an independent social worker to ascertain their wishes and feelings;[202] however, this incurs added cost and delay. The Working Party considers that further thought should be given to how this kind of arbitration can operate in a more child-inclusive way.

Parental consent

3.74 Yet it must be acknowledged that the most significant barrier to child inclusion in out of court processes can be the parents themselves, who can object to the child's involvement and thereby gatekeep their right to participate. The VoC in ADR group considered the matter thoroughly, and concluded the following:

- if a child is *Gillick* competent[203] and has sufficient "*maturity and understanding*" to decide that they want to participate in the process,[204]

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[199] VoC in ADR report, fn 108 above, recommendation 33 at p. 55.

[200] The VoC in ADR group noted that the "*Forum of Family Arbitrators [..] have made mention of an appropriate protocol of how the child's voice is heard by the child issues arbitrator*", ibid, p. 26.

[201] Institute for Family Law Arbitrators, 'Family Law Arbitration – Children's Scheme', r. 8.3.

[202] Ibid, r. 8.2.3 and r. 8.2.4.

[203] From healthcare case law in which it was found children could consent to medical advice or treatment without parental consent if they had sufficient maturity and understanding to make a reasonable assessment of the advantages and disadvantages of the treatment proposed. See *Gillick*, fn 191 above.

[204] *Gillick* has been applied to a child's maturity and understanding to participate in the court process, in the context of the test for separate representation in Part 16. See *CS v SBH* [2019] EWHC 634.

they should be able to override the parent withholding consent.[205] However, this creates practical difficulties: how can a child be assessed for their competence if there is a parental refusal to their being consulted?

- When the child is not deemed *Gillick* competent, the VoC in ADR group suggested that if at least one person with parental responsibility consents, the child should be able to be heard. In so doing, they drew upon the parental consent policies of Relate, which requires the consent of only one parent to work with non-*Gillick* competent children (although it maintains that best practice is to encourage consent from both).[206]

3.75 The difficulties are clear: a mediator would have no way of enforcing access to the child, and by insisting on doing so would risk disengagement by the parents, ending the mediation process and extinguishing the child's opportunity to be heard in any event. Unlike Relate's counselling of children, which can proceed even if one parent does not agree, a withdrawal of engagement from one parent in mediation will negate the entire process.[207]

3.76 As a result, the Working Party considers the most important improvement is in parental education, through the provision of trustworthy information for parents about the value, principles and practice of children's participation. Particularly in voluntary processes, education is more likely to secure children's inclusion than coercion.

3.77 **In summary, the Working Party recommends non-court dispute resolution processes should be better supported to be child inclusive. We recommend:**

- **Any public education materials and public campaigns about parental separation should always include information about the principles and practices of child inclusion.**
- **Family justice professionals both in and out of court should consider how to make their practice more child-inclusive, be trained and**

[205] Since "the parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision". *Gillick*, fn 191 above, per Lord Scarman at 422.

[206] VoC in ADR report, fn 108 above, p. 41. Relate is a nationwide relationship support service which provides therapeutic and counselling services.

[207] This recommendation was rejected by the Family Mediation Council, and the standards framework amended as of May 2018 still states that the consent of both parents is required for child inclusive mediation. Family Mediation Council, *Standards Framework Changes for CIM* (2018), at para. 6.4(f).

supported to do so, and provide parents with information about the principles and practices of child inclusion.

- **Piloting of child practitioners, such as NYAS child advocates, to facilitate children's participation in non-court dispute resolution processes, including but not limited to mediation.**
- **A funding mechanism for the extra work involved in publicly funded child inclusive mediation, and consideration of how such child consultation can be financially incentivised in privately paying non-court dispute resolution.**
- **Consideration of how the Family Mediation Council can require DBS checks of child inclusive mediators.**[208]
- **Consideration by the Institute of Family Law Arbitrators of how arbitration can be made more child inclusive: we think there may be benefits to including other professionals who could speak to the child, such as child advocates, and we consider the prohibition on arbitrators meeting with children requires review, particularly in relation to how best a decision made in arbitration can be fed back to the child.**

[208] We are grateful to the Family Mediation Council for confirming their support for this recommendation, as well as for improved funding mechanisms for child inclusive mediation.

CHAPTER IV: Going to Court

4.1. Some families will not be able to resolve their child arrangements problems out of court. The role of the family court in such situations is to provide a means to resolve such disputes, in accordance with the rule of law. This ensures that when questions of children's upbringing are in dispute, they are not resolved in favour of the most powerful, or against the least capable. Instead, "access to justice" for these families secures a process which is fair and accessible, through which outcomes can be achieved in children's best interests. To do this, the necessary information relevant to the children's welfare must be available to the court, and all those who wish to, including children, need to be able effectively and meaningfully to participate in the process.

4.2. A previous JUSTICE Working Party concluded in 2015 that "*in the current climate, a justice system premised on most people being legally represented cannot offer effective access to justice.*"[209] This Working Party finds the family court dealing with private child law cases in 2022 to be an acute example of that conclusion continuing to hold true. While the majority of cases feature at least one litigant in person and a non-party child, processes in place continue to be based on traditional adversarial litigation. That traditional model relies on represented parties, through their legal representatives, being able to make and respond to allegations, harness, produce and challenge evidence (documentary and testimonial), and formulate arguments of fact and law. At its core, this model relies on the notion that "*two or more professional adversaries representing the parties to the dispute will draw forth all relevant information to the contest in the process of putting forward their clients' best positions, thereby allowing the decision-maker [to make the best decision]*".[210] The court process, and the judge therein, can maintain a passive approach when such representation is in place: equal footing is in-built, and the participation of the lay client can be secured by the lawyer beyond the courtroom, through pre-court preparation, post-court debriefing and client conferences between hearings.

[209] JUSTICE, *Delivering Justice in an Age of Austerity* (2015) p.6.

[210] J. Weinstein, 'And Never the Twain Shall Meet: The Best Interests of the Children and the Adversary System' (1997) 52 *University of Miami Law Review* 79, 82.

4.3. In today's private family proceedings, the Working Party considers this traditional model to be unsustainable. Too many cases have not had their merits nor their risk assessed, legal advice has not been given, expectations have not been managed, the law is unknown or misunderstood, the court is an unfamiliar and potentially frightening process, and an individual's capacity to handle litigation may be further compromised by particular vulnerabilities.[211] And children are not parties or represented, with even less opportunity to participate than the adults in the case.

4.4. Nonetheless, we firmly believe that the family court has the potential to, and indeed must, provide meaningful and consistent access to justice for the families who come before it. It must facilitate effective participation for everyone in the family, tailored to their vulnerabilities and age; identify the issues in dispute relevant to the child's welfare; obtain the information it needs for safe decision-making; hear any live evidence it needs to in a fair and equal way; and work with the families to find solutions to their problems and enable sustainable and safe outcomes for children. In order to do this, however, radical change is required.

4.5. In proposing this radical change, we question the prevailing notion that, in contrast to non-court processes, a court will always be an exacerbator of conflict and a site of deterioration of family problems. Insofar as this has been the case, we cannot continue to resign ourselves to this effect of the court process on families' wellbeing as an inevitability; we must do better. The family court needs to deliver the service that the most vulnerable families need from it, which will relieve rather than inflame the emotional intensity of the dispute.[212] Beyond the child arrangements dispute, we further consider that the court can have some role in assisting with the underlying and co-existing problems the family are experiencing, legal and non-legal. The Working Party agrees that "*a fundamental re-balancing of the family court"* is required *"towards what ought to be its true role as a problem-solving court, engaging the therapeutic and other support systems that so many families, children and*

[211] See discussion in **Chapter 2**.

[212] For an example of the potential for the court to do this, see the report of Dr Hellin cited in the judgment of Hayden J in *Lancashire County Council v M and others (Lancashire Clinical Commissioning Group intervening)* [2021] EWHC 2844 (Fam), further discussed in Dr Hellin and HH Dancey, 'Family justice: the human condition' Family Law News (26 April 2022).

parents need if they are to achieve justice – both justice from the court and social justice."[213]

The Court Team

4.6. Judges, magistrates, and legal advisers have an important part to play in leading the cultural change necessary to achieve radical reform. They must be supported and equipped to meet the needs of the families coming before them. They alone, however, cannot secure the effective participation of litigants in person in every case, or the wider needs of such individuals, particularly those with intersecting vulnerabilities. In 2013, Lord Justice Briggs identified the 'misconception' that:

> *the unfairness to litigants in person inherent in practice and in procedure can be satisfactorily addressed at trial (or at some significant interim hearing) simply by the patience, courtesy and investigative court-craft of the experienced judge. In many cases, if not the majority, it will by then be too late, because the cumulative hurdles which litigants in person will have failed satisfactorily to overcome will have left them with insuperable disadvantages by the time they get to trial or to a hearing.*[214]

4.7. We agree with Lord Justice Briggs; a fair and accessible process requires the effective participation of litigants to be proactively facilitated throughout the process, not just during hearings.

4.8. In considering how this may be done without full representation by lawyers, we looked elsewhere: outside the family justice system, as well as outside the UK, to other jurisdictions in which the participation of those without lawyers has been the subject of considerable attention. We saw numerous examples, in reports and in practice, of the use of an additional court professional:

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[213] Sir James Munby, 'What is Family Law? Securing social justice for children and young people' (Eleanor Rathbone Social Justice Public Lecture Series 17/18, Liverpool, 30 May 2018).

[214] One of three misconceptions dismissed by Briggs LJ, the other two being that peripheral steps can ameliorate the experience of litigants in person, and that intelligible descriptions of practice and procedure for litigants in person can be written by lawyers, with which the Working Party also agrees. Briggs LJ, *Chancery Modernisation Review: Final Report* (December 2013), p.105.

- In 2015 JUSTICE responded to the legal aid cuts by recommending the creation of a new role within the civil justice system – a 'registrar'. The registrar's role was to investigate relevant issues, identify relevant evidence, and help to resolve as many cases as possible using alternative dispute resolution methods. In cases where other resolutions were inappropriate or ineffective, the registrar would actively case manage them to adjudication. The role was inspired by the use of registrars in tribunals and by other decision-making bodies in which people were not expected to have lawyers and many of the cases were broadly similar. These bodies, amongst other things, were noted to "*make the best possible use of resources by reserving the use of expensive senior decision makers for the most difficult or ground-breaking issues and for the task of oversight, and using lower paid, yet expert, trained and managed caseworkers to undertake the preliminary identification of issues, communication with claimants, seeking of additional evidence and reaching a preliminary view.*"[215]

- In 2016, Lord Justice Briggs proposed "*a new, more investigative, court designed for navigation without lawyers*"[216] in his *Civil Courts Structure Review*, proposing a 'case officer' role to progress cases towards resolution. Case officers would work closely with judicial supervisors with recourse to advice and guidance when needed, which Briggs LJ did not hesitate to call teamwork.[217] Their work would be preceded by an initial automated interactive triage online, designed to enable litigants to articulate their case before it reached the case officer.

- In the tribunals, reform has seen greater use of legal officers, previously 'tribunal caseworkers', to facilitate case progression as case management systems are moved online.[218] For example, in the First-Tier Tribunal (Immigration and Asylum Chamber) their role includes checking documentation is filed and prompting parties for any missing evidence

[215] The Office of the Social Fund Commissioner, the Financial Ombudsman Service and the Traffic Penalty Tribunal. JUSTICE, *Delivering Justice in an Age of Austerity*, p.14.

[216] Briggs LJ, Civil Courts Structure Review: Final Report (July 2016), para. 6.2.

[217] ibid, paras 7.4-7.5.

[218] As part of His Majesty's Courts and Tribunals Service ("HMCTS") wider Reform Programme of digitisation. See further HMCTS, *Guidance:* The HMCTS reform programme (2018).

ahead of scheduling a hearing, with the option of holding a remote case management hearing to clarify issues and evidential needs of parties. The impact of the role is yet to be fully evaluated but there are early indications that the greater use of legal officers, combined with the digitisation of case management and changes to pre-hearing reviews of appeals, has led to a decrease in adjournments and thereby a decrease in wasted judicial time.

- The Queen's Bench Division of the High Court has used case progression officers to give advice to court users on basic procedure, liaise by phone or correspondence with parties and their representatives to progress cases, and proactively contact parties to ensure that proper progress is made in cases, in line with the overriding objective.

- In California, the 'Family Law Facilitator' role has existed for over 25 years to assist self-representing parties in child and spousal maintenance and other family law disputes, after it was recognised that "*there is a compelling state interest in having a speedy, conflict-reducing system […] that is cost-effective and accessible to families that cannot afford legal representation*".[219] The facilitators provide neutral, non-confidential legal assistance to parties to move their case forward or help bring about its conclusion. This can include providing educational materials for parents; providing court forms and assistance in their completion; preparing court documents such as support schedules; and providing referrals to external agencies, such as the local child support agency, and other community agencies and resources.

- The pathfinder courts in Dorset and North Wales are now piloting the role of a case progression officer in private children proceedings, whose role does not yet go as far as the above examples, but does include having telephone contact with the parties at the start of proceedings to explain the court process and answer any procedural questions.

[219] California Family Code §10001(a)(4). The legislature had approved two pilot family law facilitator programmes in San Mateo and Santa Clara Counties in 1993 with the goal of improving court efficiency. Due to the programmes' success in both promoting efficiency and easing litigants' burden, the courts advocated for permanent funding for a family law facilitator's office in every county, passing the Family Law Facilitator Act in 1996. See B.R. Hough, 'Description of California Courts' Programs for Self-Represented Litigants,' (2004) 11:3 *International Journal of the Legal Profession* 305, 308-309.

A case progression officer and a team approach

4.9. Inspired by these examples, and building upon the initiative of the pathfinder courts, the Working Party considers that a similar professional in all private children proceedings would be of significant benefit. We foresee that the role could improve the court's efficient use of its scarce resources, particularly expensive judicial resources; the participation of individuals; and the quality of outcomes for families by means of the quicker, fairer, and better-informed resolution of cases**.**

4.10. **The Working Party therefore recommends the creation of the 'case progression officer' role in the family court. A case progression officer would be allocated to every case to progress the practical and evidential needs of the case and improve the participation of litigants in person.** The Working Party considers that the case progression officer should be employed by HMCTS and would be a neutral, legally-trained court employee, able to provide assistance but not advice, like the Californian Family Law Facilitator. They would be allocated to the case to ensure continuity; we consider this would benefit the court's knowledge of the case and the family, and the consistency for families would improve their experience of proceedings.

4.11. For the case progression officer to operate most effectively in a multidisciplinary family court, we envisage them working in a team with Cafcass, plus any additionally required professionals to facilitate children's participation and supplement Cafcass' expertise, such as domestic abuse support workers. This combination of legal and social work expertise would be the core 'Court Team' available in every case. The rest of the participants in the case would include **the judiciary, or magistrates and legal advisers, the family themselves, and any legal representatives they have, and/or any support personnel. These participants would work with the Court Team as part of a wider collaborative problem-solving approach, in contrast to traditional adversarial litigation.**

4.12. In reframing the approach as such, we are not simply recommending a superficial renaming. A collaborative problem-solving approach is a different way of understanding the interaction between the professionals within the justice system and those families who approach it for help. We adopt Mervyn Murch's description of such a court process:

> *a collaborative encounter where all the actors […] – judges, solicitors, barristers, Cafcass officers and the mediators operating the MIAM gatekeeping function – as well as the family members themselves, including*

the children who wish to have a voice, can be viewed as being bound together in pursuit of a common objective about which all the parties are striving to reach agreement: namely the aim of arriving at a fair and reasonable basis upon which the family can reconstitute itself […] paying due regard to the interests of the child and protecting the vulnerable.[220]

4.13. An example in practice can be seen in the Family Drug and Alcohol Courts ("**FDACs**") in England and Wales, which are problem-solving courts in public family justice. These Courts are distinguished by their collaborative approach,[221] through which multidisciplinary professionals and the judge work closely together, with the parents and any agencies and services involved with the family. Everyone is expected and encouraged to play their part in solving the problems to be resolved. As one FDAC judge said in the original FDAC pilot: "*This court is different. We don't do conflict. We minimise hostility. This is about problem solving*."[222]

4.14. However, it is important to stress that our vision is not for a 'private law' version of FDACs. FDACs in the public law system closely oversee the capacity and progress of the parties to change, in order to enable them to look after their children. The high number of hearings and intensive and lengthy oversight of a small number of families in the FDAC model is not warranted, feasible, nor desirable in the private law sphere. Rather, FDAC demonstrates the capacity of the family court system to move away from traditional structures and norms to adopt a collaborative problem-solving approach. In such an approach, FDAC further demonstrates how a group of professionals (including but not limited to the judge) can work with and for the family to understand the family dynamics, what has brought them to court, and how the welfare of the children may best be promoted. Because families in private law have varying

[220] Termed a "participant family justice" model in M. Murch, *Supporting children when parents separate: Embedding a crisis intervention approach within family justice, education and mental health policy.* (Bristol, 2018), pp. 324-327.

[221] One of 6 unifying characteristics identified in a study of problem-solving courts in practice and scholarship from other countries: Enhanced information (to and from all parties); A collaborative approach (solving problems through joint thinking and action); Fair decision-making (using a non-adversarial and an honest, transparent approach); Judicial review and monitoring (by a specially-trained judge); A focus on outcomes (to achieve the changes needed in parental behaviour and lifestyle. See J. Tunnard, J. Harwin & M. Ryan, *Problem Solving in Court: Current Practice in FDACs in England* (Lancaster University, 2016), at p. 5.

[222] J. Tunnard, J. Harwin & M. Ryan, *Problem Solving in Court: Current Practice in FDACs in England Final Report* (Lancaster University, 2016), p.32.

needs and capabilities, and the procedure to be adopted in each case can be tailored accordingly, we consider our proposal should be able to be implemented at scale in all private law cases.

The Court Team's role

4.15. The Court Team's role would be to help establish with the family what the problems are, and help progress them towards solutions in an efficient, fair and safe way. This should, in our view, mark a shift in the burdens of the family court process. There should be:

- less of a burden on individual hearings by using the time before and between hearings actively to progress cases;
- less of a burden on the judiciary in those short hearings to identify information which can progress a case while trying to adjust to inequalities between the parties; and
- less of a burden on litigants in person to legally plead their case and engage in adversarial litigation.

4.16. In this shift, there are inevitably those who will bear more of a burden. The case progression officer will proactively engage with parties between hearings, when no one does at present, while we propose a significantly enhanced role for Cafcass in the initial investigation of the case (see our recommendations under **Case Progression** and **Initial screening, investigation and referral** below). The Working Party acknowledges this, but we are clear that it is necessary. We do so with full awareness of the resource challenges currently faced by Cafcass and Cafcass Cymru. We do not suggest that our recommendations would be cost-neutral. However, we are not convinced the current process is making the most efficient use of its resources. We heard examples from consultees of Guardians being appointed because a case with struggling litigants in person on both sides had stagnated. We also received evidence from Cafcass of safeguarding interviews being saturated by questions from litigants in person about legal procedure and the court, leaving precious little time for the safeguarding interview. We consider that the new role of the case progression officer can ensure the burden borne by Cafcass is appropriate to their skills and expertise, and proportionate to the needs of the case. We also consider that a redirection of Cafcass resources to the early stages of a case will

reduce the need for the deployment of more intensive resources months into litigation.

The skills of decision-makers

4.17. The Court Team will therefore give the judiciary more time to focus on making case management and substantive decisions for the families before it. Judges recruited to the family court in England and Wales are not required to have any experience of family law, and of course magistrates who sit in the family court need not have any experience in law at all.[223]

4.18. Moreover, judging is a difficult job and private children proceedings pose particular challenges: they require interdisciplinary knowledge far beyond the black letter law, such as relationship dynamics, victim behaviour, and child development; inquisitorial skills due to the many litigants in person; and personal qualities to assist people with their problems when they are mired in emotional distress and conflict. These challenges exist within wider system pressures for judges. These include staff reductions, fiscal constraints, litigants in person numbers increasing still, and loss of respect for the judiciary by the government, about all of which large proportions of judges feel extremely concerned.[224]

4.19. In the United States, the Institute for the Advancement of the American Legal System has singled out the role of the family judge in what they term 'custody' cases, "*because of the complex, multidimensional nature of their cases*", and has sought to interrogate the "*additional knowledge, skills, and qualities not required by their colleagues who handle other case types*".[225] We consider a similar exercise, to reflect on the breadth of what is required of the bench in the family justice system, would be hugely beneficial to both the training and the recruitment of judges and magistrates in this area.

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[223] In amongst the magistrates' workload, private children proceedings are somewhat anomalous, being the only area of civil law between private individuals delegated to the lay bench. Other than private children matters, magistrates deal with proceedings between the state and the individual, be they public family proceedings brought by local authorities or criminal cases between prosecuting authorities, usually the Crown Prosecution Service, and individuals.

[224] The areas with the highest proportion of judges feeling "extremely concerned". C. Thomas, *UK Judicial Attitudes Survey* (UCL, 2020).

[225] Paper published as N. A. Knowlton, 'The Modern Family Court Judge: Knowledge, Qualities and Skills for Success' (2015) 53 *Family Court Review* 203.

4.20. Several of our consultees highlighted important issues to be addressed regarding recruitment, including the diversity and abilities of the lay magistracy and the attractiveness of a career on the district and circuit bench for experienced practitioners. Others specifically focused on training, stressing in particular the need for improved training in domestic abuse. During our consultations, there have been developments in the nature and extent of the training offered to new and experienced judges by the Judicial College. New digital training on domestic abuse and allegations of sexual assault in family proceedings was launched in October 2021 (which we understand will be compulsory for the 2022-23 training year).[226] In addition, training on the traumatic nature of domestic abuse and the impact that such trauma may have on victims' ability to participate in proceedings[227] was introduced as a mandatory module in April 2022, to address "*the attitudinal and behavioural issues raised in recent case law, the Ministry of Justice's Harm Report and the Domestic Abuse Act*".[228]

4.21. The Working Party agrees with the recent increased attention given to domestic abuse training and supports the creation of additional mandatory training modules to meet the need identified. However, we consider that this should mark the *beginning* of a period of reflection into the recruitment and training needs of judges, magistrates and legal advisers in the family court, not the end of one.

4.22. **We recommend that several aspects of the future recruitment and training of the family judiciary, magistrates and legal advisers should be subject to review.** Areas we identified for review are as follows:

- The competencies, values, and skills required of the family judiciary, family magistrates and legal advisors, and how these should be sought and tested in any recruitment processes.
- Considering how future recruitment processes can improve the recruitment of suitable candidates from diverse backgrounds. In particular, since magistrates are not required to have had a career as a legal

[226] Written Answer of Lord Bellamy, in response to written question of Baroness Helic, HL722, HL Deb (20 June 2022).

[227] See Address by the President of the Family Division, Sir Andrew McFarlane, Supporting Families in Conflict: There is a better way (Jersey International Family Law Conference, 2021), p. 13.

[228] Written Answer of Lord Bellamy, see fn 227 above.

professional before sitting, there is potential for more diverse ages and socio-economic backgrounds among magistrates than among the salaried judiciary. However, there is currently a lack of data on the socio-economic background of magistrates, a high average age of magistrates, and a word-of-mouth recruitment strategy producing "more of the same".[229]

- Considering how to make a judicial career in the family court more attractive to practitioners, perhaps reviewing and enhancing the provision of part-time appointments.
- Attitudinal training of the judiciary in problem-solving approaches, including adopting a non-blaming and non-judgemental approach to families.[230]
- The sufficiency of current training in litigant in person-focused judge-craft, including the conduct of hearings, and writing of accessible orders and judgments including summary reasons.
- Training on identifying and responding to cultural and social disadvantages experienced by litigants, including the sufficiency of training on the Equal Treatment Bench Book and unconscious bias training.
- The sufficiency of current training in the principles of child inclusion, and child-inclusive judicial practice including meeting children and providing child-friendly judgments to children.
- The sufficiency of the recently introduced domestic abuse modules. The Working Party considers ambition is required in this area and we encourage looking internationally. We are impressed, for example, by the Enhancing Judicial Skills ("**EJS**") programme in the United States: a four-day interactive education programme which goes beyond practical courtroom training, including immersive exercises where judges assume the role of a victim and are forced to make a series of complicated choices

[229] House of Commons Justice Committee, *The role of the magistracy: follow up. Eighteenth Report of Session 2017-19*, HC 1654 (June 2019) paras 43-44.

[230] See HH Dancey and Dr Hellin, 'Family Justice: the Human Condition' *Family Law News* (26th April 2022): "The common lexicon of blame-ridden language reveals the lack of understanding of the extraordinarily difficult positions parents find themselves in. It is the result of professionals' unconscious attempt to distance themselves from the stress and pain of the job. The upshot is that professionals behave in stark contrast to their advice to parents - that they must try to see the situation from the child and other parents' or professionals' perspective and keep an open mind to constructive ways forward."

with limited resources while balancing the possibilities of life-generated and perpetrator-generated risks. Judges undergoing the training were surveyed before and afterwards. They consistently admitted they did not know as much about domestic violence as they had thought prior to the programme.[231]

- The consistency of training initiatives between the judiciary and other court professionals,[232] and the possibility of shared training across members of the Court Team – Cafcass, case progression officers, legal advisers, magistrates and judges.[233]
- The efficacy of online training, compared with in-person, particularly small group, training.[234]
- The ways in which increased available data about private family cases can feedback into judicial training and improve decision-making and therefore outcomes for families. Increased data collection and analysis is anticipated through Domestic Abuse Commissioner's monitoring mechanism,[235]

[231] P. Jaffe et al, 'Enhancing judicial skills in domestic violence cases: the development, implementation, and preliminary evaluation of a model US programme' (2018) 40:4 *Journal of Social Welfare and Family Law* 496.

[232] Cafcass have also recently improved their mandatory training in domestic abuse, parallel to the Judicial College's improvements; as part of "an improvement plan to strengthen their practice with children and families who have experienced domestic abuse, and a new mandatory learning and development programme for all Cafcass practitioners, developed in partnership with domestic abuse charities and survivors of domestic abuse." See Cafcass Annual Report, fn 101 above, p. 61.

[233] The preservation of judicial independence must be carefully guarded, but it does not present a complete bar to multi-disciplinary and multi-agency training in our view. Indeed, we note the benefits of joint training reported by FDAC judges and their specialist teams: see J. Tunnard et al, fn 222 above, p. 14.

[234] All the judges we spoke to described the in-person Judicial College training as well-delivered, particularly the focus on small group work. However a magistrate we spoke to noted the online training to be "easy to click through" without opportunity for active learning with peers.

[235] See Domestic Abuse Commissioner, *Improving the Family Court Response to Domestic Abuse: Proposal for a mechanism to monitor and report on domestic abuse in private law children proceedings* (November 2021).

further population-level data work,[236] and any future schemes of compulsory data collection at the end of cases.[237]

- The adequacy of appraisal schemes, and how appraisals can be used to identify training needs, so they are used effectively to improve competence. This is particularly a concern with respect to magistrates, of whom appraisals have been criticised as being essentially a "*tick box*" exercise.[238]

The initial process: proactive screening, investigation and referrals

4.23. Currently, issues and allegations in the case are raised by the parties through court forms, and through a limited telephone safeguarding check by Cafcass, ahead of a first hearing.[239] Upon this basis, the first hearing is expected to decide how to case manage the case as efficiently as possible, either resolving the dispute through agreement or narrowing issues and identifying case management directions. The activity before the first hearing, therefore, is all-important to the case. However, we heard of ineffective first hearings being commonplace, when the nature of the case and the complexity of the issues had simply not been identified during this process. As one barrister we spoke to explained:

> *In public [child] law you have professional scaffolding throughout the case; lawyers for each [party] having advocates' meetings and helping case manage, proposing ways forward, presenting difficulties to the bench. And they do that in light of a decent evidence base, all that work the social workers have done, it is presented to the court, and when there's a hole, the lawyers will identify it. In private law, especially with litigants in person,*

[236] From the Family Justice Data Partnership between Lancaster and Swansea Universities, see fn 75 above.

[237] Announced by the President of the Family Division as an element of the strategy for improved transparency of the Family Court; Sir Andrew McFarlane, *Confidence and Confidentiality: Transparency in the Family Courts* (October 2021), p. 15.

[238] Of considerable concern to the Justice Committee in their review of the Magistracy in 2019. See fn 230 above, paras 70-73.

[239] A First Hearing and Dispute Resolution Appointment ("FHDRA").

you can have a vacuum – you're not sure what parties are saying, why they can't agree, what risks there may be. It's presented to the court as a mess.

4.24. While the safeguarding checks from Cafcass could in theory provide more insight, they are limited in both scope and the time Cafcass officers have to complete them. Indeed, Cafcass has itself suggested their limited focus is "*sub-optimal*" and suggested that more substantive Cafcass involvement would improve judicial case management, in particular the question of whether a fact-finding hearing is needed.[240] We were told by consultees that telephone conversations with adult parties, if contact was successfully made, are often only around 20 minutes in length, and tightly focused on whether there was an allegation of harm or abuse, rather than any broader enquiry about the problems faced by the family. Police and local authority records are consulted, but there is no scope to enquire further afield with professionals who know the child, such as their teachers. Furthermore, as identified above, rules explicitly prevent the Cafcass officer from speaking to the child during the safeguarding checks before a first hearing.[241]

4.25. Meanwhile, the MOJ Harm Panel found that adversarial court proceedings ensure the process remains adult-orientated rather than placing the focus on the child, while also entrenching positions rather than promoting resolution. They heard evidence of intimidated parties for whom the pressure not to allege harm, along with the fear of counter-allegations – particularly parental alienation[242] – acts as a barrier to the prompt and safe identification of issues of harm at the start of proceedings. The MOJ Harm Panel recommended an investigative and problem-solving approach based on an "*open enquiry into what is happening for the child and their family*".[243]

4.26. **We agree, and recommend an initial investigation into the circumstances of the family as the first stage of a problem-solving court process**. Indeed,

[240] *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* [2021] EWCA Civ 448, 38-40.

[241] PD 12B, para 13.6.

[242] The use of counter allegations of parental alienation in cases raising domestic abuse is a matter of international concern, see for example Council of Europe, *GREVIO: Group of Experts on Action against Violence against Women and Domestic Violence* (3rd General Report on GREVIO's Activities, June 2022) .

[243] MOJ Harm Panel report, see fn 2, p. 172.

we consider this approach to have far-reaching benefits for all family justice users, not limited to victims of domestic abuse. A proactive investigation by the Court Team has the potential to identify issues in the case with far greater clarity than can be expected of litigants in person. A proactive investigation can also better identify support and participatory adjustments, which those with intersecting vulnerabilities may need. Finally, an investigation can include the child from an earlier stage as a participant in the process.

4.27. An investigative approach along these lines is currently being piloted in Dorset and North Wales, pursuant to the MOJ Harm Panel's recommendations. The Working Party seeks to build upon this initiative to reflect upon the full potential of a less adversarial, more accessible, and more efficient approach. Below we detail what we consider to be the eight essential features of such an initial investigation:

- information;
- screening;
- Cafcass enquiries (with adults, the child(ren) and third parties);
- a route to non-judicial processes;
- enhanced case management information;
- referrals to other services;
- a flexible and collaborative process; and
- a process focusing on participation and consent.

Information

Information for the adult parties

4.28. **We recommend making the provision of information to the parties at the outset a priority** to enhance their participation and ensure the investigation is done *with them*, not *to them*. It is also of practical benefit to the court, since it can improve litigants' understanding of what is required from them. We envisage that the case progression officer would make initial contact with the adult parties separately after receiving an application, as we understand is currently being piloted in Dorset and North Wales. They should provide them with information about the investigatory process specifically and the court in general, and signpost them to further sources of information and legal support.

The officer's ability to do so will of course be greatly enhanced by our recommendations in **Chapter 3**: an authoritative website to which they can direct families; early legal advice; and coordination of legal and non-legal help through a local network or hub.

4.29. This stage is essential in our view, as not everyone will have been able to access such information before court. For example, one litigant in person who shared her experience with the Working Party explained:

> *I was so afraid I would lose the children. When [the court application] came, it was just fear and tears because I didn't know what to do – until then, I didn't realise he would try to take the children off me. [Asked about legal information accessed] No I didn't look for information beforehand, but now I wish I had. But I didn't think at the time – I was just afraid.*

4.30. Furthermore, the initial engagement with the parties would identify and remedy gaps in the information submitted in the court forms, for example clarification of contact details of the respondent, and identify any participatory needs which may have been missed in the court forms, for example the need for an interpreter.[244] This stage is therefore a safety net to ensure that those who are unrepresented and vulnerable can be assisted to access the information they need about the process they are entering into, some of whom, it must be remembered, are unwilling respondents who did not choose, or anticipate, going to court.

4.31. This initial contact would also provide an opportunity to inform parents about the child's right to participate and the presumption that they will be offered this opportunity during the investigatory process (see below). While the court can order the child's participation, unlike out of court processes, the problem-solving team approach should prioritise as much being done by consent as possible, including the child's participation.

Information for children

4.32. We also consider that age-appropriate information should be provided to the child at this stage. This should include information about the family justice

[244] Support Through Court explained to us that the need for interpretation is regularly missed in court forms, and only identified at court, leading to wasted first hearings which have to be adjourned, and added stress and delay for families.

process and those involved, their right, but not their obligation, to participate, and how their voice will be given weight but not necessarily determine the outcome. Those we spoke to from the FJYPB stressed that earlier information is essential to stop children not only feeling ignored but also worrying about the process. Research shows that children want to be kept better informed about various aspects of the legal process.[245] Meanwhile being kept in the dark can cause significant distress, and children can fill in the blanks with worrying and inaccurate ideas about the court as a form of punishment for their parents, or as a process which will put them in front of their parents and ask them to choose between them.[246]

4.33. While hardcopy materials should be available, digitally literate children could be signposted to online resources, including the authoritative online platform recommended above. Furthermore, the Working Party is aware of research into the use of interactive tools (such as board games, role play, and interactive headsets) to familiarise children with court, which have been shown to improve those children's psychological well-being and reduce their court-related stress.[247] Thus far, the development of such tools has largely focused on children who will have to give evidence in criminal proceedings. However, the Working Party considers there to be much wider potential benefits to children and adults of trauma-informed tools. **We recommend further development of psycho-educational tools to familiarise children and adults with the family justice system, particularly the family court, its processes, and its professionals**

Screening

4.34. **The Working Party recommends that the same structured screening tool for risk which we recommended be used by family justice professionals throughout the justice system, such as mediators and lawyers, be incorporated into the investigation phase.** The Australian tool we highlighted

[245] Research summarised in Roe, see fn 90 above, p. 5.

[246] Ibid.

[247] For example, the "Kids and Teens in Court" Program run by the Chadwick Center, California, which is a tool based on a trauma-focused cognitive-behavioural-therapy model, see Peterson, 'Kids and Teens in Court (KTIC): A Model for Preparing Child Witnesses for Court' *Community Psychology* (2020) 65, 35-43. JUSTICE is also aware of a Kids in Court Game (KiCGame) in development at Sheffield Hallam University, see Kyriakidou, et al, *Preparing Children for Court through Playing!* [Booklet accompanying online workshop] (2022).

for consideration above, FDOORS, has for the past 18 months been adapted for use by family courts in Adelaide, Brisbane and Parramatta, as part of a pilot 'Lighthouse Project'.[248] The pilot provides parties with an initial screening questionnaire, which requires yes/no answers only and takes 10-15 minutes. Thereafter a team of Judicial Registrars and Family Counsellors consider the parties' responses to the initial questionnaire, make further enquiries about identified risks, then factor the outcomes into both the management of the case and the non-legal support identified for individuals. We consider asking every litigant to undertake only a short 10-15 minute screening questionnaire to be entirely proportionate to the level of potential risk in all child arrangements cases and the importance of identifying that risk. As referenced in **Chapter 3,** we note the adaptation of the tool to include children in Sweden and encourage consideration of how risk screening of children can be incorporated.[249]

Cafcass Enquiries

4.35. As discussed above, the current safeguarding checks are limited in both scope and the time available for them. As one Cafcass officer explained to us:

> *Going into someone's world when you have never met them before and expecting to be able to have a proper delve and come out with something respectful and meaningful is a difficult job, made more difficult in the time that we have to do it.*

4.36. **We recommend that Cafcass' enquiries in the initial investigation should include enquiries with third parties and court records; enquiries with the adult parties; and enquiries with the child.** Cafcass will need to be adequately resourced to enable the officer assigned to the case, who is conducting the enquiries, to have adequate time to do so.

Enquiries with third parties and court records

4.37. We consider that third party information, such as the police and local authority checks which currently take place, should of course still be obtained, alongside risk screening and discussions with the family. However, it is clear to the Working Party that further information from those who know the child –

[248] See fn 172 above.

[249] See fn 176 above.

particularly those at their school – may be identified as being necessary and relevant during the investigatory process. We consider that this additional third-party information would be appropriately obtained at this stage. The Working Party also considers that information from the court and Cafcass records about previous or concurrent litigation needs to be routinely accessible at this stage, to provide the context of the litigation history, and help secure judicial continuity where possible.

Enquiries with the adult parties

4.38. Cafcass currently performs telephone interviews with the parties ahead of the first hearing, but these are limited in both scope and duration. The Working Party is clear that Cafcass must have a more substantial role in any investigative process, including the enquiries with the adult parties. Preceding such enquiries by both providing more information to the parties (at the beginning of the investigatory process) and obtaining more information from them (through screening questionnaires) can ensure more efficient and effective use of Cafcass resources.

4.39. In separate interviews (by telephone, or remotely over the internet), the Cafcass officer assigned to the case would discuss with each party the risks that have been identified via the screening tool. We consider this to be a step which could greatly benefit from collaborative work with specialists, such as domestic abuse specialists. Cafcass's role at this stage however would not be restricted to risk identification. It would also be proactively seeking to obtain a more holistic understanding of the nature of the child arrangements problem, the family dynamics, and the history of the problem including any previous litigation or unsuccessful attempts at non-court dispute resolution. Additional tools could be incorporated by Cafcass at this stage; for example, a tool to identify parties' emotional readiness to negotiate in child arrangements disputes. This, along with information about risk, could enable the investigation to identify which families may be suitable for a conciliatory process at that time, and which would not.

Enquiries with the child(ren)

Children are not only relevant and competent witnesses to the process of their parents' divorce, they are also the most reliable witnesses of their own experience.[250]

4.40. In **Chapter 3**, we explained our conclusion that there should be a presumption that the child is offered the opportunity to participate in all processes, including in court. That presumption needs to be embedded in the practical processes of the court, the first opportunity for which is the initial investigation. Procedural rules, except in the pathfinder courts, currently mean the child's voice is entirely absent from the initial stages of the case.[251]

4.41. The pathfinder courts are currently piloting engagement with children before the first hearing. This engagement is described as

> *direct or indirect (for example, via digital means or through a third party) […] in a means consistent with their welfare needs and determined as appropriate in accordance with their age and understanding), to determine their circumstances, preferences for engagement and initial wishes and feelings*.[252]

4.42. The Working Party considers this change to be essential and we strongly support it. Ignoring children in the initial stage of proceedings fails to factor their wishes and feelings into any case which may then go on to settle before a chance for the child to speak. For those who continue in proceedings, far from protecting the child or alleviating their distress, the FJYPB told us the lack of acknowledgement or contact from the court for months could be immensely alienating and distressing.

4.43. Furthermore, in cases in which there are factual disputes between the adults relevant to the child arrangements in question, such as disputed domestic abuse, standard practice is to determine facts without speaking to the child at all. A section 7 report – if one is ordered – will only take place after the factual dispute has been settled or determined. This approach therefore ignores the fact that children may have something relevant to say about their experiences of the past,

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[250] I. Butler, L. Scanlan, M. Robinson, G. Douglas & M. Murch, 'Children's involvement in their parents' divorce: implications for practice' (2002) *Children and Society*, 16(2), pp. 89–102, p. 99.

[251] Practice Direction 12B para. 13.6.

[252] PD 36Z para. 13.1(c).

as well as their wishes and feelings about the future. Instead, the issues are identified, and the facts of the case purportedly resolved, in an entirely adult-centric way. Furthermore, the Working Party heard evidence from practitioners that overlooking the child in this way can risk serious delays and injustice: we heard of cases in which allegations of abuse had been dismissed in a fact-finding hearing, but when the child was spoken to the child then insisted on the truth of the events to the Cafcass officer.[253] One children's solicitor we spoke to summarised the issue thus:

> *In private law, there are welfare impacts to case management decisions but [you're] being brought in too late to participate for the child. You often don't get involved until there has been a factfinding or it has been "carved up". Then months later the Guardian is speaking to the child and they are wedded to their events […] [and] you have to sometimes go back – and this can be a year down the line from when proceedings began – and say this needs a hearing because the child is talking about things which have been dismissed without proper consideration.*

4.44. There are therefore several benefits: children's input from an earlier stage will ensure that those children who want to share information relevant to their arrangements, especially regarding safety, can do so promptly. It will also in our view acknowledge children from the start of proceedings as subjects and rights-holders, not the objects of litigation. Furthermore, it will help the proceedings to be more child-focused and less adult-centric, to the benefit of all involved.

4.45. We stress that earlier participation does not mean hasty participation; it must be no less considered and skilled. The Working Party notes the benefit of the adult and third-party enquiries in informing how the enquiries with the child will be best conducted. For example, it may be identified that the child already has a social worker, who may be better placed to make initial enquiries with the child. They will also inform whether the presumption of participation should be rebutted in a particular case, such as when the child is too young or when

[253] In accordance with the principle of binary consequences which underpins the fact-finding jurisdiction of the Family Court, if a matter is found not to meet the civil standard of proof, it is treated as not having happened: "In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other." (*Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, per Baroness Hale at 32).

the child's participation will cause more harm than not. However, such conclusions must be made on a case-by-case basis and be subject to ongoing consideration. With respect to age, we repeat our concerns about arbitrary age limits, particularly that of ten years of age. In looking abroad, we found important reminders that younger children can and do regularly participate in proceedings. For example, Norwegian law requires that children over seven, or those younger who are able to form their own opinions, shall be allowed to express their opinion before decisions affecting their personal situation are made.[254] In German family courts, young children are heard regularly, with a recent article suggesting children from the age of three are regularly seen.[255] But as we have stated above, we do not consider that any particular age should be identified as the minimum at which it becomes presumptively useful to hear from the child.

A route to non-judicial processes

4.46. The investigation should enable a better response to a family's problems than if they were left to navigate the adversarial system alone, and thus improve their access to justice. But this should not, in the Working Party's view, mean that a judicial process is inevitable if that is not the best option for the family. Instead of a 'one-size-fits-all' approach, we see the investigation as an opportunity to tailor the process to the family.

4.47. This idea is behind the concept of the 'multidoor courthouse', which emerged in the 1970s and has since spread worldwide.[256] The original multidoor courthouse was envisaged as disputants meeting a clerk in the lobby of the courthouse, who would evaluate the issues for their suitability for different

[254] It also provides that after the age of 12 the child's opinion shall be given considerable priority. Section 31 of the Children Act (Act No 7 of 8 April 1981 relating to Children and Parents).

[255] J. Salzgeber and S. Warning-Peltz, '*Hearing the Voice of the Child: Current Practice in Family Courts in Germany'* (2019) 57 *Family Court Review* 387, 389.

[256] F. Sander, 'The Multi-Door Courthouse', 3 *Barrister* 18. Its development partly by the American Bar Association is discussed in G. Kessler and L. J. Finkelstein, 'The Evolution of a Multi-Door Courthouse' (1988) 37:3 *Catholic University Law Review* 577. For its use throughout South America, see M. Hernandez-Crespo 'From Noise to Music: The Potential of the Multi-Door Courthouse (Casas de Justicia) Model to Advance Systemic Inclusion and Participation as a Foundation for Sustainable Rule of Law in Latin America' (2012) 2 *Journal of Dispute Resolution* 335. For its development in Nigeria, see L. O. C. Chukwu & K. N. Nwosu, 'The Role of Lawyers in Fostering Alternative Dispute Resolution in the Multi-Door Courthouse' (2016) 49:2 *Law and Politics in Africa, Asia and Latin America*, 220.

dispute resolution services and thereby "fit the forum" to the dispute.[257] Identifying which cases could benefit from processes other than litigation was intended to improve outcomes for disputants and reduce burdens on courts.[258] In family law that idea has since evolved to fitting the forum not only to the dispute but to the people as well, via triage or allocation to different 'tracks'.[259] For example, Connecticut has developed a multidoor courthouse-inspired Family Civil Intake Screen, through which a court counsellor or case manager evaluates the family and their dispute[260] and directs them to the most appropriate dispute resolution method, be it mediation, conciliatory case conferences, or judicial evaluation.[261]

4.48. In this jurisdiction, the evidence suggests that the majority of families applying to the family courts do so appropriately and cannot safely find resolution for their problems out of court.[262] However, an investigatory process which can assist the majority of such litigants to better tailor the *court* process to what they need, could also assist those who might be better suited to a non-judicial process. We see this, not as a 'diversion' or rationing device designed to save court resources, but as a welfare-focused mechanism for ensuring that the best method of resolving the family's problems is selected in the light of the best information regarding their circumstances. **We recommend therefore that the investigatory process enables access to non-judicial processes for the right cases**.

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[257] F. Sander, 'The Multi-Door Courthouse', 3 *Barrister* 18, 20.

[258] ibid, 41-42.

[259] As recommended by considered in this jurisdiction, by the FSG report, para. 229 and the Private Law Working Group's second report, paras 81-101. See fn 2 above.

[260] The interview questions fall into the following categories: (1) General Information; (2) Level of Conflict; (3) Ability to Cooperate and Communicate; (4) Complexity of Issues; (5) Level of Dangerousness; and (6) Disparity of Facts/Need for Corroborating Information. See D. Kulak, P. Salem & R. M. Deutsch, 'Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen' (2007) 27 *Pace Law Review* 741, 758.

[261] Ibid.

[262] The 2018 Manchester Pilot identified that 14-20% of case could be safely diverted, but of those only a fraction were successfully diverted. Discussed in **Chapter 2**, see above fn 50-51.

4.49. Non-judicial processes could be negotiation appointments assisted by Cafcass.[263] They could also include mediation out of court, for which proceedings could be stayed. Doing so only after screening and follow up enquiries about risk can ensure cases can be identified safely, while discussions with adult parties about their emotional readiness to negotiate and the history of the dispute (including for example whether mediation has recently been tried and failed) can ensure it is done efficiently and avoids delay for the child.

4.50. We also consider that some of those case could then have a route back to court with a consent order.[264] This would not in our view offend the 'no order principle' in section 1(5) of the Children Act 1989 *per se*, i.e. the principle that the court should not make an order unless to do so is better for the child than no order at all. When parents think that the possibility and sustainability of a negotiated agreement would be enhanced by a consent order, this appears to us to be a pragmatic solution which should be available. Indeed, if without such a consent order the negotiations are more likely to stall or break down, it could be properly described as 'better' for the child than refusing to make an order.

Enhanced case management information

4.51. For those cases which do proceed in court, the Court Team would be able to identify key elements of the case for tailored and proportionate case management. **We recommend this should include:**

i) **The Cafcass officer determining who can be available to the child to ensure their ongoing participation.**[265] This identification will be in light of any information gleaned during the investigation stage. While the Cafcass officer in the Court Team will often be the best person to facilitate the child's participation in any ongoing court process, there may be another person who is more suitable, such as an existing key worker, a local authority social worker, or another appropriate professional. This stage would also provide a **first opportunity to consider whether joining**

[263] For example, their Improving Child and Family Arrangements service, which replaced the Child Contact Intervention programme in 2021.

[264] Indeed, many of the cases deemed suitable for non-court resolution in the Manchester pilot dropped out because the parties preferred the court process or wanted an enforceable agreement. See above fn 50.

[265] See discussion of the child's participation as a process, not a one-off event, below at **Beyond being heard: the child's ongoing participation.**

the child as a party and appointing them a Guardian may be in the child's best interests, with the enhanced information gathered from Cafcass' enquiries enabling the frontloading of this question.

ii) **Any further information which may be needed in the case,** such as expert evidence, third party disclosure orders or testing. The need for information and its relevance to the child's welfare would be identified by Cafcass, with procedural requirements, need for judicial approval, and financial barriers, all considered by the case progression officer.

iii) **Any disparity in alleged facts between the parties and their relevance to the child arrangements in question**. In many of these cases, safeguarding issues will be identified. Some may not be disputed, and the question for the court is solely what should happen in the future. Others, however, may feature different accounts of what has happened in the past. This does not necessarily mean the court will want to decide between the accounts: it will only do so when relevant to the child arrangements in question. The information received by the judge from the enquiring Cafcass officer can usefully assist in that consideration of relevance and the purpose and proportionality of judicial determination.[266]

iv) **The history of litigation, including any repeat applications**. The precipitating event for an application, its history, and its context within the family's separation, may all be relevant to understanding the nature of the dispute. Any recent (failed) attempts to settle the matter may also be relevant to its suitability for non-judicial resolution. Identification of repeat cases can inform the judicial consideration of whether repeat litigation is itself causing harm. The Working Party notes that recent changes in statute[267] and case law[268] encourage the improved and increased use of barring orders under section 91(14) Children Act 1989, which

[266] See FPR PD 12J [14] and [17], and the recent restatement of the importance of identifying relevance in the Macur Guidelines, see Macur LJ (approved by the President of the Family Division), *Fact-finding hearings and domestic abuse in Private Law children proceedings – Guidance for Judges and Magistrates,* para. 12.

[267] S. 91A Children Act 1989, inserted by s. 67(3) Domestic Abuse Act 2021.

[268] See *Re A (A Child) (supervised contact) (ss91(14) Children Act 1989 orders)* [2021] EWCA Civ 1749 King LJ at 41: "*In my judgment in many cases, but particularly in those cases where the judge forms the view that the type of behaviour indulged in by one of the parents amounts to 'lawfare', that is to say the use of the court proceedings as a weapon of conflict, the court may feel significantly less reluctance than has been the case hitherto, before stepping in to provide by the making of an order under ss91(14), protection for a parent from what is in effect, a form of coercive control on their former partner's part".*

impose a leave condition on return applications when repeat applications to the court are being used as a tool of abuse, to harass, disturb and control the other party. Not all repeat litigation should be prevented. Some cases return quite appropriately, if circumstances have changed, if new information has come to light, or if previous orders were made on the basis of incomplete information or undue pressure on one of the parties to agree. Identification therefore of the history of the litigation will not be determinative, but will, alongside risk screening and further third-party information, put the judge in a much better position to consider if section 91(14) is applicable, and thereby protect those who need it promptly.

v) **Any matters impacting allocation**: the case progression officer should identify matters of legal complexity elucidated in the investigation to inform the allocation of the case to the appropriate tier of judiciary, such as urgent matters, jurisdictional issues, or disputed significant harm to the child such as child sexual abuse. The information from the investigation about any previous court proceedings would also inform judicial continuity where possible. The Working Party heard accounts of return cases being unidentified through current gatekeeping and allocation procedures; and therefore we consider that improving the case management system's capability to identify return cases is crucial.[269]

vi) **Participatory needs of the adults ahead of any required hearing**. The Working Party heard from numerous consultees that litigants in person can lack both the legal and practical knowledge to apply for participation directions, such as screens, separate waiting rooms, intermediaries,[270] as well as the confidence to ask for them, resulting in unnecessarily stressful and sometimes traumatic experiences at court for the most vulnerable. It has been confirmed that the duty to consider parties' vulnerability and their participation lies with the court, even if a litigant does not actively apply for or raise the issue of their vulnerability.[271] Therefore, a proactive investigation into what adjustments parties may need, in advance of any hearing, is required. This would remove the burden from the most

[269] This could be achievable as part of HMCTS's Reform programme to digitise the courts and tribunals, see fn 219 above. Private children proceedings were due to be digitised in 2020, however this was delayed due to the Covid-19 pandemic.

[270] See fn 81 above.

[271] Recently confirmed by Judd J in M *(A Child)* [2021] EWHC 3225 (fam), paras 59 and 62.

vulnerable litigants, while also ensuring the court meets its duties to the parties in the case.

4.52. **We recommend that this enhanced case management information would be set out in a report for the judge, with recommendations as to how the case should proceed. The report would be provided to the parties well in advance of its judicial consideration.** The case progression officer's role would include explaining to any litigants in person that the report's recommendations were not decisions already made, but would fall to be considered by the judge. They would explain that the parties could agree with the recommendations, in which case the judge would be able, if he or she so decided, to endorse them on the papers without holding a hearing. Alternatively, if a party did not agree with any of the recommendations, the case progression officer would explain that the hearing would provide an opportunity to challenge these, and further signpost them to support available in hearings, such as Support Through Court or similar services.

Referrals

4.53. **We recommend that the role of the Court Team should also extend to facilitating appropriate referrals to support for any identified needs**. Litigants may need help finding litigation support or assistance, from court duty advice schemes, practical court support services such as Support Through Court, or local law centres. The latter could provide for more holistic assistance with matters indirectly relevant to the child arrangements dispute (e.g. child maintenance advice). This could be facilitated greatly if such services were coordinated through an alliance or hub structure with which the Court works, as recommended in **Chapter 3.**

4.54. If eligibility for legal aid is identified during the investigation, then there should be a referral to a local legal aid practitioner. This would again be facilitated if a hub or alliance of relevant services included legal aid practitioners.[272]

4.55. Meanwhile the Court Team could also refer to non-legal programmes and support. Suitable support could be identified as a result of the risk screening

[272] See further our recommendations relating to the court's referral of litigants for legal aid, at **Case Progression,** below.

and Cafcass's follow-up enquiries, as is the case in the second and third stages of the FDOORS model.[273] There would, in our view, be no need to wait for a court order to refer to parental education programmes – Working Together for Children or Separated Parents Information Programmes[274] – as long as funding were available for Court Team referrals and such referrals came after a risk screening of both parties.[275] Referrals could include mental health support groups, counselling, domestic abuse support services, local authority early help services, as well as discussions of informal support structures, such as those within the family.

4.56. We also recommend referrals be available to the child, if any local support groups or services are identified with the family as appropriate. Again, this could be facilitated greatly if such services were coordinated in the community. We support active referrals, in which the Court Team, with the relevant person's consent, make the referral straight to the service, rather than signposting, which depends on the user navigating the intake process of the service. This will in our view enhance access to support for the most vulnerable.

A flexible and collaborative process

4.57. Some investigations may proceed simply: all relevant information will be available to Cafcass, no significant further information will be identified as required during discussions, nor will any additional needs of the family be identified during the process. This, however, will not be the case for many. The process must therefore incorporate flexibility. This flexibility should allow for further information to be obtained and conversations with parents to be revisited, for example through having a voluntary drug test after which the need for a judicially-led outcome can be reviewed. In a case in which parties are at different levels of emotional readiness to negotiate, flexibility could allow for a prompt referral of one parent to support, such as counselling, while the interim arrangements are determined by a judicial decision.

[273] Doors 2 and 3, see fn 175 above.

[274] The WT4C programme is available in Wales; SPIPs are available in England.

[275] To ensure those at risk of harm from another parent, for whom a protective and not a co-parenting approach is appropriate, are not inappropriately instructed to attend.

4.58. Collaboration between the case progression officer and Cafcass will also be a key component. If, for example, a particular vulnerability is identified by Cafcass, collaboration with the case progression officer on this matter could ensure appropriate adjustments are sought ahead of any hearing. The judge would continue to be available in reserve if issues arose which might risk halting the investigation.

A process focusing on participation and consent

4.59. Some consultees expressed concern to the Working Party that an enhanced investigatory role for Cafcass prior to any judicial consideration could allow judgements about the family and their dynamics to become embedded prior to judicial scrutiny. We heard particular concerns that this would risk "reframing" of abusive relationships as high conflict relationships without judicial scrutiny, particularly when a counter-allegation of parental alienation has been made. The Working Party is clear that the objective of obtaining enhanced information through the investigatory process is to improve the effective participation of the family, not impede it. The process therefore must have this principle at its core, with the aim of clarifying issues with the family, not obstructing fair access to judicial scrutiny.

4.60. To achieve this, the Working Party is clear that any recommendation to the family for a non-court resolution process would only be pursued by consent. Some consultees suggested there should be a power available to the investigating team to divert the case out of court without the agreement of the parties, for example, to instruct them that mediation would be more appropriate and bar access to the court. We cannot support non-voluntary mediation in this area of law and therefore do not support such a suggestion: it goes against the voluntary ethos of mediation; we doubt it would lead to sustainable outcomes, and we consider it could risk worsening conflict and incurring delay for the child.

4.61. The Working Party does not consider the Court Team should be able to block access to the court at any stage. We consider such a power would be far outside the appropriate delegated powers of the Court Team in its case preparation and enhanced information gathering role, and the denial of access to a judge and court would be likely to breach the individual's Article 6 right to access a fair and impartial tribunal. The appropriate way for access to the court to be limited – not absolutely prohibited – is through the use of section 91(14) of the Children

Act 1989, which can restrict access subject to the court's permission. We agree with recent changes to increase the use of this power when the court is being purposely used as a tool of abuse, but the power to impose such a restriction should properly remain a judicial matter.

Case Progression

Hearings

4.62. After the investigatory stage, several tasks may be required before a case is able to be resolved. Additional evidence may be needed from a third party; witness statements may be required; experts may have to be instructed and questions drafted. The increase in the number of litigants in person means that hearings have become the only opportunity for matters to progress, since the case is propelled forward by judicial events rather than by legal representatives between hearings. With current waiting times for hearings exacerbated by the backlogs caused by the Covid-19 pandemic, this strikes the Working Party as an inefficient model, which both delays case progression and uses expensive judicial resources to propel it forward in fits and starts, months apart. Meanwhile the process is less responsive to matters going wrong and litigants have nowhere to go if they need clarification with tasks between hearings. Below is just one case study recounted to the Working Party:

> *A father whose children had been taken abroad by the mother made a child arrangements application. However, the judge told the father in the hearing that the application was incorrect and that the father needed to make a different application to the High Court. The child arrangements proceedings were kept open while the court expected the father to commence High Court proceedings. However, at further hearings at three and six months, different judges heard the father had not made the application, told him to do so, and adjourned the case. It was only at the third hearing that the father spoke to a volunteer support service at the court, which identified that the father had not understood what he needed to do, nor how to do it. A volunteer located the court form for him and assisted him to fill it in. By that point, the child had been in another country for 9 months.*[276]

[276] Example provided to the Working Party by a volunteer support service.

4.63. The case progression officer's involvement after the investigation is therefore critical. They are the case management 'eyes and ears' of the judge, and can identify between planned hearings when an additional hearing may be needed, and what preparation is needed. Not only are judicial resources thereby reserved for when they are genuinely required, but also the stress of attending hearings (particularly those in which the litigant is not sure of the purpose) is minimised. This model also allows proceedings to be far more responsive to the needs of the case; the court can tailor the number of hearings to the needs of the family, rather than a one-size-fits-all approach.[277]

4.64. **We therefore recommend that hearings are held as necessary in each case, as determined by the Court Team in collaboration with the parents and with recourse to the judge where appropriate. There would be no one-size-fits-all first hearing in every case, nor any set menu or progression of hearings.**

4.65. Hearings would be held, for example, to deal with urgent matters; to determine interim arrangements; to resolve contested facts in order to enable accurate risk assessment; to resolve the dispute concerning the child's welfare and make final orders; to decide a question of expert evidence, further third-party disclosure, or testing. This means, following investigation, the case could go straight to the fact-finding process, or indeed straight to a final hearing if appropriate.

Before hearings

4.66. When a hearing has been identified as necessary, its purpose would be communicated to the parties through a court order. Thereafter, **we recommend that if a party or both parties do not have a lawyer, preparation for hearings would be managed by the case progression officer, with directions given by the judge or legal adviser and magistrates.** The case progression officer would proactively secure any automatic adjustments (such as eligibility for an interpreter) and identify any discretionary adjustments which would need judicial consideration ahead of the hearing (such as eligibility for, and availability of, participation directions, for example appearing by video link or screens in the courtroom).

[277] The standard progression of hearings being First Hearing and Dispute Resolution Appointment (FHDRA); Dispute Resolution Appointment (DRA); Final Hearing.

4.67. They would provide guidance and proactive assistance to litigants in person, or actively refer them to available organisations, for example Support Through Court, who could do so. This could include how to prepare a witness statement or organising a witness to attend court. They could also provide further information about the court and the process of the up-coming hearing itself, to minimise parties' stress and anxiety.

4.68. Before hearings in which a bundle is required, the case progression officer would prepare the court bundle, if neither party is represented. If one party is represented, the lawyer would prepare the bundle but the case progression officer's role would be to ensure that the litigant in person is able to participate in deciding what goes into it.

After hearings

4.69. A further important role for the case progression officer is after a hearing is over. Support Through Court said to us: "*so many clients nod or say yes in the hearing – but they then come out and say they didn't understand*", explaining that post-hearing debriefs and the opportunity to ask questions is often crucial. However, not all litigants in person are able to benefit from a volunteer service, nor are many of such services able to provide assistance beyond that day at court. We consider having a point of access after a hearing is over, to clarify matters or seek support in completing a court-ordered task, to be crucial to ensuring cases progress without unnecessary delay. **We therefore recommend that the case progression officer should be available to clarify the order and the outcome of the hearing for the litigant in person, immediately after the hearing in person or later by email and telephone, and provide guidance and signposting for help with next steps, including support to complete tasks in the order.** Their assistance would be valuable in progressing more complex tasks such as securing further third-party disclosure, arranging testing, or instructing experts between hearings. Furthermore, they could provide the litigant in person with information after the final hearing about the possibility of appeal.

During hearings

4.70. Some judges attempt to make up for the role of the missing lawyer by guiding and giving prompts; others can adopt a "*sink or swim*" approach, treating the

litigants in person no differently from trained lawyers.[278] The Working Party does not consider litigants in person can, or should be expected, to know what to say, when, or how, as if they are legal representatives. We heard examples of litigants not knowing they could (or how to) self-advocate in hearings, including: challenging Cafcass recommendations; explaining they disagreed with something the other party had stated in the hearing; applying for an expert assessment.[279] We also heard accounts of litigants in person presuming that the judge would lead the hearing, then struggling to set out submissions of what they were seeking by way of outcome when faced with a less interventionist judicial approach.

4.71. While the case progression officer can assist with preparation for hearings, and clarification afterwards, it is the judges, legal advisers and magistrates whose conduct will ensure the effective participation of litigants in person during hearings themselves. We agree with those before us who have concluded that the neutral arbiter role of the judge is unsustainable when so many parties are unrepresented, and a more litigant in person-focused judicial style is required.[280] **We recommend therefore that when there is one or more litigant in person, there needs to be a judge-led elicitation of evidence and/or submissions to assist the court to determine the outcome which is in the child's best interests. Judges, magistrates, and legal advisers should be provided with training to support this approach.**

Continuity

4.72. As a case progresses, we consider continuity of the professionals in the Court Team to be important not only to the quality and efficiency of the case administration, but also to the participation and experience for litigants in person and children. **Therefore, we recommend that the same Cafcass officer involved in the investigation should be available to do further work as required by the court, such as a section 7 report**, unless their enquiries identified a more suitable professional already known to the child such as a local authority social worker. This will ensure the fewest new professionals are

[278] Trinder et al (2014), see fn 55, pp. 74-75.

[279] We are grateful to Farhana Begum, PhD candidate at the University of Kent, who shared findings of her current research into litigants in person with the Working Party.

[280] ibid.

introduced to the child.[281] **Furthermore, case progression officers should be allocated to the case to ensure continuity for the parents, which will have particular benefit to litigants in person.**

4.73. **In addition, we recommend continuity of the decision-makers in the case. Cases should be wherever possible allocated to the same judge or legal adviser (and ideally panel chair) to deal with the case throughout proceedings**. We acknowledge the difficulties with this; judicial continuity has long been recognised as desirable in the family court, yet it is regularly not feasible. We anticipate that judicial continuity would be easier to achieve if the role of the judge were used more sparingly, with judicial input and hearings only where needed. We further anticipate that continuity of the Court Team professionals will be easier to facilitate than judicial continuity, since their availability need not be secured on a specific date as is the case with hearings, but rather over a period of time. Therefore, while we strongly support the principle of continuity of decision-makers, we also note that continuity of the Court Team can help mitigate any judicial discontinuity.

Expert assessment, third party information and testing

4.74. The above recommendations can enhance participation in the process, but they cannot provide necessary evidence when securing it is beyond the financial means of the parties. The Working Party is extremely concerned about the absence of public funding for testing and expert evidence when these are unaffordable for litigants. Cafcass will arrange and fund DNA tests, however the same provision does not exist for alcohol and drug testing, even if such testing has been identified as relevant and necessary to determine what arrangements are in the child's best interests.

4.75. Ordering expert assessments poses a similar problem; many consultees emphasised the impossible circumstances of expert evidence being necessary in a case but not being within the means of the parties. If the assessment is of the child, then the child should be made a party and therefore be granted a legal aid certificate which will cover the costs of expert evidence. However, when

[281] Minimising the number of new people the child is expected to speak to and trust was stressed as important to us by the FJYPB.

the assessment is of a parent, lack of funding has the potential to cause extreme difficulties.

4.76. An example provided to the Working Party was the lack of funding for expert evidence (medical or psychological) when a litigant in person may lack capacity in proceedings. Such litigants are potential protected parties,[282] for whom there is the possibility of the Official Solicitor acting as a litigation friend if there is evidence or a finding of lack of capacity. If there is no available funding for an assessment of capacity, however, the Official Solicitor is out of reach. She also requires security for costs for legal representation.[283] For those without funds this would have to be through exceptional case funding, which in turn would probably depend on the same evidence of lack of capacity.[284] One judge described this to us simply as "*a black hole*".

4.77. Further financial barriers identified for third party disclosure were also raised, such as charges for letters from medical professionals[285] and police disclosure. The latter was a particular concern of the MOJ Harm Panel, who recommended that "*urgent consideration is given by police forces, together with the family court and policy representatives, as to how police disclosure may be funded where parties are not legally aided and are not, otherwise, able to fund it themselves*."[286] IDAS told us that this was a significant barrier for the litigants they support:[287] they regularly see victims of domestic abuse who are unable to afford police disclosure, leaving them without necessary evidence in the case.

4.78. We do not advocate the funding of information or expertise on the mere whim of any party; we are clear that the funding of expert evidence, testing, or further

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[282] See the current guidance which acknowledges that, in the case of litigants in person in private proceedings, the court needs to take a practical approach and investigate the issue, rather than the traditional approach of requiring those who raise capacity to prove it. Family Justice Council Guidance, *Capacity to Litigate in Proceedings involving children* (2018), p. 22 onwards.

[283] See Official Solicitor Practice Note, *The Official Solicitor to the Senior Courts Appointment in Family Proceedings and Proceedings under the Inherent Jurisdiction in Relation to Adults)* (January 2017)

[284] Requirements for exceptional case funding applications are discussed below.

[285] Which we were told were often relied upon if no one could afford testing for drugs and alcohol, creating a double barrier for those who can afford neither.

[286] MOJ Harm report, fn 2 above, pp. 180-181.

[287] Independent Domestic Abuse Services, a Yorkshire charity supporting those experiencing or affected by domestic abuse or sexual violence.

third-party information needs to be focused on what is necessary and relevant to the issues in the case. However, when it has been so concluded by a judge or magistrates, we consider the absence of public funding is unjustifiable and seriously risks undermining the quality and safety of the process and its outcomes for children. **We recommend that expert assessment, third-party information, and testing, should be available in all cases in which it is deemed necessary by the court. Where parties cannot afford the relevant fees and no legal aid certificate exists in the case, funding should be available for obtaining this information. This includes the funding of expert medical assessments of capacity.**

Representation

4.79. The Working Party decided not to recommend a reversal of legal aid policy to its position before the legal aid cuts in 2013. This was not a decision taken lightly; however, it was made on balance for two key reasons. Firstly, in light of the significant court backlogs after the Covid-19 pandemic, as well as the cost of living crisis at the time of writing, we were acutely aware of the current demands on government-wide and MOJ justice spending as well as the large savings which had been made in cutting private family law legal aid.[288] Secondly, there was clear evidence that the family justice system before the legal aid cuts had considerable room for improvement. The *Norgrove Review* in 2011 found a costly, complicated and disorganised system in which children and adults experienced confusion and delay.[289] We therefore sought to balance ambition for radical change with pragmatism, to produce recommendations capable of delivering substantial improvement within the current fiscal climate.

4.80. While the removal of lawyers without any adequate adaptation in the system has led to significant barriers for litigants in person, we were not persuaded that reversing this policy was the only way to secure access to justice. Instead, as can be seen above, we concluded that the system should be redesigned around those without lawyers. Notwithstanding this conclusion, we consider that there

[288] The reduction in legal aid scope in private family justice resulted in a spend reduction which exceeded the anticipated total. Between 2012-13 and 2017-18, legal aid spending fell by approximately £90m in civil cases and £160m in family cases, compared to £105m and £130m estimated in the impact assessments that accompanied the Act. See MOJ, *Post-Implementation Review: Part 1* (February 2019), p. 7 and further information about spending change in private family from p. 139.

[289] See the problems identified in the interim report, which met agreement in consultation and the final report, at *Family Justice Review: Interim Report* (March 2011), p. 46 onwards.

are some parts of the process, and some particularly vulnerable litigants, who do need representation and to whom *legally aided* representation should be available. We take these three areas in turn below.

Adjudication of disputed alleged harm

4.81. Not all alleged harm will require a factual determination, either because it is accepted, or because a determination is not proportionate to the issues in the case. A more substantial investigative process early on will help identify these cases and prevent unnecessary fact-finding hearings, as discussed above. For some families, however, it will be both necessary and relevant to the child's welfare and the outcome of the case for facts to be determined. In other words, what has happened in the past must be determined before deciding what should happen in the future.

4.82. The fair and effective conduct of these hearings is of huge importance to the outcome of the case. As the Court of Appeal has recently observed, "*the stakes may be high*":

> *If the court decides that an abusive allegation has not been sufficiently proved, the court must assess future risk on the basis that the event 'did not take place'. If, in reality, the abuse did occur but there is a lack of evidence to prove it, the court's subsequent orders may risk exposing the child and parent to further abuse. Conversely, if the alleged abuse did not in fact occur, but the court finds the allegation proved, orders significantly limiting the 'perpetrating' parent's future relationship with their child may be imposed.*[290]

4.83. Despite this, individuals continue to be left to allege and respond to allegations in these evidential hearings without legal representation, struggling to be their own notetaker, cross-examiner, and witness. Many do so when the other party has legal representation; consultees, the Working Party members, and reports prior to ours, have expressed significant concern in ensuring equality of arms in such cases.[291]

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[290] *Re H-N* [2021] EWCA Civ 448, para. 6.

[291] See Recommendation F4 of the Westminster Commission on Legal Aid's report, *Inquiry into the sustainability and recovery of the legal aid sector 2021* (October 2021), p. 28.

4.84. It is wrong to assume that current legal aid provision spares those alleging abuse of this experience: many survivors of domestic abuse find themselves acting as litigants in person, either because they are above the means threshold but cannot afford representation (as discussed further below), or because they lack the documentary evidence required to secure legal aid.[292] So do many parents, who may have safety concerns but lack the external evidence or local authority assessment which would satisfy the legal aid evidential requirements.[293] Such situations put the litigant in person in the position of a prosecutor, requiring them to call evidence of theirs or their child's abuse and present it to the court, even when they have not chosen to be in the proceedings in the first place, for example when responding to an application.

4.85. The Working Party heard directly from one litigant in person, who described the experience as being "*forced to prosecute my own rape trial*". She explained to us that she had been too intimidated and did not understand how to cross-examine, nor how to conduct the rest of the hearing, including whether she could bring her own witnesses. She explained to us that on the day of the hearing, the judge had asked a select few questions for her, whereas the cross-examination of her by the other side's barrister had lasted four hours. The difficulty of the situation is compounded in our view when the litigant is expected, in addition, to respond to counter-allegations of parental alienation raised in answer to an allegation of abuse. The risks are acute to the victim of

[292] Evidential barriers to accessing legal aid were identified in MOJ research in 2017, "*organisations, and health professionals in particular, can be unwilling to write letters; data protection issues arise when attempting to access evidence from the police; language or other vulnerabilities create barriers; and victims who do not disclose abuse to an organisation that can supply evidence end up significantly disadvantaged."* See, F. Syposz, *Research investigating the domestic violence evidential requirements for legal aid in private family disputes* (Ministry of Justice, 2017) pp. 2-3.

[293] Both domestic abuse and child abuse legal aid gateways will accept a letter from children's services as evidence, if the letter confirms that the adult or child has been assessed as being at risk of harm, see LASPO Schedule 1, paras 12 and 13. Mums in Need (MIN), a support charity for mothers subject to post-separation coercive control, explained to us that they regularly see local authorities not conducting a full assessment with the family if they deem the parent seeking help to be a protective parent. In such circumstances, MIN have experience of children's services signposting victims of abuse or protective parents to the Family Court, while closing the case and not fully assessing the risk, but also while being firm about the need for that parent to continue to be protective in the face of any demands for contact which might put the child at risk. MIN stressed that signposting to the Family Court without full assessment makes the victim of abuse and the child doubly vulnerable, as they then lack the evidence needed to satisfy the legal aid evidence requirements and also fear that failing to then apply to the family court will be seen by the local authority as a failure to protect.

abuse and the child: if the victim cannot effectively participate and the allegations are not proven as a result, she and the child can be put at risk.

4.86. Meanwhile, those responding to abuse allegations have no eligibility for legal aid under the current legal aid scheme, regardless of the seriousness of the accusations, their merits, or their ability to conduct proceedings. If those who are wrongly accused are unable to effectively participate, they also risk serious consequences, since the orders that will follow will limit their relationship with the child. Moreover, whether they are wrongly accused or not, their effective participation is critical to the reliability of the factual determination and the legitimacy of proceedings.

4.87. In recent years there has been significant further concern: the cross-examination in person between a victim and a perpetrator in these cases being itself a form of abuse.[294] Provisions in the Domestic Abuse Act 2021 seek to address the issue, through the prohibition of direct cross-examination by litigants in person in limited circumstances when certain criteria are met.[295] Furthermore, there is provision for court-appointed legal professionals to be funded to conduct cross-examination instead, when "*necessary in the interests of justice*" and in the absence of a "*satisfactory alternative*".[296]

4.88. The provisions came into force on 21st July 2022,[297] with accompanying statutory guidance on the role of the qualified legal representative undertaking

[294] This has been criticised for years by the judiciary, as "inherently and profoundly unfair" (Hayden J, Re A (a minor) (fact finding; unrepresented party) [2017] EWHC 1195 (Fam), at [60]); and a practice which will "sometimes amount, and on occasions quite deliberately, to a continuation of the abuse, as the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process". Sir James Munby, *Because it is the right thing to do* (24 July 2018).

[295] For the prohibition to apply automatically, there must be evidence of a conviction, caution, charge, on-notice protective injunction, previous finding of fact, or other "specified evidence". For other cases in which harm is alleged based on the alleged victim's testimony alone, with no third-party evidence, the prohibition is discretionary. The automatic provisions are found in ss 31R to 31T of the Matrimonial and Family Proceedings Act 1984 and the discretionary power found in s. 31U, inserted by s. 65 of the Domestic Abuse Act 2021.

[296] S. 31W of the Matrimonial and Family Proceedings Act 1984 inserted by s. 65 of the Domestic Abuse Act 2021.

[297] The Domestic Abuse Act 2021 (Commencement No. 5 and Transitional Provision) Regulations 2022.

the cross-examination.[298] From the guidance it is clear that the scope of the legal professional's role is very limited:

- they may elicit relevant information from the prohibited party that will form the basis of the cross-examination and inform the drafting of the position statement. However, they should not take instructions from them in the manner that a party's own lawyer ordinarily would.[299]
- they should advance the interests of the prohibited party during the cross-examination, but the qualified legal representative "*must not attempt to present the prohibited party's entire case*".[300]

4.89. The Working Party considers the limited new role of the court-appointed lawyer does not go far enough in addressing the assistance required by many litigants in person in evidential hearings. We note that the prohibition of cross-examination in principle remains discretionary for some cases in which domestic abuse is alleged,[301] and a court-appointed legal professional does not automatically follow,[302] thereby creating a likely pool of litigants in person who will continue to be forced to conduct cross-examination themselves. Moreover, even those alleged victims and alleged perpetrators with a court-appointed legal professional will nevertheless lack the overall professional advice and assistance needed to conduct a contested evidential hearing fairly and effectively: this includes the cross-examination of any non-prohibited witnesses, including expert witnesses, and presenting the overall case in submissions.

4.90. We of course welcome the new provisions as an improvement on the previous position. However, they fall short, in our view, of securing access to a fair and safe evidential hearing for all litigants in person. Given the importance of these hearings, and the significant consequences on the lives of the families of the findings which are made or not made, we have concluded that legal representation for both parties needs to be reconsidered in such cases.

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[298] MOJ, Statutory guidance: Qualified legal representative appointed by the court.

[299] Ibid, p. 12.

[300] Ibid.

[301] See fn 296 above.

[302] See above, and fn 297.

4.91. **We therefore recommend that if the court identifies that an allegation of harm is relevant to the child's welfare such that it requires judicial determination, then both parties should be eligible for legally aided representation.**

Improved access to existing legal aid provisions

4.92. It was clear to the Working Party that the existing legal aid provisions are not working as they should. Legal aid purportedly exists to prevent abuse victims and protective parents without adequate funds from having to conduct proceedings without legal representation, yet many do. We heard from support organisations that the means test is set too low, causing many who cannot realistically afford to pay privately nevertheless to be deemed ineligible.[303] We spoke to one litigant in person who had to conduct proceedings alone, despite having evidence of abuse, because the Legal Aid Agency considered the value of her camper van to take her over the means threshold. She explained to us:

> *they [the Legal Aid Agency] said I could sell it, but I was too afraid; it was my failsafe in case me and the kids had to move again. Yeah, that was a shock because that was all I had when I left [the family home].*

4.93. The means test is currently under review, the government having proposed raising the disposable capital threshold, the gross income threshold, and changing various aspects of the income assessment process.[304] The Working Party did not have the capacity to consult extensively on means calculations and thresholds, however it is clear that reform is both overdue and critically important. The current scheme is evidently leaving some victims of abuse and protective parents with no affordable choice but to represent themselves.

4.94. Even those who come under the means threshold and have the requisite evidence may still not realise this is the case before proceedings have begun. Southall Black Sisters shared examples with us of individuals, some made destitute by their separation from an abusive partner, being unaware of their legal aid entitlements until months into proceedings. The court is in a prime position to identify those cases, particularly when an investigative process may

[303] There have been modest improvements, but only when judicially reviewed. See *R (oao. GR) v Director of Legal Aid Casework* [2020] EWHC 3140 (Admin), which concerned "trapped assets" in property and found the Director of Legal Aid Casework has a discretion to value capital other than money on an equitable basis.

[304] MOJ, *Legal Aid Means Test Review* (2022), Chapters 3 and 4.

obtain third-party information which would satisfy the evidential requirements. **We therefore recommend that there be a standardised referral mechanism from courts to local legal aid providers when litigants in person appear eligible for legal aid under the domestic abuse or child abuse evidential gateways.**

4.95. While cases featuring domestic abuse or child abuse are the only case for which there is any preserved funding in private children proceedings, there is supposed to be a safety net of "*exceptional case funding*" ("**ECF**").[305] This funding is for those no longer in scope for legal aid funding but whose human rights would otherwise be breached if they had to represent themselves in proceedings. The Court of Appeal has clarified that such cases do not need to be "*rare or extreme*".[306] The test is whether withholding legal aid would mean that the applicant is unable to present his case effectively and without obvious unfairness, having regard to (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself or herself (or to participate in the relevant process) without legal assistance.[307]

4.96. However, ECF is not reliably accessible to individuals before they come to court: some have criticised the application process for being too complex and time-consuming for individuals,[308] and there is evidence that the scheme is completely inaccessible to those with multiple intersecting vulnerabilities, who need the scheme most.[309] Meanwhile, others have identified that professionals can have a preconception that any application will not succeed, decide not to

[305] Section 10 of LASPO 2012.

[306] *R (Gudanavienene and Others) v The Director of Legal Casework and others* [2014] EWCA Civ 1622, para. 45.

[307] Ibid para. 72 onwards, as incorporated into the Lord Chancellor's Exceptional Funding Guidance (Non-Inquests) (January 2021) paras. 19-29.

[308] For example, see House of Commons Justice Committee, *Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012*, Eighth Report of Session 2014–15, HC 311 (March 2015), para. 47.

[309] Rights of Women, *Accessible or beyond reach? Navigating the Exceptional Case Funding Scheme without a lawyer* (2019).

use unpaid time on an application for which they may not receive payment, and have a lack of knowledge about ECF generally.[310]

4.97. Once at court the Working Party heard examples of litigants being identified as highly vulnerable and in need of legal assistance, yet there being no routine consideration or practical mechanisms available to help that litigant access ECF.[311] An intermediary we spoke to explained that work with litigants in person could be impossible, since so often the individual's requests for assistance are a blend of communication help, legal procedural information and legal advice. She explained that work with litigants in person was only feasible because she knew enough about the local community support available to coordinate legal advice and some pro bono representation for those cases. She was not aware of any available professional help with ECF applications, nor of what the scheme involved. She further added that many intermediaries would not take on litigant in person work because of these difficulties.

4.98. It appears to the Working Party that the court has an unparalleled vantage point to identify individuals who may meet the ECF criteria. It already has a duty to consider any participation directions required by vulnerable litigants, an exercise which goes hand in hand with the identification of eligibility for ECF. The court understands the complexity of the case, is involved in identifying the issues, and is highly likely to be able to consider and apply the test for ECF more effectively than the litigants themselves.

4.99. If ECF is in fact to work as a 'safety net', it must be reliably accessible from court, and we consider the best way of doing that is to enable the court itself to refer cases. **We therefore recommend a legal aid referral mechanism from the court to the legal aid agency for exceptional case funding when an individual is considered by a case progression officer or judge to be eligible.**[312]

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[310] H. Connolly, H. Crellin & R. Parhar, *An update to: Cut off from justice. The impact of excluding separated and migrant children from legal aid* (The Children's Society, August 2017), p. 42.

[311] Albeit there are pockets of availability at court thanks to volunteer services in the court building, such as Liverpool University Law Clinic's drop-in clinic at court for ECF in family cases, as referenced in Public Law Project's Toolkit, *Exceptional Case Funding Clinics* (2019), p. 8.

[312] Whether could thereby bind the Legal Aid Agency, as suggested by Richard Miller of the Law Society to the Justice Committee last year, should be further considered. House of Commons Justice Committee, *The Future of Legal Aid : Third Report of Session 2021-22*, (21 July 2021) HC 70, p. 52.

Access to representation for children

4.100. In public law cases all children are a separate party to proceedings, regardless of their age. These children are represented in a tandem model by two professionals: a legally-aided solicitor and a Children's Guardian.[313] These professionals are not directly instructed by the child; instead, the Guardian's role is to analyse what is in the child's best interests, according to the welfare checklist "*as if for the word 'court' in that section there were substituted the words 'children's guardian'*",[314] their wishes and feelings being one constituent part. The solicitor's instructions are thereafter taken from the Guardian, even if they contradict the child's expressed wishes and feelings. To directly instruct a solicitor, the child must have sufficient understanding and wish to do so.[315] In such circumstances, the Guardian will find another solicitor and the solicitor already involved will take direct instruction from the child.

4.101. In private law, the child's position is remarkably different. The child is not automatically a party and allocated a Guardian and legal representative. The test to do so is when it is in the child's "*best interests*".[316] However, although the accompanying Practice Direction sets out a wide range of circumstances which might justify such a decision, these are heavily caveated by the warning that it is "*a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases.*"[317] As cited above, Cafcass statistics suggest only 6% of children are separately

[313] Known as specified proceedings, see s. 41 of the Children Act 1989 and FPR r. 16.3.

[314] R.16.20(3), the welfare checklist being at section 1(3) of the Children Act 1989.

[315] R16.6. This is otherwise referred to as being "capable" in r16.21. See FJC, 'Guidance on assessing child's competence to instruct a solicitor' (April 2022).

[316] FPR r 16.2.

[317] PD16A, para. 7.1. The suggested situations include where the views and wishes of the child cannot be adequately met by a report to the court; or the child having a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties (which can arguably be said for many private law disputes particularly when parents are litigants in person). Other more specific types of case are also included: intractable disputes involving implacable hostility to contact or disputes where the child may be suffering harm; older children opposing a proposed course of action; complex cases, involving medical, mental health issues, international complications outside child abduction; cases involving serious allegations of physical, sexual or other abuse in relation to the child; allegations of domestic violence (sic) not capable of being resolved with the help of a welfare reporter; proceedings concerning more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position; where there is a contested issue about scientific testing.

represented in this way in child arrangement cases in England.[318] We heard that this is subject to significant variation regionally.

4.102. Many we spoke to expressed significant concern at the disparity in approach to representing children in private and public law proceedings. In 1975, 14 years before the Children Act 1989, a previous JUSTICE Working Party shared this view. Their report, *Parental Rights and Duties and Custody Suits*, chaired by Gerald Godfrey QC, was unwavering on the matter:

> *representation for the child is essential […] In any custody suit, whether parents are "battling" against each other or against the state, the interests of the child cannot be presumed to coincide with those of either disputant. Because a child has a direct personal interest in the proceedings and his rights may be adversely affected by it, he needs the help of a lawyer (instructed by a competent spokesman) whose only goal is adequate representation of his interests […] a child is a person and requires independent and expert representation as a matter of right.*[319]

4.103. Almost half a century later, we found ourselves faced with the same issue, and no doubt the same practical and resource-related barriers. Some consultees described such reform to us as "*the gold-standard*", which we consider to be fitting given the current resource restrictions. Cafcass is currently struggling to meet demand even at the current extremely low rate of Guardian appointments, with only one other organisation – NYAS – providing a small number of others. Short of an unprecedented increase in funding to facilitate twenty times as many instructions as they currently do, we did not consider automatic separate representation for all children to be a realistic prospect in the current climate.

4.104. While we would support such 'gold-standard' reform should it ever be feasible, we did not on balance feel able to recommend it. We instead felt a duty to consider a more nuanced and proportionate response to children's participation which would not be as resource intensive but would enable improved participation for children using the current or slightly increased resources. Our proposals for improved participation for all children, regardless of their party status or the availability of a Guardian, are in the next section below.

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[318] See fn 101 above.

[319] JUSTICE, *Parental Rights and Duties and Custody Suits* (1975), para. 99.

4.105. We do, however, emphasise our concern at the unavailability of Guardians in all the cases in which they are ordered, even under the relatively restrictive current rules, and we note there has been recent recognition of the problem in a published judgment in which Cafcass did not have the resources to accept an appointment.[320] Our recommendation with respect to Guardians is therefore modest but urgent: **funding must be made available to ensure every child who requires a Guardian has access to one.**

Children's ongoing participation in court proceedings

4.106. We concluded above that children must be given the opportunity to be heard much earlier in the court process. We have recommended that they are given the opportunity to be consulted in our proposed investigatory process, and we support the piloting of such measures in the pathfinder courts in North Wales and Dorset. We reiterate here that children should not wait months, much less be entirely denied, the opportunity to participate in proceedings about their lives.

4.107. However, this initial opportunity to be heard must not be mistaken to secure children's participatory rights alone. Listening to a child's voice when they choose to speak is critical; however, participation is a process, not a one-off opportunity to say something.

4.108. In our view, current court processes are inadequate to be properly described as a process, let alone as featuring the five basic steps set out by the UN Committee on the Rights of the Child (information, being heard, taking the voice into account, feedback, redress).[321] Over half of cases do not feature any record of the child participating, and in those which do, the child's participation is usually a one-off event, i.e. a single section 7 report.[322] Currently there is no assistance available for the child to obtain an update on proceedings, ask questions, or be provided with feedback about the outcome of the case.

4.109. The core of the problem, in our view, is that children's opportunities to participate are determined to a large extent by what the adults want and the

[320] *Re K* (*inability to instruct guardian*) [2022] EWFC B4 (25 January 2022).

[321] See fn 87 above.

[322] Hargreaves et al (2022), see fn 102 and 104 above.

imperative to resolve the dispute, rather than being determined by the child's rights and needs. This means children's wider participatory rights, of receiving information and feedback about the case, are currently left to chance and largely dependent on parents, who themselves may be struggling to understand and to cope.

4.110. We agree with many before us who have called for a culture change in child participation. Children must not be seen as "*passive, dependent and less than adults*" but rather "*active social actors in their own lives*".[323] It is the Working Party's view that fundamental reform of the system into one which *proactively* provides children with opportunity to participate effectively and meaningfully, in a process not a one-off event, is the only way we:

- respect children as rights-holders, not the object of proceedings;
- enable them to contribute to the decision-making process in a meaningful way, not tokenistically; and
- enable the court to have the best information of their ascertainable wishes and feelings, and any harm of which they may be at risk, and thereby discharge its duty to consider the child's welfare as the paramount consideration.

A court duty

4.111. Currently, there is no explicit court duty to facilitate the child's participation in domestic legislation or procedural rules. While the court currently has a duty to consider the ascertainable wishes and feelings of the child in its decision-making, it does not have an explicit proactive duty to ascertain them.[324] And while the court must consider the adult parties' wider participation in the case and any vulnerabilities which may diminish this participation, children are explicitly excluded from this duty (even if they are a party).[325]

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[323] E Kay M Tisdall, 'Subjects with Agency? Children's Participation in Family Law Proceedings' (2016) 38:4 *Journal of Social Welfare and Family Law* 362.

[324] As opposed to Scotland, see fn 100 above.

[325] The duty to consider parties' participation in proceedings is specifically disapplied for children who are parties (see r.3A.2(1) which excludes children from the application of r.3A.4) while children who are not parties remain unacknowledged. Children are not explicitly excluded from r. 3A.5, the duty to consider the vulnerability of a witness (party or non-party), as they are from r.3A.4.

4.112. An important first step can be taken, therefore, in recognising the child's right to participation in the rules of the court and the court's duties to the families who come to it. **We recommend an explicit duty upon the court to provide children with the opportunity to participate in a case concerning them**. We consider this should be done through amendments to Part 3A and Practice Direction 3AA to remove their provisions which exclude children from their ambit. **We further endorse the recommendation of the Vulnerable Witnesses and Children Working Group in 2015 that the overriding objective be amended to reflect that dealing with a case 'justly' includes the participation of children (along with vulnerable witnesses and parties)**.[326]

Being heard

4.113. While just under half of children are participating, few are heard directly by the judge or justices. Indeed, to refer to a child's 'evidence' when discussing how their voices are communicated to the court has the potential to be misleading. In the overwhelming majority of cases, the child will not be a witness and they will not give oral evidence or produce a witness statement. Hearsay is admissible in family proceedings[327] and when the child has the opportunity to be heard, their voice will almost always be relayed to the court by an adult, usually the Cafcass officer. The child's voice will therefore be hearsay, and form part of another person's evidence.

4.114. This indirect way of hearing children is continued in our recommendations: the initial investigation includes the child being spoken to by the Cafcass officer in the Court Team, and they would relay what the child has said to the court. They would also continue to relay the child's voice in section 7 reports. We recognise the clear benefits to many children of being heard in this way: they are provided with a skilled child professional, who can speak with them in a comfortable setting and thereafter relay their voice to the court.

4.115. However, this indirect way of being heard prompted three distinct concerns in our consultations and discussions.

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[326] Final report (2015), fn 107 above, p. 21.

[327] Children (Admissibility of Hearsay Evidence) Order 1993 SI 1993/621.

- The child may wish to have a more direct interaction with the judge or justices, particularly if their case will be decided rather than settled.
- There may be potential inaccuracies if the child's voice is filtered through an adult.
- The child may have something relevant to say about disputed facts in the case.

These are taken in turn below.

Meeting the judge or justices

4.116. The opportunity to meet the judge was important to the children with whom we spoke. The FJYPB National Charter states that every child of sufficient age and understanding should have the opportunity to meet the judge overseeing their case.[328]

4.117. The current guidance is very clear that this is not an evidential meeting:

> *It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.*[329]

4.118. The opportunity to meet the judge is therefore primarily a way of ensuring procedural legitimacy for the child. It can occur before a decision has been reached, so the child can meet who will be deciding their case. As Sir James Munby asked last year: "*how would we feel if correspondingly important decisions about us were arrived at by faceless individuals who we were not allowed to see?*"[330] Or it can be done afterwards, to feedback the decision to the child (we discuss the latter further below).

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[328] FJYPB, *National Charter*.

[329] Family Justice Council, approved by the then-President of the Family Division, *Guidelines for Judges Meeting Children who are subject to Family Proceedings* (April 2010).

[330] Sir James Munby, 'Our treatment of the vulnerable – challenges for the family justice system' (Paper, Royal Holloway University of London Symposium, 16 March 2021)

4.119. There are no data on how many judges do meet children, however we understand it is not a widespread practice. Even rarer, in our understanding, is a magistrate meeting a child. While it is theoretically possible, none of the magistrates we spoke to had done it, known colleagues who had, nor received any training which would support them in doing so, despite their interest.

4.120. **We recommend that the opportunity to meet the judge, justices, or the panel chair in the case should be more widely available to all children.** However, for this opportunity to be responsibly offered, the purpose *must* be clear. One young person we spoke to described going to a judicial meeting, only to be disappointed that the judge did not want to hear directly what she wanted the outcome to be:

> *I only had about 20 minutes to talk to the judge and I was really keen to talk to her, but she wasn't really interested in my opinion. She was just more interested in learning about me as a person, which I can understand from her perspective. But I was just really looking forward to telling her about what I wanted and what outcome would be the best for me. And she kind of just stopped me and told me, you know, it would be better if my representatives would do that for me because I can't really be sharing what I want to say without the other parties being there.*

4.121. In 2015 the Vulnerable Witnesses and Children Working Group reflected on the potential confusion for children in the purpose of the meeting and the "*dangerous conflation*" of the child's meeting of a judge and the judge hearing their evidence.[331] We agree that there should be more clarity about the purpose of the meeting, however we do not consider further clarity *for the child* can be achieved through judicial guidance or practice directions. Instead, we consider that **information about judicial meetings and their purpose should be included within the information provided to the child by the Court Team at the beginning of proceedings in order to manage children's expectations.** The Cafcass officer in the Court Team should thereafter provide the child with the opportunity to clarify any queries from the child about the nature of the interaction.

Being heard accurately

[331] Final report (2015), fn 107 above, p. 14.

4.122. An inherent limitation of children's voices being communicated indirectly through adults is the potential for inaccuracy or reinterpretation.[332] This was a key concern for the children and young adults we spoke to, who stressed that there is very little to be gained in being "*heard*" by a professional if they will not accurately relay their voice to those making the decisions. They explained that the complete lack of control over how accurate the professional actually is can cause significant anxiety. This was especially the case when the reporting professional would also be expressing an opinion for the court, which the children feared could result in their voice being lost.

4.123. The Vulnerable Witnesses and Children Working Group were similarly concerned with the potential for adult reinterpretation of children's voices in family proceedings. They explained "*if the child/young person is not going to give oral evidence there must be provision for their evidence to be heard as directly as possible without interpretation by the court-appointed officers or others."*[333]

4.124. Working Party members and consultees had experience of children's voices being selectively quoted or reinterpreted by professionals in their analyses.[334] We also had experience, and heard examples, of good current practice, such as inclusion of direct forms of communication like letters to the judge in section 7 reports. However, the overall picture was inconsistent.

4.125. One category of case sparked particular concern lest the child's voice be presented in an edited or reinterpreted fashion: those in which a professional not only concludes that the outcome should be different to the expressed wishes and feelings of the child, but also that the child's views are the product of parental influence, often referred to as one parent 'alienating' the child from the other, or 'brainwashing' the child. We observe that these children can be

[332] On the general "filtering" of children's voices in which they are only heard with qualifications and caveats from professionals, see P. Parkinson and J.Cashmore, *The Voice of a Child in Family Law Disputes* (Oxford University Press, 2008), pp. 60-61.

[333] Final report (2015), fn 107 above, p. 20.

[334] There is evidence of significant problems with this in the past (2006-07) with children's views about contact being edited and reinterpreted to promote contact between children and non-resident parents, even when children's expressed reluctance was based on fear of the parent and experiences of violence. See G. Macdonald 'Hearing Children's Voices? Including children's perspectives on their experiences of domestic violence in welfare reports prepared for the English courts in private family law proceedings' (2017) 65 *Child Abuse and Neglect* 1; see further A. Barnett, *Literature Review*, fn 10 above, p. 64.

some of the most vulnerable: if the child is accepted by the court to have been influenced, such conclusions have the power to prevent any weight from being given to the child's voice at all.

4.126. In all cases, the Working Party considers **the child's views should not be reinterpreted or selectively quoted, but rather communicated fully and directly to the court. Any analysis, suggested interpretation or representations about the weight to be given to the child's perspective by the professional should be kept entirely separate from the full account of the child's views**. This ensures the child is heard accurately and ensures the judge or justices can scrutinise the professional opinion about weight, since they will have the complete record of what the child has said separately from how the adult is interpreting it.

4.127. This requires a consistent approach to the accuracy with which children's voices are communicated by all professionals. We consider this should be standard practice for Cafcass, during the investigation we propose and later in section 7 reports, but also for local authority social workers and expert professionals who have spoken to the child. This will not change the role or duties of such professionals: their primary duty is to provide their independent expert opinion to the court, not to be the child's advocate. However, it should highlight their additional *responsibility* in also being the communicator of the child's voice, in the context of the child's right to be heard by the court. **We recommend consulting with different reporting professionals (Cafcass, local authority social workers, Guardians and assessing experts, e.g. psychologists) as to how this should be best implemented, for example through guidance or training.**

Giving evidence

4.128. If the child is recounting an experience relevant to an issue in dispute, for example an incident of abuse, they may have to give evidence as a witness. There is no longer a presumption against children giving evidence in the family courts; such a presumption was explicitly disapproved in 2010 by the Supreme Court in *Re W*.[335] Instead, the court must conduct a balancing exercise between the possible advantage of the child giving evidence in determining the truth and the possible damage to the child's welfare from giving evidence, taking into

[335] Re W [2010] UKSC 12.

consideration Cafcass's advice and the representations of the adult parties.[336] The court can decide that alternatives to calling a child to give oral evidence are adequate, such as Cafcass/the local authority social worker asking the child further questions, and relaying the answers to the court.[337] If the alternatives are inadequate, the court has responsibility for ensuring the child gives the best possible evidence, has the power to case manage the practicalities and control of the questioning process, and must be scrupulous in the attention it gives to such as task, being prepared to intervene if the questioning is inappropriate or unnecessary.[338]

4.129. Despite the removal of the presumption against children directly giving evidence in court, our shared experience and that of consultees was that children doing so in family proceedings continues to be very rare, particularly in private family cases. Our recommended investigatory stage would give children an opportunity to be heard by the investigating Cafcass officer in the Court Team at the outset; this will be the first indication of whether they may wish to provide a factual account, an opportunity they are denied in the current system which decides or allows the adult parties to settle the factual matrix of the case without speaking to the child. Considering if the child has something relevant to say as a witness of fact not only improves the quality of evidence before the court in any fact finding exercise on which the child's safety may depend. It is also relevant to their experience of the litigation, for example the potential for causing children distress when they consider their reports of safety concerns have not been taken seriously.[339] We intend the investigatory process to enable an early proactive approach from the court to the question of whether the child may be required to give evidence and the consideration of the *Re W* balancing exercise, rather than waiting for one of the adult parties to apply to call the child as a witness, or waiting for a section 7 report to reveal an account from the child later on in the proceedings.

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[336] See Family Justice Council, *Guidelines in Relation to Children Giving Evidence in Family Proceedings* (2011), para. 9.

[337] Ibid, para 12.

[338] Ibid, para 21. See further, r. 3A.5 FPR provides the duty to vulnerable parties and witnesses giving evidence. Children are not excluded from this provision, as they are the provision to consider participation outside of giving evidence.

[339] R. Carson et al (2018), see fn 91 above, pp. 34-35, 59-61, 79, 90

4.130. In considering whether a child should give evidence, the measures available to the court to minimise any risk of harm are of central importance. There has been progress in such measures in the family court since the report of the Vulnerable Witnesses and Children Working Group called for improvements in 2015; there is now greater provision in the rules for participation directions to be made to assist vulnerable witnesses to give their best evidence, and training for advocates.[340] Progress in the family court has also benefitted from the progress also made in the criminal justice system in the past twenty years, in which the task of reducing the harm caused to children, through their giving evidence and being subjected to cross examination, has been the subject of focused attention, including a statutory scheme of special measures and piloting of its provisions.[341] Notably, the pre-recording of witness evidence, including the cross-examination of the child prior to trial, has been successfully piloted in the criminal courts and incrementally rolled out over the past ten years; it is now available in all Crown Courts in England and Wales.[342]

4.131. In conducting the *Re W* balancing exercise, it is crucial that the court has as full a range of options as possible at its disposal. **The Working Party encourages the continued development of measures available to children (and vulnerable witnesses more generally) to facilitate their best evidence in the family courts. This includes learning from and where appropriate conducting pilots of measures already used in the criminal courts, such as pre-recorded cross-examination.** Indeed, we consider that the possibility of a child's evidence being pre-recorded, including any cross-examination using a judicially approved structure of questions, should generally be among the court's considerations.[343] However, while the current rules do enable a court to

[340] Since the Report of the Vulnerable Witnesses and Children Working Group in 2015, Part 3A and Practice Direction 3AA have been introduced, the practice of holding ground rules hearings has gone from being unheard of to being commonplace, and advocacy training from the Inns of Court, originally formulated for criminal practitioners, has been extended to family. See the Inns of Court College of Advocacy, Advocacy and the Vulnerable (Family)

[341] The criminal courts operate under an explicit statutory assumption that a child will be taken to be a "vulnerable witness" and eligible for various statutory special measures, contained in ss 16-30 Youth Justice and Criminal Evidence Act 1999. The suite of statutory special measures therein have been implemented incrementally over the past 20 years, most recently including the roll out of s.28 pre-recorded witness cross examination after piloting.

[342] HMCTS, Section 28 for vulnerable victims and witnesses in Crown Courts (October 2020)

[343] See discussion of the "significant advantages" foreseen of not appearing live in the hearing, in the FJC Guidelines, fn 337 above, para 12

order this,[344] we stress that facilities, funding and training are required on the ground to ensure such measures are more than merely hypothetical but are practically accessible in family courts across England and Wales, as they are now in Crown Courts.

Beyond being heard: the child's ongoing participation

4.132. While accuracy in relaying the child's voice may improve their being heard, it is also important for children to feel respected as rights-holders in a process which is about them. Justice must not only be done, but be seen to be done. For children, who are not present in every hearing or served with every document as their parents are, this requires proactive consideration of how the child can be reassured that they are being heard, respected and taken seriously. This should be a consideration for every child, but we consider it will be particularly important for children for whom the professional recommendations conflict with their expressed views. For these children, the process risks becoming one in which they feel unheard, disenfranchised and even betrayed by the professional to whom they have spoken.

Trust and the professional's duty to the court

4.133. We consulted with many professionals from different backgrounds who work with children in decision-making processes, including social workers, paediatricians, criminal justice practitioners and psychologists. A predominant theme was the importance of the relationship of trust between the child and the professional. Consultees were clear that this was not the same thing as confidentiality, since most of those we spoke to could not offer children confidential consultations, but rather clarity and honesty about what they would share and why. As a consultant paediatrician we spoke to explained, "*The most important thing is trust that their voice is being ascertained for the right reasons […and…] know[ing] what is being done with the information they are giving us*".

4.134. Some of the FJYPB members we spoke to were clear that they were not told enough about who would be seeing and reading any report written about them.

[344] See PD 3AA paras 5.4 – 5.5

Explanations do feature in Cafcass and Cafcass Cymru's online materials[345] but not in the standard letters sent to children from Cafcass or Cafcass Cymru in advance of consultation for a section 7 report. We are unable to know how often this is and is not explained to children orally and we have heard that many Cafcass officers do explain their reporting duty to the court when introducing themselves to children. However, we recommend that such a critical element of the process should be better embedded to ensure it is unmissable: **we recommend it is both included in writing in letters sent to the child in advance of consultation, and explained orally before every consultation, not just by Cafcass but by all professionals who may report on a child. Again, consideration will need to be given to how this can be best implemented across different reporting professions.**

A point of contact with a named professional

4.135. An additional way of improving ongoing participation is to ensure the child has a point of contact during proceedings. This is currently unavailable to all children without a Guardian, meaning they must rely on parents for information during proceedings**.**

4.136. The Working Party considered the potential employment of an entirely separate professional for all children to advocate for them. We discussed the potential use of Independent Children's Advocates, to which children are entitled outside the family justice system in various decision-making processes such as complaints to the local authority or reviews of looked-after children's care plans (which similarly could include issues of where the child lives and what contact the child has with family they do not live with).[346] These professionals offer a confidential service to children, advocating the child's voice only, not what they as professionals consider to be in the child's best interests, and providing children with information and updates during the process.[347]

4.137. The Working Party saw many benefits to such an additional role. It would provide a clear solution to the issue of children's voices being over-shadowed

[345] Cafcass, My parents are separating - Cafcass - Children and Family Court Advisory and Support Service ; Cafcass Cymru, Cafcass Cymru information pack.

[346] S.26A of the Children Act 1989.

[347] For an overview of advocacy services in England, see the Children's Commissioner for England, *Advocacy for children* (June 2019).

or reinterpreted by professionals, as discussed above. The confidentiality aspect would also in our view greatly facilitate a relationship of trust for every child. On balance, however, we did not consider an additional child advocate in every case to be a proportionate use of resources. In many cases, the wishes and feelings expressed by the child will not conflict with professional opinion of their best interests. In these cases, we considered keeping new professionals introduced to the child at a minimum to be desirable, while focusing on improving the quality of children's participation through the existing professionals involved.[348]

4.138. **Of the existing professionals available, we recommend that the investigatory process should identify a named professional for the child to contact**. For a minority of children, this may be a local authority social worker, or for an even smaller minority it is an opportunity to identify if they have an established relationship with another adult, for example a key worker, who would be better suited to be the child's first port of call.[349] However, for the majority of children, this will be the allocated Cafcass officer in the Court Team. Therefore this recommendation does not entail an additional professional, but rather explicitly recognises an additional role for the Cafcass Officer in the Court Team: to ensure that the child has someone to contact when they are unable or uncomfortable asking a parent about the case.

4.139. This does not mean the Cafcass officer (or other professional) could or should divulge all information requested by the child; this would be a matter for individual consideration on a case-by-case basis, with direction sought from the judge where appropriate. However, it would at least provide a way for children to access that opportunity, denied to them in the current process. It would also give children who decline to participate initially the opportunity to change their mind, or allow those who have been spoken to the opportunity to add to anything they have said. Finally, we consider this professional could be of benefit to children in feeding back the outcome of the case (see below).

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[348] In doing so we note we came to the same conclusion as the Australian Law Reform Commission (ALRC) which grappled with this same question – whether to add a separate Child Advocate role to private children proceedings – in 2019. See Australian Law Reform Commission, *Family Law for the Future – An Inquiry into the Family Law System* (ALRC Report 135, 2019) p. 377.

[349] We acknowledge that external professionals would have to be engaged in this role carefully, given that proceedings are private and the information in them highly sensitive.

Ongoing consideration of effective and meaningful participation

4.140. Of course, the child should not bear the burden of their ongoing participation alone, by being the only one to instigate contact. There will be interim decisions made and updates in the case, and **we recommend that the court should proactively keep the child's participation under ongoing consideration, asking if the child's participation is still effective and meaningful, in light of any update in the case.** For the children we spoke to, the most important update was knowing about professional recommendations when they are made:

> *it's just as important to tell the child, young person, what you recommended, whether you've gone with the wishes and feelings or especially if you haven't. Because, you know, [if you don't] that's going to make them feel completely disregarded and misunderstood.*[350]

4.141. We observe this again goes to the importance of the relationship of trust between the professional and the child. Understandably, Cafcass officers we consulted emphasised that sharing their recommendations needs to be very carefully considered, precisely because they were *not* decisions, but only recommendations. They raised the concern that sharing recommendations could be confusing and more harmful to the child if the court's judgment or the parents' settlement did not then match the recommendations.

4.142. The Working Party agrees that the appropriateness of sharing recommendations prior to a decision being made in the case is not something which can be decided other than on a case-by-case basis. However, we consider that it is an extremely important part of treating participation as a process, not a one-off event. **We recommend that the starting point should be shifted from the current practice of assuming the child will not be told, to presuming the child will be told in an age-appropriate way, with a reasoned justification required on the court file if the child will not be told what professionals are recommending about them**.

4.143. Finally, we note that simply telling the child about recommendations may be insufficient. Various further responses should be proactively considered and used where appropriate to secure the child's effective and meaningful participation. Additional responses will be especially useful, in our view, if any professional assessment communicating the child's voice qualifies or conflicts

[350] FJYPB consultee.

with the experience, feelings or wishes the child has expressed. Responses could include:

- showing the child the report, and its layout, to reassure them of how their wishes and feelings have been communicated (verbatim and separate)
- providing the child with an explanation of the reasons for the different view and an opportunity to ask questions;
- providing the child with an opportunity, in light of the different professional view, to communicate any further views;
- consideration of whether the child wishes to see the judge/justices;
- consideration of whether the child has sufficient understanding and wishes to instruct a solicitor separately.

Feedback

It is so important to explain the outcome – that is where the trust comes in. If [you] have asked them what they want and told them their voice is important, then that is sort of undermined if you come to a decision and don't explain it.[351]

4.144. The child has a right to feedback about how the decision was reached and the weight their voice was given. The young people we spoke to explained this was important for them, for some in the immediate aftermath of the process, while for others it had long-term importance. Some, for example, made data subject access requests of Cafcass as young adults to view their files and better understand why decisions were made. Research also indicates the importance to children of having decisions and outcomes explained to them.[352] Indeed, in one Scottish study the failure to explain the final decision directly to the children was a significant factor in children's perceptions that their views were not considered important by the court.[353] Meanwhile, the perception that their views and experiences were not listened to caused children who had

[351] Consultant paediatrician consultee.

[352] R. Carson et al (2018), see fn 91 above, p.5 and international research cited at footnote 15.

[353] F. Morrison and K. Tisdall, 'Children's participation in court proceedings when parents divorce or separate: legal constructions and lived experiences' (2012) *Law and Childhood Studies: Current Legal Issues* 156, cited in A. Roe, see fn 90 above, p. 6.

experienced violence and abuse significant distress in both conciliatory and adjudicative processes.[354]

4.145. However, feedback regularly goes unaddressed. If the child has a Guardian (6% of cases), the Guardian has a duty to ensure the child is notified of a decision in the proceedings, if to do so is appropriate to the age and understanding of the child.[355] However, for the other 94% of children, there is a notable absence of any professional with a duty to consider who is telling the child what. Cafcass shared with us that this would be, aside from any resource considerations, an operational challenge for them as well, since they often simply do not know when a final order has been made; they often are not contacted.

4.146. We identified two significant challenges to providing feedback to children effectively in the current system: ensuring reasons for outcomes and an explanation of the weight attributed to the child's voice are available in every case; and delivering the feedback.

Recording reasons for outcomes and the weight attributed to the child's voice

4.147. The first challenge is ensuring the reasons exist in the first place. The majority of children will be subject to orders as a result of settlement, not a judicial determination.[356] As a result, how the child's views have been considered and the weight given to them can often go unspoken. We do not consider this to be satisfactory: when a child has been heard, their right to feedback is not contingent on whether the adults in their case find agreement. Be it a negotiated settlement, i.e. a consent order, or an imposed one, the child has shared their wishes, feelings and experiences and should be informed how that information was treated. **We therefore recommend that the court should proactively consider what reasons the child shall be given about the outcome of the proceedings and the weight that was given to their expressed views,**

[354] R. Carson et al (2018), see fn 91 above, pp. 34-35, 59-61.

[355] PD 16A para. 6.11.

[356] Research consistently shows over three-quarters of final orders in child arrangements cases are by consent, without any distinction between cases with or without allegations of domestic abuse. See Barnett (2020), fn 10 above, section 9.6 at pp. 95-96; and MOJ Harm Panel report, fn 2 above, at footnote 159 at p.144.

irrespective of whether the outcome is determined by the court or by consent of the parties.

4.148. In cases which are not determined, but the parties seek an order reflecting an agreed outcome, we suggest a standard requirement of a 'child participation statement'. This could set out the views of the child on the agreed outcome, including any wishes and feelings expressed and any safeguarding concerns raised by the child. In cases in which the outcome is different to the child's expressed preference, the statement would be a place to explain why, indicating to the court what weight the child's voice had been given and which other welfare factors were considered in arriving at the outcome. In other cases, it would provide an opportunity to explain why the child's views had not in fact been ascertained, e.g. if the child is too young. Professionals involved in reaching the settlement could be responsible for drafting it for the court; this could be lawyers or a mediator during a stay of proceedings, or Cafcass if they are meeting with the family to help facilitate agreement.[357] In cases in which the parents had no professional help in reaching an agreement during proceedings, the case progression officer could explain the statement to them and provide them with a *pro forma* to fill in.

4.149. This kind of statement would have several benefits:

- Firstly, it would ensure that the child's voice is not overlooked in the negotiation process and the court-approval process.
- Secondly, in cases in which the child has raised safeguarding concerns, it would better enable the court to fulfil its duty to exercise the same caution as it does in contested cases, and consider all the information and evidence available to it to determine if there is any risk of harm to the child.[358]
- Thirdly, it would simplify keeping a record of the weight given to the child's voice. When approving a consent order consistent with the child's expressed views, the court could place the statement on the court file and attach the statement as a schedule to the relevant order. When approving an order which contradicts a child's expressed views, or a case in which the child has spoken about the safety of arrangements, the statement would ensure these matters are not overlooked in the approval process. The court

[357] For example, the Improving Child and Family Arrangements service.

[358] PD12J para. 8.

would then be alerted to the need to accompany its approval with reasons explaining how the child's voice was taken into account and why the court is approving the order. Both the child participation statement and the reasons would then be placed on the court file as well as attached to the order.

4.150. When the final order is not agreed between the parties but rather the court is making the determination, the judge or magistrates should provide reasons for the decision reached and the weight the child's voice was given. In practice, we consider the omission of an explanation about weight given to the child's voice is more likely when the judge or magistrates/legal advisor are writing for the adults in the case, rather than the child. There are excellent examples of judgments addressed to children, such as the 'Dear Sam' judgment written as a letter to the child;[359] however Working Party members' experience is that such judgments are outliers. **We recommend that the court should actively consider providing judgments addressed to the child, such as the judgment in *Dear Sam*, and/or accompany any judgment with a summary statement in age-appropriate language of why it considers the order to be in the child's best interests and how the child's views were taken into account. Judicial training will be required for this.**

Delivering feedback

4.151. The second challenge is how to deliver the feedback to the child. The assumption made, if feedback is considered at all, is that the parents are in the best position to provide any feedback to the child. The Working Party questions this presumption from both the parents' and the child's perspective. One litigant in person we spoke to explained that she was too traumatised by the experience of court to explain the judgment to the children. She described how useful and important it had been that the Guardian in her case had written a letter to the children and called them to talk about it. Research also indicates there is value for some children in hearing outcomes from professionals, which can address some of their frustration if they do not feel heard in the process.[360]

[359] A (Letter to a Young Person), Re (Rev 1) [2017] EWFC 48, Mr Justice Peter Jackson (as he then was). See also a recent example by HHJ Dancey and *E (A Child) Step-parent Adoption)* [2022] EWFC B3. Albeit this is an adoption case, it is another example of a judgment directly addressed to the child.

[360] See for example the quote from "*Hayden M*" in R. Carson et al (2018), see fn 91 above, p. 66.

4.152. That is not to say that parents delivering the feedback will always be the wrong choice; in some cases they will be best-placed. However, it will depend on several factors: the quality and nature of the child's relationships with professionals in the case and parents; the child's views and whether the outcome reflects them; whether the child has raised any safeguarding concerns; and the degree of agreement between parents. The issue was well put by an attendee at our roundtable with FJYPB. She observed:

> *it depends on every family dynamic completely. I think I would have been quite happy for my dad to just tell me, but I think he didn't tell me because he wants to protect me. But then that kind of backfired when mum told me. It's like, well, now I've heard it from the wrong person. So perhaps if I spoke to an independent person, that would have really helped. But […] it's that consistency as well, because I don't want to hear it from different people who I now don't trust or someone who's going to leave or, you know, so if that consistency can't be maintained, then it would be my perspective, you know, in my situation for it to come from my dad.*

4.153. **We recommend that the court should proactively consider the best way of delivering and explaining the outcome to the child whenever a final order, or a substantive interim order, is made, by consent or by judicial determination.** In line with our other recommendations, the child should have had a named professional available to them throughout the proceedings, usually the Cafcass officer in the Court Team; we consider the delivery of feedback would therefore be well placed with this professional if the child has had the opportunity to build a relationship with them. We recognise that this would be a change to current practice for Cafcass and would require additional resources.

4.154. We further recommend that, **if it is decided that the parents should feedback the outcome, there should be professional support and guidance available to them to do so.**

Judicial feedback

4.155. As we noted above, in judicially determined cases children may value meeting the person deciding the arrangements that will determine their future care, and we consider that they should have the opportunity to do so should they wish. We add to this observation that the opportunity to receive feedback from the judge or justice(s) may also be of benefit, particularly for those children whose

expressed wishes and feelings are not reflected in the judicial determination.[361] This does not have to be the first time the child hears the outcome – this may be thought to be more appropriately delivered by someone the child has met before, away from the court. But thereafter the child may quite reasonably seek to meet the decision-maker and hear directly from them how their voice was taken into account and given weight. We therefore **recommend that children should be offered such an opportunity in suitable cases and, if the child does express such a wish, this should be accommodated unless the court documents reasons as to why it would not be in the child's interests to do so.**

4.156. However, for this opportunity to be offered to more children, it is essential that judges and magistrates are provided with the support to be able to do so skilfully and confidently. We **recommend that judicial training in meeting children is developed**, which can allow those who may for good reason be cautious about meeting children, to develop and test their skills in an interactive environment and receive feedback from child professionals. It may well also require proactive consideration of whether there is a **suitable, child-friendly environment** for the child to meet the judge, particularly in shared court buildings with criminal courts. While some children will wish to see the courtroom where the case and their parents will be heard, others may be more comfortable with a meeting in another location, or a remote meeting for example by video.

Data

4.157. We have been assisted by the recent review of the Cafcass administrative data of child participation conducted by the Lancaster-Swansea data partnership.[362] However, the data limitations from that study highlight the difficulties in obtaining a clear picture of children's participation currently and tracking any improvements in the future. For example, there is no systematic data collected on how many children are meeting a judge or justices, writing letters, engaging with experts such as psychologists or independent social workers, or receiving child-friendly judgments. We do not know the ages of children spoken to, or the length, duration or quality of their participation, and in cases featuring

[361] We also observed this may be an additional role of the arbitrator out of court, in our recommendations to make non-court dispute resolution processes more child-inclusive in **Chapter 3**.

[362] Hargreaves et al (2022), see fn 12 above.

siblings we do not know if all or some have been spoken to in a report in the case.[363]

4.158. Cafcass has begun recording if the child has been "*seen*" in the preparation of a report, which will allow better analysis of child participation in the future. We support this improved data collection, but caution against the conflation of a child being *consulted* and child being *observed* (for example at contact) in the term "*seen*": they are very different experiences of participation as far as the child is concerned. We further highlight that Cafcass is not the only actor facilitating participation currently in the system and data collection does not only lie with them. In the current system and in that which we propose for the future, child participation will be shared between local authorities, the courts, and third parties such as NYAS. We therefore **recommend that HMCTS, Cafcass, local authorities, and other relevant third parties such as NYAS, should work together to improve the data collected and analysed about how children participate in court proceedings.**

Review

4.159. Once an outcome has been agreed or determined in private family proceedings, there is currently very little ongoing oversight by the court.

Court oversight

4.160. Review hearings to consider how arrangements are progressing are generally discouraged: the rules stipulate that cases should not be adjourned for review unless such a hearing is necessary and for a clear purpose,[364] and those we consulted explained that in practice they are indeed rare. The rules also encourage section 7 reports to make recommendations for stepped arrangements for children where safe to do so,[365] usually meaning orders for the child to spend increasing time with the non-resident parent, set out in an order but with no review of the court.

4.161. The court has two further types of oversight available to it other than a review hearing, both facilitated by Cafcass or the local authority: a contact monitoring

[363] See full discussion of the data limitations in ibid, p. 10.

[364] FPR PD12B para. 15.3.

[365] FPR PD12B para. 15.4.

order[366] and a family assistance order.[367] The former is not intended to provide assistance or support to the family after the order, but rather to monitor compliance by the adults named in the order and report the compliance to the court. Meanwhile family assistance orders are entirely consensual and are wide-ranging in the support they can offer the family: to "*advise, assist and befriend*" those named in the order, which can include the child. The professional assisting the family can then be directed to write a report to the court including any advice to vary the order. However, family assistance orders are resource-intensive and rare in practice; there were only 367 Family Assistance Orders made in 2021, half of those ordered a decade ago in 2010 (771).[368]

4.162. The Working Party found that the above restrictions in court oversight result in a 'cliff edge' which does not work for the families leaving court. Consultees told us that new arrangements were regularly being ordered without having been tested and without any support in place for parents or children. We heard examples of parties lacking help with fine tuning arrangements in the early days of the implementation of orders, which could lead to arrangements breaking down or parties relitigating small issues. Meanwhile, domestic abuse charities expressed concern at the kinds of stepped final orders deemed "*safe*" in light of risks identified in proceedings. Respect,[369] Women's Aid, and Welsh Women's Aid,[370] cited final orders being made in which supervised contact is ordered to move to unsupervised in the future, when the perpetrator of abuse has completed a perpetrator programme or simply after a period of time.[371] Respect explained to us that such stepped orders are not well suited to domestic abuse cases, since programme attendance alone is no guarantee that the risks have

[366] Ss 11G and 11H of the Children Act 1989.

[367] S. 16 of the Children Act 1989.

[368] MOJ, *Family Court Statistics Quarterly: October to December 2021*, Table 4. There are no data on the number of contact monitoring orders ordered.

[369] Respect is a UK membership organisation working to end domestic abuse, advancing best practice on work with domestic abuse perpetrators, male victims and young people who use violence and abuse.

[370] Women's Aid and Welsh Women's Aid are sister federations, working in England and Wales respectively to end domestic abuse against women and children.

[371] We note the discontinuation of the Domestic Abuse Perpetrator Programme ("DAPP") commissioned by Cafcass (referrals ceased 30 June 2022). See Cafcass, *Domestic Abuse Perpetrator Programme*. The DAPP has never been commissioned by Cafcass Cymru.

reduced, nor indeed is the passage of time. Respect explained that risks must be reassessed continuously, and formally upon completion.

Parents returning to court

4.163. Instead of the court having oversight over its orders, once a final order is made the parties are left to re-apply to the court should they wish to vary or enforce the order, for example if it is being breached or if they consider it is no longer working. Research suggests that around 30% of cases do return, with 63% of those returning within two years.[372] Cafcass found that 39% of cases which did return returned to court due to mutual parental conflict; 36% for safeguarding reasons; 16% of cases were due to a change in life circumstances; and in 9% of cases the child's wishes and feelings were the principal driver.[373] A study of applications to enforce contact orders (i.e. not applications to vary the order) produced a similar pattern, with the most common type of case involving parents whose conflicts with each other had prevented them from making the order work reliably in practice.[374] The second largest group involved cases with significant safety concerns,[375] followed by cases where older children themselves wanted to reduce or stop contact, with the smallest group (4%) being implacably hostile resident parents refusing contact.[376]

4.164. Consultees explained to us that some of these returner cases are very necessary, for example, cases in which new issues of risk have arisen or significant changes of circumstance require a reconsideration of the welfare analysis. Others are necessary but avoidable, such as cases in which litigants in person had been pressured to agree on arrangements which were incomplete or unsuitable, leading to relatively quick returns. Some are abusive, with evidence

[372] B. Marsh, E. Halliday & R. Green, *Private law cases that return to court: a Cafcass study* (Cafcass, 2017).

[373] ibid

[374] L. Trinder, J. Hunt, A. Macleod, J. Pearce, and H. Woodward *Enforcing contact orders: problem-solving or punishment?* (University of Exeter, 2013) pp. 29-36.

[375] There was a high incidence of safeguarding concerns in the cohort: with concerns about domestic abuse, child abuse or neglect in a third of cases; around half of cases had involved a referral to the police and/or children's services at some point; and a third of applicants had at least one conviction for drug/alcohol offences or crimes of violence/against the person. Ibid, p2.

[376] L. Trinder, J. Hunt, A. Macleod, J. Pearce, and H. Woodward *Enforcing contact orders: problem-solving or punishment?* (University of Exeter, 2013) p. 36.

of the court process being used as a way of exerting post-separation coercive control.[377]

4.165. Meanwhile, consultees emphasised that cases which do not return are not necessarily "*successful*". There is evidence of parents choosing not to seek enforcement of orders despite their being breached, due to the perceived ineffectiveness of the court, and the financial and emotional cost of litigation.[378] Research also indicates that protective resident parents' fear of being accused of parental alienation or implacable hostility can act as a barrier to their seeking changes to ordered contact even if they do not consider it in the child's best interests.[379]

Children's need for oversight

4.166. The potential need to change an order is not only an issue for the adults involved: it was a key concern of the children and young adults we spoke to from the FJYPB. As one attendee explained:

> *young people are kind of left in a situation that they're not happy with and not comfortable with, and it's not quite panned out as the court probably expected. And the child, you know, where do they go? What do they do? Who do they talk to? Where can they ask for help? And particularly with junior people who have been involved in domestic abuse situations can leave them really particularly quite vulnerable.*

4.167. The assumption is that at least one parent will apply to the court to vary arrangements on behalf of a child if the child is extremely unhappy or indeed unsafe in arrangements. However, there is evidence of children being very aware of how their objections to contact may be interpreted through a transmitting parent, resulting in the child silencing themselves. For example:

> *Yeah she [mum] was very supportive of me but in that circumstance it's very hard to be supportive of your child because you get accused of*

[377] As reported to the MOJ Harm Panel report, fn 2 above, pp. 125-30, resulting in their recommendation to strengthen s.91(14) of the Children Act 1989.

[378] Termed "lumpers" in the study, and described as experiencing weary resignation, see L. Trinder et al, (2013), fn 378 above, p. 16.

[379] See MOJ Harm Panel report, fn 2 above, pp. 158-59.

manipulating, […] I couldn't turn to my family because[…] it would look bad on them and it would not be in my best interests in court. So for five years I was very much on my own.[380]

4.168. As we discussed above in **Chapter 3**, children can apply with leave of the Court for a child arrangements order under section 10(8) of the Children Act 1989, which is an important backstop if the child does not have an adult to seek an order for them if they need one. However, such applications are rare and their accessibility is highly questionable in practice.

A proactive and proportionate approach to review

4.169. We consider that a fresh approach to review is required, rooted in the Court taking responsibility for the orders it makes. Review should cease to be seen as exceptional, but instead be reinstated as a standard part of the court process, designed to ensure that court-ordered arrangements are in fact working for the child.

4.170. We understand increased review is currently being piloted in North Wales and Dorset, pursuant to the MOJ Harm Panel's recommendation of a third 'follow up' stage (after the first 'investigatory' stage and the second 'adjudication' stage (if needed). We support this pilot, and contribute the below considerations of what increased 'review' should look like in order to be proactive and proportionate to the needs of the case.

4.171. **We recommend that upon the making of a final order, whether by consent or following a contested hearing, the court should normally direct that a review of the progress of the order will take place.** The order would be a "*final order, subject to review*".

4.172. This review should, in our view, have the following aims:

- To ensure that orders are in fact in the best interests of the child and are not putting any child or adults at risk of harm;
- To use the authority of the court in a positive rather than a punitive way, by providing continued focus after court on what is best for the child, some

[380] FJYPB roundtable participant cited in the MOJ Harm Panel report, fn 2 above, p. 147.

oversight, and accountability for parents who may otherwise not comply for reasons other than the child's best interests;

- To provide parents with an opportunity to seek help to remedy problems which emerge, or iron out minor issues, short of a re-application to court;
- To ensure children are directly heard and asked if the order is working for them, rather than burdening them with asking a parent to change arrangements or seeking to change them themselves.

4.173. None of the court's current powers, in our view, suffice to achieve these aims. First, family assistance orders provide holistic support to families over and above reviewing the court order, which may over-burden Cafcass or the local authority and not be proportionate to the needs of all families. Secondly, contact monitoring orders check whether adult parties are complying with orders, rather than considering if the order to be complied with in fact continues to be in the best interests of the child. Thirdly, review hearings entail court attendance and judicial expense, which we do not consider would be necessary in every case and which would make direct inclusion of the child challenging and unnecessarily formal in practice.

4.174. Instead, **we recommend a new review mechanism: an enquiry, after a period of time determined by the court,[381] into whether the order is working in the best interests of the child and if any alteration to the order is required**. We recommend that such enquiry would be undertaken by a reviewing officer, who would normally be the Cafcass officer in the Court Team or Local Authority social worker previously involved in the case. In order to be proportionate to the needs of each case, we consider the enquiry should be flexible and not take place in court. **The method of contacting the family members would be at the officer's discretion based on the nature of the case:** it could be a remote or in person meeting, and we would suggest a default of separate meetings but acknowledge together may be appropriate depending on the facts of specific cases. **There should be the potential for the reviewing officer at their discretion to contact third parties where relevant. Importantly, the enquiry would include consultation with the child. We**

[381] We understand the pathfinder courts to be operating within a range of 3 to 12 months, with which we agree.

recommend this would be presumed, with reasons required for any decision not to do so.

4.175. **The result would be a short report to the court addressing the question 'Is the current order working in the best interests of the child?' and any recommended next steps**. Next steps could include:

- if the reviewing officer considers the order continues to be in the best interests of the child, recommending the judge close proceedings without any further hearing required;
- recommending a review hearing at which the judge would consider any concerns the officer has about the order being in the best interests of the child (maintaining judicial continuity wherever possible); and/or
- recommending a further review period.

What the review is not

4.176. The review would not necessarily result in a judicial hearing, which in our view would conserve judicial resources for cases which need further consideration. Moreover, the review hearing would not change the test for re-litigating findings which have already been made by the court; this would continue to be considered in accordance with the established guidance in *Re B*, i.e. when it is decided that the child's welfare requires a matter to be re-litigated.[382] The court's focus would be on the child's welfare needs and the extent to which the reviewing officer has identified that the current order is not meeting them. Furthermore, the review would not preclude individuals' ability to apply to vary or enforce child arrangements orders. However, we do consider that parties' knowledge that a review is imminent would significantly decrease the number of unnecessary applications to vary or enforce orders.

4.177. Finally, our recommendation of a reviewing officer is not suggested in any way to be a panacea for the difficulties families face after court, nor to be sufficient on its own for the more challenging cases which come before the court. We do consider they could, in their enquiries, review any non-court support to which the family members were referred. However, the reviewing officer would not be tasked with managing the day-to-day progress of the order or with providing

[382] *Re B (Children Act Proceedings: Issue Estoppel) [1997] Fam* 117 at 128 onwards (Hale LJ).

ongoing support for the family. Therefore, in cases which need this intensity of oversight, contact monitoring orders and family assistance orders should continue to be available in appropriate cases. We particularly consider that family assistance orders should be more widely available for families with complex needs.

CONCLUSION AND SUMMARY OF RECOMMENDATIONS

The family justice system is struggling to secure access to justice for the separating families who come to it for help. By access to justice, we mean access to safe and sustainable child arrangements as a result of a fair and accessible process, in which i) the child's welfare is the paramount consideration; ii) necessary information relevant to the child's welfare is available; and iii) all those who wish to, including children, can effectively and meaningfully participate. We have asked what improvements separating families need, guided by our principles: the rule of law requires access to forms of dispute resolution – including access to the court system; the family justice system must be designed around the needs of families, not the expertise of legal professionals; and the child's perspective must be at the heart of every stage of dispute resolution in the family justice system. In doing so, we have sought to put those families – their needs, rights and experiences – at the heart of our work at every stage.

What has resulted is not a complete blueprint; indeed our recommendations are intended to be considered alongside other reforms already underway, including the current 'pathfinder' pilot courts in North Wales and Dorset. They are a series of recommendations and ideas which we consider to be ambitious but realistic, and which we strongly believe will improve the experience and outcomes of the family justice system for the families who use it.

We urge policy-makers, family justice professionals, and other interested readers to consider them, and ponder how far they might offer a better way forward in helping families to reach positive outcomes for their problems, including those that do require the help of the family courts to resolve.

Beyond The Court: The Wider Family Justice System

Authoritative & accessible information

1. We recommend the creation of a single authoritative online information platform for separating families, which must have consistent funding, user-testing and be kept up to date. The platform should cater for the legal and non-legal information needs of all separating/ed families, before, during and after any resolution process, not just those initially considering their options. Any online platform should also be designed for use by children as independent users.

2. Information needs to be comprehensible as well as available. Maximising the accessibility of information for separating families should be a priority for all those providing such information, be they individuals, Government, non-governmental organisations or courts. This should include adapting information in light of current and future understanding of users' vulnerabilities, characteristics and needs as well as for different ages of children.

Legal Advice

3. Publicly funded early legal advice on child arrangements should be piloted without delay.

4. We recommend a review into whether Schedule 1 paragraph 15 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 is effectively providing children who seek legal information and advice about a s.10(8) Children Act 1989 application with that advice.

Coordination of services for separating families

5. We support the creation of networks and alliances of information and support for separating families, particularly those featuring a multi-agency navigator role, such as CLOCK's "Community Legal Companion".

6. Where family hubs are available, we strongly support the inclusion of the various needs of separating/ed families, including the child as a unique user. These should adopt a "hub and spoke" model, and we suggest trusted community organisations, schools and courts themselves should all be "spokes" to ensure services are accessible by the most vulnerable wherever they go for help.

7. We recommend that any networks, alliances, hubs or any other collaborations of services should not be segregated into legal/court-based and non-legal/court alternatives. Instead, the aim should be to provide access to multidisciplinary support and multiagency services for adults and children, whether or not they also are involved with the court. This requires partnership working between the court and local services (and as a "spoke" to family hubs, see Recommendation 6) and between legal and non-legal service providers in the community.

8. We recommend the systematic use of a common structured risk screening tool by professionals throughout the family justice system including mediators, legal professionals, any professionals conducting family hub intake assessments, and Cafcass in court, to ensure a consistent and proportionate response to risk, wherever a family go for help. Such a tool should be a universal initial screen for overall risk, not limited to domestic abuse, for every person, which will identify the need for fuller assessment if a risk is identified, along with suitability for referral for support services.

Funding for non-court dispute resolution

9. The Working Party recommends that, in addition to the mediation voucher scheme, consideration should be given to how other non-court dispute resolution processes can be financially supported, such as collaborative law and solicitor negotiation, and other "packages" of legal and non-legal support.

A child participation presumption (both out of court and in court)

10. There should be a system-wide presumption that all children are offered the opportunity to participate in processes which assist in the resolution of a dispute which concerns them, both in and out of court, in an age-appropriate way. The presumption can be rebutted, for example if the child is too young or if more harm would be done by involving the child than not, however this should be done on a case-by-case basis.

Child inclusion in non-court processes

11. Non-court dispute resolution processes should be better supported to be child inclusive. We recommend:

    - Public education materials and public campaigns about parental separation, should always include information about the principles and practices of child inclusion.
    - Family justice professionals both in and out of court should consider how to make their practice more child-inclusive, be trained and supported to do so, and provide parents with information about the principles and practices of child inclusion.

- Piloting of child practitioners, such as NYAS child advocates, to facilitate children's participation in non-court dispute resolution processes, including but not limited to mediation.
- A funding mechanism for the extra work involved in publicly funded child inclusive mediation, and consideration of how such child consultation can be financially incentivised in privately paying non-court dispute resolution.
- Consideration of how the Family Mediation Council can require DBS checks of child inclusive mediators.
- Consideration by the Institute of Family Law Arbitrators of how arbitration can be made more child inclusive: we think there may be benefits to including other professionals who could speak to the child, such as child advocates, and we consider the prohibition on arbitrators meeting with children requires review, particularly in relation to how best a decision made in arbitration can be fed back to the child.

Going To Court

The Court Team

12. We recommend the creation of a "case progression officer" role in the family court, who should be a neutral, legally-trained court employee. A case progression officer would be allocated to every case to progress the practical and evidential needs of the case and improve the participation of litigants in person.

13. A collaborative problem-solving approach to cases should be adopted, facilitated by a core multidisciplinary Court Team. The Court Team should consist of the case progression officer, Cafcass, plus any additionally required professionals to facilitate children's participation and supplement Cafcass' expertise, such as domestic abuse support workers. The Court Team would work collaboratively with the other actors in the case, namely the judiciary, or magistrates and legal advisers, the family themselves, and any legal representatives they have, and/or any support personnel.

14. We recommend several aspects of the future recruitment and training of the family judiciary, magistrates and legal advisers, should be subject to review. These include the competencies, values, and skills sought in recruitment processes; the diversity of recruits; training in problem-solving approaches,

litigant in person judgecraft, cultural and social disadvantages of litigants, principles and practices of child inclusion; ongoing review of the recently introduced domestic abuse training; the consistency of training between disciplines and the possibility of multidisciplinary shared training; online and in person training methods; how data of case outcomes can feedback to and improve training (and decision-making); and the adequacy of appraisal schemes.

The initial process: Proactive screening, investigation and referrals

15. When the court receives a child arrangements application, there should be an initial investigation conducted by the Court Team. In conducting the investigation, the Court Team would:

    a. provide the family with information at the outset as a priority, (and we support and recommend further development of psycho-educational tools to familiarise children and adults with the family justice system, particularly the family court, its processes and its professionals)

    b. screen them for risk with a structured risk screening tool (see Recommendation 8),

    c. make enquiries with the parties, the child and relevant third parties.

16. The investigatory process need not result in a court hearing; the Court Team may identify with the family that a non-court process would be a better way to resolve the dispute. This would always be by consent; the team would not have the power to bar access to a judge, or magistrates and a legal adviser.

17. For those cases which do continue in court, the investigatory process would identify enhanced case management information for judicial consideration, including:

    a. who will facilitate the child's ongoing participation in that process, and frontloading consideration of whether a Guardian should be appointed;

    b. Any further information which requires judicial consideration, such as expert evidence, orders for third-party disclosure, or testing;

c. Any disparity in alleged facts between the parties and their relevance to the child arrangements in question;

d. The history of litigation, including any evidence of abusive repeat applications to inform judicial consideration of a barring order under s.91(14) of the Children Act 1989;

e. Any matters impacting allocation, such as legal complexity, urgency, or judicial continuity

f. Any urgent matters for the court's consideration;

g. Participatory needs of the adults ahead of any required hearing, in light of any identified vulnerability.

18. Regardless of whether the family continue in court or out of court, the Court Team would make appropriate referrals to support for any identified needs of the adults and/or the children which are directly or indirectly relevant to the child arrangements dispute (for example child maintenance advice, local authority early help services, mental health support, counselling, domestic abuse advocacy, Working Together for Children or Separated Parents Information Programmes, Support Through Court, children or adult support groups). We support active referrals rather than signposting. If eligibility for legal aid is identified during the investigation, this too should be subject to a referral (including if it is suspected the litigant may be eligible for exceptional case funding, see Recommendation 26).

Case progression

Hearings

19. We recommend that hearings are held as necessary in each case, as determined by the Court Team in collaboration with the parents and with recourse to the judge where appropriate. There would be no one-size-fits-all first hearing in every case, nor any set menu or progression of hearings.

20. Preparation for hearings would be managed by the case progression officer if a party or both parties do not have a lawyer, with directions given by the judge or legal adviser, and magistrates. Preparations would include proactively securing participation adjustments and providing guidance and assistance to litigants in person.

21. After hearings, the case progression officer should be available to clarify matters for the litigant in person, in person immediately after the hearing or

later by email and telephone, and provide guidance and signposting for help with next steps, including support to complete tasks between hearings and information about appeals.

22. During hearings, when there is one or more litigant in person, there needs to be a judge-led elicitation of evidence and/or submissions to assist the court to determine the facts or the child's welfare. Judges, magistrates, and legal advisers should be provided with training to support this approach.

Continuity

23. There should be continuity of the Court Team. We recommend that the same Cafcass officer involved in the investigation should be available to do further work as required by the court, such as a section 7 report, unless their enquiries have identified a more suitable professional already known to the child such as a local authority social worker. Case progression officers should also be allocated to the case to ensure continuity for the parents, which will have particular benefit to litigants in person. Furthermore, cases should wherever possible be allocated to the same judge or legal adviser (and ideally panel chair) to deal with the case throughout proceedings.

Experts

24. We recommend that expert assessment, third-party information, and testing, should be available in all cases in which it is deemed necessary by the court. Where parties cannot afford the relevant fees and no legal aid certificate exists in the case, funding should be available for obtaining this information. This includes the funding of expert medical assessments of capacity.

Representation

25. If the court identifies an allegation of harm between the parties, and the alleged harm is relevant to the child's welfare such that it requires judicial determination, then both parties should be eligible for legally aided representation.

26. We recommend that there be standardised referral mechanisms from courts to local legal aid providers or the legal aid agency when litigants in person appear eligible for legal aid, both i) under the domestic abuse/child abuse gateways; and ii) for exceptional case funding.

27. Funding must be made available to ensure every child who requires a Guardian has access to one.

Children's ongoing participation

A court duty

28. We recommend an explicit duty upon the court to ensure children are given the opportunity to participate in a case concerning them, and an amendment of the overriding objective to reflect that dealing with a case "justly" includes the participation of children (along with vulnerable witnesses and parties).

Being heard

29. We recommend that the opportunity to meet the judge, justices, or the panel chair in the case should be more widely available to all children. Expectations must be managed about this meeting through the provision of information to children at the beginning of proceedings.

30. When the views of the child are communicated by a professional to the court, they should not be reinterpreted or selectively quoted, but rather communicated fully and directly to the court. Any analysis, suggested interpretation or representations about the weight to be given to the child's perspective by the professional should be kept entirely separate to the full account of the child's views in any evidence or report filed in the case. We recommend consulting with different reporting professionals (Cafcass, local authority social workers, Guardians and assessing experts, e.g. psychologists) as to how this should be best implemented, for example through guidance or training.

31. The Working Party encourages the continued development of measures available to children (and vulnerable witnesses more generally) to facilitate their best evidence in the family courts. This includes learning from and where appropriate conducting pilots of measures already used in the criminal courts, such as the pre-recording of cross-examination.

Beyond being heard: the child's ongoing participation

32. The purpose of consultation and the professional's reporting duty to the court should be explained to every child by all professionals consulting them. We recommend it is both included in writing in letters sent to the child in advance of consultation, and explained orally before every consultation, not just by Cafcass but by all professionals who may report on a child. Again,

consideration will need to be given to how this can be best implemented across different reporting professions.

33. The child should have a named professional, who will usually be the Cafcass Officer in the Court Team, who is available to them throughout proceedings, should they wish to speak (further) or seek an update. Depending on the relationship developed, this person may be of assistance in delivering the outcome to the child as well (see Recommendation 35 onwards)

34. After the initial investigation, the court should proactively keep the child's participation under ongoing consideration, asking if the child's participation is still effective and meaningful, in light of any update in the case.

35. We recommend proactive consideration of sharing professional recommendations with the child, with a reasoned justification required and recorded if the child will not be told what professionals are recommending about them. Additional responses to ensure the child's participation is effective and meaningful may thereafter be required, especially when any professional assessment communicating the child's voice qualifies or conflicts with the experience, feelings or wishes the child has expressed. These could include:

- showing the child the report, and its layout, to reassure them of how their wishes and feelings have been communicated (verbatim and separate)
- providing the child with an explanation of the reasons for the different view and an opportunity to ask questions;
- providing the child with an opportunity, in light of the different professional view, to communicate any further views;
- consideration of whether the child wishes to see the judge/justices;
- consideration of whether the child has sufficient understanding and wishes to instruct a solicitor separately.

Feedback

36. The court should proactively consider what reasons the child shall be given about the outcome of the proceedings and the weight that was given to their expressed views, irrespective of whether the outcome is determined by the court or by consent of the parties. We suggest requiring a 'child participation statement' from the parties to accompany any request for the court to approve a consent order.

37. When the court is the decision-maker, we recommend that the court should actively consider providing judgments addressed to the child, such as the judgment in Dear Sam, and/or accompany any judgment with a summary statement in age-appropriate language of why it considers the order to be in the child's best interests and how the child's views were taken into account. Judicial training will be required for this.

38. In all cases, the court should proactively consider the best way of delivering the outcome to the child, including the likely benefit to the child from hearing the outcome from a professional involved in proceedings.

39. If it is decided that the parents should feedback the outcome, there should be professional support and guidance available to them to do so.

40. In adjudicated cases, children should be offered an opportunity to meet the decision-maker and, if the child does express such a wish, this should be accommodated unless the court documents reasons as to why it would not be in the child's interests to do so. Training for magistrates and judges in meeting children should be developed in consultation with child professionals, and suitable child-friendly environments or remote options should be available to meet children.

Data

41. We recommend that HMCTS, Cafcass, local authorities, and other relevant third parties such as NYAS, should work together to improve the data collected and analysed about how children participate in court proceedings.

Review

42. Upon the making of a final order, whether by consent or following a contested hearing, the court should normally direct that a review of the progress of the order will take place. This would be a "final order, subject to review" and would identify a Reviewing Officer. The Reviewing Officer should normally be the Cafcass officer or local authority social worker involved in the case.

43. We recommend the purpose of the review would be to consider if the order is working in the best interests of the child, and if any alteration of the order is required. The reviewing officer can also review any non-court support to which the family was referred. They would contact the family including the child to

do so and any relevant third parties such as the child's school or other family members. We recommend this would not necessarily lead to a hearing: the Reviewing Officer would provide a short report to the court addressing the question "Is the current order working in the best interests of the child?" and any recommended next steps. Next steps could include recommending the judge close proceedings or hold a review hearing.

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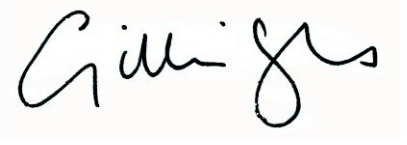

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