P R I V A T E L A W : F A M I L Y D I S P U T E S

THE TIME FOR CHANGE
THE NEED FOR CHANGE
THE CASE FOR CHANGE

Private Law Working Group

SECOND REPORT

To the President of the Family Division

[12 March 2020]

Contents

Annex 1 Membership of the Family Solutions Working Group
Annex 2 Re-draft of 'What the Court expects from Parents'

[1] Introduction and summary

1. The First Report ('Report 1') of the Private Law Working Group ('PrLWG[1]') was published on 3 July 2019. There then followed a period of consultation on its contents and recommendations; the consultation closed on 30 September 2019.

2. This is our Second Report, which we have entitled:-

   '***The Time for Change. The Need for Change. The Case for Change'***.

   This title reflects our increasingly firm belief, significantly fortified by the many responses to our consultation, that the *time* has come now to seize the initiative to plan for fundamental, long-term and sustained system change in the way our 'private law' family disputes are resolved.

3. In our First Report, we identified many of the pressures on the court system (see [12]-[27] Report 1); many of the consultees who commented on this aspect of our report confirmed and reinforced the accuracy of our assessment. But the *need* for change is not just driven by the demand on over-stretched courts; it is also driven by:-

   - a recognition that the Child Arrangements Programme ('CAP')[2] has not been successful in some of its core and essential messaging[3] i.e. seeking to encourage parents to exercise decision-making for their children in fulfilment of their parental responsibility, rather than delegating decision-making to the

[1] We have now given ourselves the acronym PrLWG to distinguish this group from the Public Law Working Group which has customarily used the acronym PLWG.
[2] P*D12B FPR 2010*
[3] See for instance para.1.2, 1.3, 2.1, 2.2, 2.3, 5, 6.1 *PD21B FPR 2010*

court / diverting families away from court in the first place / encouraging judges[4] to consider diverting cases into non-court dispute resolution;

- an awareness of the significant harm caused within families by parental conflict;
- the perceived failings of the family court to manage some domestic abuse cases appropriately, calling into question the outcomes of such cases;
- the fact that very few families are eligible for publicly funded legal advice or representation, and enter a court system without any meaningful advice or legal/practical help;
- an awareness of good quality services available to support separating families, including mediation, but little if any coherence to the delivery of such services or incentive to families to access such services.

We believe that we have reached a critical point in the evolution of in-court and out-of-court dispute resolution for separating families; the system (such as it is) is not functioning appropriately, and its weakness is exposed by the pressure of the demand placed upon it. Little will be gained by tinkering with the current arrangements. We feel that now is the time to instigate more radical system change for the benefit of future generations.

4. This is necessarily a further *interim* report, while we await the publication of the report of the Ministry of Justice ('MoJ') Panel into 'Harm in Private Law Cases'[5]. Given the significance of domestic abuse and other forms of harm (including behaviours described as parental alienation) in many private law cases, our final

[4] Where we have used the term 'judge(s)' we include 'magistrate(s)', unless the context indicates otherwise, or there is specific provision otherwise

[5] The Panel was established in May 2019. The remit of the panel's enquiry is: "*How effectively do the family courts respond to allegations of domestic abuse and other risk of harm to children and parent victims in private law children proceedings, having regard to both the process and outcomes for the parties and the children.*"

recommendations will (as appropriate) take into account the substance and recommendations of that expert panel report.

5. This report is divided into three chapters:-

   - **Chapter 1**: In summary form only, we set out the main themes to emerge from the consultation which we conducted between 3 July and 30 September 2019, together with our headline response to the same; we have incorporated our responses below in **Text boxes and in bold ;**
   - **Chapter 2**: The publication of our First Report has helpfully stimulated discussion beyond the specific remit of the PrLWG. In this short section of the report we summarise some of the key points to emerge from:-
     - A 'scoping event' hosted by the Nuffield Family Justice Observatory (17.11.19),
     - A focus group meeting with a number of the FJYPB board members (20.1.20),
     - The early discussions work of a Family Solutions Working Group (13.2.20), and
     - The development of the 'alliances' in Dorset and in Kent, which follow the 'SSFA' model outlined and advocated in our First Report.
   - **Chapter 3**: We outline some of the 'next steps' which need to be taken to advance our thinking; we identify some useful initiatives/efficiencies which are being trialled by individual courts around the country; we discuss the piloting of some recommended initiatives.

6. In headline terms, the following points emerge strongly from the consultation (outlined more fully **Chapter 1** below) as follows:

   - There is a <u>need</u> (and an accompanying desire among professionals and litigants) for radical reform of the way in which private family law disputes are resolved in and out of the family court;
   - The ambitious objective of a national 'Family Solutions Service', complementary to (or incorporating) the family court, is enthusiastically supported;

- There is a need for some immediate action to relieve the very considerable stresses on the family justice system caused by the increasing numbers of private law disputes[6];

- Delays in the court process are one of the most significant concerns expressed through the consultation; many consultees spoke of the court delays creating or exacerbating the difficulties in the parent/child relationship post-separation;

- A suitable level of sustained and properly-targeted investment (including re-distribution of funding where appropriate) is required to assist parties to resolve their disputes in or out of court in the most effective way. The Legal Aid reforms of 2012[7] have been counter-productive to the effective resolution of private law disputes;

- Affordable services for separating families are currently patchy, and fragmented. The creation of a 'Supporting Separating Families Alliance' ('SSFA' or similar) is widely supported. Any co-ordinated provision for separating families should have a national identity; there is only little support for the proposal that the alliance(s) should be run by Local Family Justice Boards ('LFJBs'), which are deemed to be too closely aligned to the court system, inconsistently effective across the country, and not properly resourced. Alliances or other co-ordinated services should be properly funded;

- SPIPs ('Separated Parents Information Programmes') and WT4C ('Working Together For Children') in Wales should be offered much earlier in the process of family separation, should ideally be heavily subsidised (or preferably free), and available to many more separating parents. These resources are overwhelmingly (albeit not universally) viewed by our consultees as beneficial for families in

[6] This of course has to be seen in the context of the family court dealing with high numbers of public law applications and the 26-week statutory timeframes for public law cases.
[7] The *Legal Aid Sentencing and Punishment of Offenders Act 2012* (LASPO 2012).

teaching parents how to put their children first while separating[8], and helping parents to learn the fundamental principles of how to manage conflict and difficulties;

- Although opinion is divided on Mediation Information and Assessment Meetings ('MIAMs'), most consultees consider that they are beneficial, as they do present opportunities for parties to learn about non-court dispute resolution, and they should be retained. There is consensus that the delivery of MIAMs is not as effective as it should be, and there is support for our proposals to revitalise / refresh the manner in which they are initiated and provided. Within this sphere, there is strong (but not universal) support for the imposition of an obligation on respondents to attend a MIAM. Those in favour felt that this would achieve greater success (i.e. conversion into all forms of non-court dispute resolution ('NCDR'); those opposed considered that the likelihood of more respondents agreeing to mediation if they were compelled to attend a MIAM was low. The Official Solicitor would wish to see a MIAM exception introduced *specifically* for those who lack capacity to mediate;

- The allocation of cases onto one of three tracks within the court system receives strong (albeit not universal) support. There is a consensus that more attention needs to be given to the swifter resolution of cases where contact has broken down completely. There needs to be flexibility to move cases between tracks while the case progresses through the courts.

7. The discussions which have taken place beyond the PrLWG (**Chapter 2** below) have served to re-inforce strongly the messages of our First Report, and underline the need for system change in the way we as a society, and the justice system, address the needs of separating families.

[8] Though note: Liz Trinder et al, *Building Bridges: An Evaluation of the Costs and Effectiveness of the Separated Parents Information Programme (PIP)* (DfE, 2011); Liz Trinder et al, *Evaluation of the Separated Parents Information Programme (SPIP Plus) Pilot* (DfE and Cafcass, 2014).

8. We have therefore sought to identify (**Chapter 3**) some early initiatives to reduce urgently the stresses on the family justice system; we have also identified some 'pilot' projects to 'road test' some of our proposals. It is hoped that early results from the pilots can be factored into our next (and probably final) report.

CHAPTER 1

[2] Consultation

9. The consultation period was 3 months. The PrLWG received altogether 133 written responses to the consultation. We are greatly indebted to the very many people who responded to the consultation, both individuals and representative bodies. The views received were thoughtful, constructive, in some instances detailed and qualitatively rich, and above all helpful to us in further formulating our thinking.

10. The profile of consultees was as follows:

    a. **28.5%** (38) responses from professional representative bodies connected with the family justice system (including professional organisations and associations, LFJBs, and the family courts);

    b. **20.3%** (27) responses from litigants and/or persons with some personal experience of the court process as a party or family member of a party;

    c. **15%** (20) responses from individual solicitors (or their firms), or barristers in private practice;

    d. **12%** (16) responses from individual mediators;

    e. **7.5%** (10) responses from individual magistrates and legal advisers;

    f. **3.7%** (5) responses from individual judges;

    g. **3.7%** (5) responses from Cafcass, Cafcass Cymru and individual Cafcass employees;

    h. **9%** (12) responses from others.

11. We were disturbed to note the comments of one consultee who observed that few people in the 'private sector' of the family justice system "are aware of the review or motivated to contribute". We feel that the review was sufficiently well-broadcast as to generate responses from a wide section of the public and professionals.

12. Those who expressed a view about the content of the report were generally supportive of the outline proposals, acknowledging that we had rightly identified the pressures on the system, and sought constructively to address them.

13. During the period of the PrLWG consultation, the Ministry of Justice ('MoJ') Panel on Domestic Abuse and Serious Harm in Private Law proceedings also ran a consultation. The focus of the MoJ Panel's work is on how the family courts protect children and parents in private law children cases concerning domestic abuse and other serious offences (both as to process and outcome), the operation of *PD12J FPR 2010*, *Practice Direction 3AA FPR 2010*, *Part 3A FPR 2010* and *section 91(14) Children Act 1989* orders[9]. As we indicated in our first report ([87] Report 1) domestic abuse features in a large number of cases (estimated to be >c.60%) proceeding through the family court. At the time of writing, we understand that the MoJ 'Harm in Private Law Cases' panel is expected to produce a report in or about April or May 2020. A number of our consultees referred to their submissions to this consultation; one or two sent us copies of their submissions to that consultation.

14. On 18 November 2019, and as foreshadowed by our first report (see [54] and *footnote 33*: Report 1) the Nuffield Family Justice Observatory hosted a workshop of professionals with an interest in supporting families enduring separation; the principal objective was to consider design principles for the SSFA. We discuss this event further in **Chapter 2** below (see [155]-[157]). On 20 January 2020, Cafcass convened a workshop of several board members of the Family Justice Young People's Board to consider our proposals. We highlight some of the key themes to emerge from this discussion below (see again **Chapter 2** at [158]-[163]). On 13 February 2020, a Working Group formed under the aegis of the PrLWG (the 'Family Solutions' Working Group) met to discuss a range of principally non-court activities. The working group is largely made up of co-opted members with a range of interests in the field of family solutions; the group is chaired by a PrLWG member, Helen

[9] For the Progress report of the work of the MoJ Panel, see https://consult.justice.gov.uk/digital-communications/assessing-harm-private-family-law-proceedings/supporting_documents/assessingchildrenharmprogressupdate.PDF

Adam, a mediator. The full list of members of the 'Family Solutions' Working Group is at **Annex 1**.

[3] Membership of the PrLWG

15. In her response to the consultation, the Official Solicitor rightly observed that the membership of the PrLWG during the period of our earlier work (i.e. in preparing the First Report: June 2019) had not included a representative who took a specific interest in the rights/interests of the vulnerable. We responded to that justified observation by inviting and welcoming Cheryl Morris from the Official Solicitor's Department onto the working group. NACCC observed that there was no 'third sector' representative on the group; we acknowledge this too and have engaged directly with third sector representatives at the Nuffield Foundation scoping event in November 2019 and will continue to do so as our work develops.

16. We were further pleased to welcome on to the PrLWG Rosalind Fitzgerald (solicitor, in place of Olivia Piercy), Her Honour Judge Alison Raeside (in place of His Honour Judge Jordan), Anna Sinclair (Cafcass Cymru), Mrs Tracy Sortwell JP, and Professor Liz Trinder (Exeter University), who have all contributed significantly to our work. The PrLWG has worked conscientiously towards the development and production of this second report.

[4] Our working assumptions: the objective of achieving lasting change

17. Our First Report had been predicated on the basis that the pressures on the family justice system currently derive from a combination of:

    a. Significant increase in case volumes;

    b. Increase in the numbers of litigants in person; lack of legal aid funding; litigants attending at court without having received any legal advice;

    c. The court being used as a default for many separating couples; insufficient support for separating couples to access forms of non-court dispute resolution;

d. Parents with unrealistic expectations about what the court can offer;

e. Incoherent network of support services for separating families;

f. A high incidence of returning cases.

18. The PrLWG had embarked on its work with the ambition of stimulating lasting change in the field of dispute resolution for separating parents. In its response to the consultation, Cafcass summarised a view expressed by many consultees that:

> "… system change at this time is both necessary and possible given the strong agreement and commitment we have seen from the wide range of professionals involved in the review process. It is now essential to put in in place a sustained and properly funded programme of work to better align court proceedings with wider support services for families in dispute over family arrangements, drawing on the work of the full range of agencies and government departments already involved in family services."

Another consultee echoed this in commenting that: "radical reform is essential and long overdue. The Family Law System is not fit for purpose".

19. As for a wider and longer-term objective, the PSU (Support Through Court) wrote:

> "… we would like to see a longer-term vision, leading to a central, non-court affiliated, family specialist hub, which would be informed by previous attempts (e.g. Child Maintenance Options), lessons learned from the SSFAs, and by enhanced research. Immediate development of the SSFAs could be undertaken with this in mind, while issues around adequate resourcing are addressed".

20. This appeared to correspond with Cafcass' vision:

> "… we would like to work with partners, under the auspices of the Family Justice Board, on a coordinated national long-term strategy over 5-10 years, overseen by a delivery board and guided by a clear framework of principles, standards and outcomes".

21. More than one commentator remarked that the PrLWG had been wrong to assume that court was the *default* option (as we had suggested in our report); our earlier

view had been influenced by the comments of Anthony Douglas (see the First Report (June 2019) at [4]). On further consideration of this issue, we accept that the research evidence in fact points the other way - that many separating parents would much prefer to *avoid* court if they could, and make considerable efforts to do so, and do in fact attempt other options which they perceive to be viable before going to court (see, *inter alia*, Trinder, L., Connolly, J., Kellett, J. & Notley, C. (2005) *A Profile of Applicants and Respondents in Contact Cases in Essex.* London: Department for Constitutional Affairs; Trinder, L., Connolly, J., Kellett, J., Notley, C & Swift, L. (2006) *Making contact happen or making contact work? The process and outcomes of in-court conciliation.* London: Department for Constitutional Affairs; Hunt J. and Trinder L. (2011) *Chronic litigation cases: Characteristics, numbers, interventions. A report for the Family Justice Council*. London: Family Justice Council; Liz Trinder et al, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, 2014); Isabella Pereira et al, *The Varying Paths to Justice: Mapping Problem Resolution Routes for Users and Non-Users of the Civil, Administrative and Family Justice Systems* (Ministry of Justice, 2015); Anne Barlow et al, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan, 2017)).

22. One commentator (a solicitor) observed that the increase in the number of applications was not just down to the lack of legal advice following the passing of the *Legal Aid Sentencing and Punishment of Offenders Act 2012* ('*LASPO 2012*') (as we had suggested) but was also attributable to:

    a. people being more aware of the court and what it can offer people, and what it can do;

    b. a growing awareness of emotional harm;

    c. changing ways in which families are constituted which may give rise to greater scope for conflict. In most private law cases, there is a power imbalance;

    d. fathers being much more involved in the care of their children (they are keener to play a full part after separation; fathers feel more empowered).

23. Importantly, those who expressed a view about our aspiration for more 'radical' reform (see [9] of Report 1) supported our view that ideally society would be better served by a 'Family Solutions' service, in which a range of co-ordinated state funded services were offered to support families through separation. The British Association of Social Workers ('BASW') reflected this ambition by observing that "there should be greater emphasis and more investment to enable a relationship-based approach with families in private law. The current system does not allow for this, it is very process driven".

24. There was little challenge to, or criticism of, the provisions of the Child Arrangements Programme (*PD12B FPR 2010*) ('CAP') itself from among our consultees. One parent consultee expressed the view that the CAP was "documented very well" but not "publicised very well". Another consultee (a mediator / solicitor) fairly proposed that the family court processes should be simplified to reflect the fact that very many parties in private law cases are unrepresented.

25. A view which underscored many of the submissions was that the current system is too adversarial and encourages the 'blame game'. This aligned with a complementary theme that it was high time that the system should be designed around its users rather than professionals. A strong case was made for a change in culture towards more collaborative ways of making arrangements (where it is safe and appropriate to do so) which are in the best interests of children following separation, supported by inquisitorial rather than adversarial court processes.

The consultation responses have amply confirmed the view expressed in the First PrLWG Report that radical and systemic reform of private law is indicated.

We are convinced that separating families would benefit from more co-ordinated services in the community, and this could/should *evolve* into a national 'Family Solutions' service which incorporates the court system. The consultation responses vindicated our view that the benefits of more active non-court support for families would be felt across the family justice system. We recognise (as Cafcass has observed: see above) that this should be a "national long-term strategy" which we accept may take some years to achieve; its

evolution could/should be overseen by a delivery board and guided by a clear framework of principles, standards and outcomes; the work should, in our view, start now.

While it is difficult to know how many cases will be successfully diverted away from court through forms of non-court dispute resolution (in this regard useful reference could be made to the Australian experience which revealed that even with a very high quality, well-funded community service only a small minority rely primarily on mediation (Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K., Qu, L., & the Family Law Evaluation Team. (2009). *Evaluation of the 2006 family law reforms*. Melbourne: Australian Institute of Family Studies)) we consider that family separation should be better supported in this country, and where safe to do so, disputes should ideally resolved away from the court.

While there was a general lack of criticism of the CAP (see above), it is of course possible that many lay consultees were simply not aware of it.

[5] Domestic abuse

26. Domestic abuse as a feature of private law cases in the family court is currently being extensively examined by the MoJ 'Harm in Private Law' Panel. The issue has also been the subject of recent examination by a Working Group of the Family Justice Council, which has consulted on proposed 'Best Practice Guidance' for the family courts in responding to cases (including cases under the *Family Law Act 1996* and financial remedy cases, as well as private law children's cases) in which domestic abuse is alleged. The *Domestic Abuse Bill* was introduced onto the House of Commons on 3 March 2020, just as we put our final touches to this report. Our reservations about its specific contents (which we outlined in our original report: see para. [92] ibid.) remain; we are further concerned that there is nothing in the *Bill* which acknowledges the need for children affected by domestic abuse to have access to specialist support services. The Parliamentary Committee was concerned at one of the keystone provisions of the *Bill* (limited funding for the purposes of cross-examination of respondents in domestic abuse cases), citing the potential for inconsistency in application because too many victims of domestic abuse would be protected only at the discretion of the court. The Committee recommended that the mandatory ban is extended so that it applies where there are other forms of evidence of domestic abuse, as in the legal aid regime threshold. The PrLWG notes

that the Government appears now to have accepted this recommendation in full, and the *Bill* as introduced on 3 March gives effect to it. What is now *clause 59* of the *Bill* includes a new power for the Lord Chancellor to specify evidence which will trigger the automatic ban on cross-examination in person, and we understand that the Government intends that this further evidence will broadly replicate the evidence criteria set out in regulations under the legal aid regime.

27. Unsurprisingly, many of our consultees (particularly but not exclusively those with personal experience of the court system) raised the issue of domestic abuse in their responses to us. Specifically:

- that the issue of domestic abuse had complicated the proceedings; that this was in part because the issue is not raised at the outset of the case (i.e. not raised/'pleaded' in the application or in early documentation, and only emerging later in the proceedings);
- that gatekeepers have an imperfect/incomplete understanding about the issue from the information presented in the application form and this can occasionally lead to erroneous case allocation;
- the low level of understanding of the issue of abuse (particularly the issue of coercive control) by many family court magistrates and judges;
- there needs to be a better understanding by the judiciary and other professionals of the difference between parental conflict (which not uncommonly occurs on separation) and domestic abuse which is often chronic (from barrister consultee);
- not all cases of parental conflict should be diverted to fact-finding hearings;
- all partners within the SSFA must be able to distinguish between parental conflict and domestic abuse so that it is able effectively to identify and support survivors and their children with appropriate services and strategies (Transparency Project);
- the inconsistency between courts nationally, and between judges within a court, over the need for a fact-finding hearing in a given case;
- the inconsistency in the application of *PD12J*.

The PrLWG accepts the importance and validity of the points raised in the paragraph above; these points warrant further close attention when designing reformed systems. The PrLWG will properly take account of the MoJ 'Harm in Private Law' Panel report, which is studying this issue in greater depth, and its recommendations. In this regard,

the PrLWG associates itself with the concerns raised in the Civil Justice Council Paper on Vulnerable Witnesses (February 2020) at para.71-74.

The PrLWG is clear that, when considering the issue of domestic abuse, it is necessary to distinguish between short term heightened conflict which is a common feature of separation but is not necessarily or always harmful; persistent/chronic, unresolved conflict which is much more likely to result in emotional harm for the child with long-term consequences, and which will need to be taken into account when making a plan for child arrangements; and domestic abuse (in all its forms) which is undoubtedly harmful. In each case it is important for the court, the parties, and the professionals to focus on the impact on the child as part of a wider assessment of family/parental dynamics which will not be confined to domestic abuse (as Cafcass/Cymru have commented, reference needs to be made to 'alienating behaviours' or similar as part of these wider dynamics).

28. The consultees considered that there needs to be much more conscientious adherence to *PD12J* and/or a better understanding of how it should/could be applied; in particular, a number of consultees emphasised that the court should only be holding fact-finding hearings (see para.[5] of *PD12J*) where the determination of facts is "likely to be relevant in deciding whether to make a child arrangements order and, if so, in what terms" (per the Council of Circuit Judges). One representative body consultee (NAGALRO) considered that *PD12J* "where implemented" was "very effective in protecting children and victims of abuse" and is "a good mechanism to protect children and non-abusive parents".

29. There was strong support for the proposal that SSFA alliance members should be able (and indeed encouraged) to provide support and services for survivors and perpetrators of domestic abuse (including, for example, the response from the Family Law Bar Association). It was noted that very few specialist domestic abuse services are funded to provide a dedicated support service to survivors during family court proceedings, as they often do for criminal court proceedings (Women's Aid).

30. A number of our consultees advised that there is a need to revisit the interim contact regime in *PD12J* (para.25 ibid.) viz. "the court should not make an interim child arrangements order unless it is satisfied that it is in the interests of the child to do so and that the order would not expose the child or the other parent to an unmanageable risk of harm". They argued that in these cases, the arrangements for

parties in private law litigation should be brought more in step with those which routinely apply in public law[10]. One consultee suggested that any Track 2[11] case should provide (where necessary, i.e. where contact would otherwise not be happening) for state-funded 'supervised contact' by a professional – again, this would bring the position in private law into line with the position in public law; "child contact centres, where they are adequately resourced and have capacity at fairly short notice, are a possible solution, but there are currently not enough of these" (NAGALRO).

The PrLWG notes that consultees were on the whole supportive of PD12J, though less confident about its application. The PrLWG considers it essential to await the conclusions and recommendations of the MoJ 'Harm in Private Law Cases' panel before committing itself to a view on interim contact under PD12J, or indeed on any revisions to procedure which are affected by PD12J. It is important (a point we make later, see the notes following [90] below) that courts should not 'rush to judgment' on re-establishing contact before assessing why it is not happening.

There is superficial attraction in the proposal that the services to support child contact arrangements in private law should mirror those available in public law; many children lose out because of the lack of affordable contact provision. However, there is currently no obvious source of funding for such a provision. We suggest that a more reliable solution to the vexed issue of interim contact would be to ensure that 'urgent' cases are processed by the court in a timely way towards decisions which are safeguard-checked and in the interests of the child.

[6] Delay

31. One of the strongest themes underpinning our consultation responses was the concern about the very considerable delays in the resolution of private law applications through the court, and the problems for the family associated with delay; these were articulated at length and are too numerous to list. Focus was,

[10] The cost of a contact centre for the private law litigant can be prohibitive. One of our PrLWG had recent court experience of a case in which F would have been required to make two upfront non-refundable payments of £60, so £120, and then £72 per hour for a LA contact centre. On the basis of two hours contact once a week, that amounts to £264 in week 1, and £144 per week thereafter. Universal credit (aside from housing costs) is £73 a week. We felt that this example was probably typical.

[11] Adopting our proposal for 'tracking' of cases through the courts; track 2 was for the non-simple case.

interestingly, brought to the delays at all stages – from the very outset of the process (at the point of issue of the application), and the despatch of the notice of hearing, to the point where the parties are first seen by a judge (solicitor). We were advised that this delay can extend to well over two months (even in some instances over three months), and on any view for a period which is longer than that prescribed by the CAP. Delays were described by our consultees at every stage of the process. The delay in listing fact-finding hearings after FHDRA[12] (and then the welfare hearing thereafter) was a further and particular concern.

32. Delay is felt to be particularly problematic where there is no current/ongoing contact between the child and one of the parents. As mentioned above, many consultees were concerned that where an excessive period elapses between the application and the FHDRA, one of the most damaging consequences is that attitudes (of the parent and of the child) become more and more deeply entrenched. Some consultees spoke of the self-fulfilling component to the difficulties with contact; a lengthy period without contact between parent and child may change (i.e. harden) a child's attitude and a parent's attitude to contact.

The PrLWG accepts unreservedly the concerns raised about delay; protracted proceedings, and long unfilled gaps between litigation stages, can have a serious impact on the emotional and mental well-being of the subject child or young person, and of course the parties. The *section 1(2) CA 1989* imperative ("the general principle that any delay in determining the question is likely to prejudice the welfare of the child") is, we recognise, often not honoured.

The stark reality is that with ever-increasing numbers of court applications in private law, which compete for court time with the high numbers of public law applications, and which together exceed the current capacity of the family court and Cafcass/Cymru, delay is an inevitable and regrettable consequence.

A counterpoint is that the passage of time can also provide a much-needed opportunity for children who are subject to domestic abuse (and the parent caring for them) to recover from that trauma.

[12] First Hearing Dispute Resolution Appointment

[7] Working for and with the vulnerable

33. The Official Solicitor rightly drew our attention to the lack of focused commentary in our first interim report on the circumstances of the vulnerable, and those under a disability, and their access to services and to court in the private law process: she commented that "mediators and other NCDR providers are unlikely to have received training to recognise a lack of capacity to negotiate or litigate, and some individuals with mental health issues may be articulate, but have for example a high level of suggestibility or other challenges which cause them to be unable to negotiate without assistance".

34. The responses to the consultation included the following additional comments on the same theme:

    a. Any alliance of services (such as a SSFA) should include disability support groups – for example, mental health advocates;

    b. The available information and support needs are currently insufficiently accessible; court documents, advice for litigants, and indeed the CAP itself, are written as if all litigants involved in the family justice system are educated and literate;

    c. a properly funded administrative infrastructure will be required to ensure that the vulnerable are assisted throughout the out-of-court and the in-court arenas;

    d. attention should be specifically given to capacity issues (in a similar way to screening for domestic abuse issues) by MIAM providers, mediators and others who deliver services outside of the court; "unless consideration is given to whether a party lacks capacity to negotiate, agreements may be made which are unenforceable" (Official Solicitor). It is necessary to ensure that those who cannot make valid agreements are steered away from NCDR.

35. The Official Solicitor commends the DfE / DoH 'Good Practice Guidance on Working with Parents with a Learning Disability' (2016) and considers that parts of this guide, which is designed for use in public law proceedings, could usefully be read across

into the private law field[13]; a parent with a learning disability may require support and service irrespective of any child protection issues.

36. There was some concern expressed about the limited attention given by judges to the appropriateness of special measures in court for those who are vulnerable. It is noted that not all of the work undertaken by the Vulnerable Witnesses and Children Working Group and the Voice of the Child Working Group was ever implemented. Although the *FPR 3A* and *PD3AA* emerged as a consequence of the recommendations, we were rightly reminded of the lack of implementation of the *children* recommendations – a point highlighted by Sir James Munby on countless occasions.

The PrLWG acknowledges the validity of the comments made above. We are reassured that assessment of capacity is part of the core training for mediators.

It is now some time since Vulnerable Witnesses and Children Working Group prepared its report; subject to any evidence indicating that the recommendations are outdated, it would wish to endorse the implementation of the *full* proposals of the working group on Vulnerable Witnesses and Children (2015).

The PrLWG was interested to note the recently published Civil Justice Council Report: "Vulnerable Witnesses and Parties within Civil Proceedings" (February 2020) which contains interesting and important reflections on family proceedings esp. at 26 *et seq*, 49 *et seq* and 82 *et seq.*

[8] Responses to Questions

37. In the following section of the report, we summarise the responses to the specific questions raised in the First Report, with our outline responses.

[9] SSFA: Do you support the formation of an alliance of services (the 'Supporting Separating Family Alliance')? Should this be overseen by the Local Family Justice Boards,

[13] Note the Presidents Guidance: Family Proceedings: Parents with learning disability: https://www.familylaw.co.uk/news_and_comment/president-s-guidance-family-proceedings-parents-with-a-learning-disability - this applies to all family proceedings, not just public law.

or overseen/managed in some other way? Should the alliances have a local or national identity/organisational structure?

38. There was unanimity of view about the need for an effective delivery of services for families experiencing separation, and for the creation of a coherent corpus of services; this needs to be adaptable and versatile, as 'one size does not fit all' (barrister consultee). It was acknowledged by many that separating couples need more than one service on separation, including, for many, legal advice.

39. Cafcass spoke of the need for integrated community based and specialist services

> "… to support a public health approach to family conflict, which helps to solve family problems before they escalate, and reduces the impact on children. We believe the services required go beyond typical legal or dispute resolution services – the language of 'dispute resolution' is not helpful in our view - and need to involve domestic abuse services, drug and alcohol services and mental health services too".

40. The majority of consultees were clear that this should be a *nationally* administered operation, to co-ordinate services for separating families; many spoke of the specific value to there being a *national* infrastructure of the SSFA. A *national* alliance was also seen to be helpful in setting direction, best practice and guidance for the local alliances, helping to coordinate their work and feeding into the Local Family Justice Boards. In this regard further consultee comments included:

    a. there is a perceived risk that unless there is a national administration, funding and oversight, a 'postcode lottery' would develop in the delivery of services;

    b. it was noted that some parents do not live in geographic proximity to one another, and there needs to be some facility for liaison between services in different parts of the country;

    c. regional differences in the services offered are currently stark; there needs to be national consistency in the quality of services offered, with national led aims, objectives and standards;

    d. a national organisation would be more effective for data capture;

e. much can be learned from the DWP 'Reducing Parental Conflict Programme'; this programme is designed to bring together local authorities and their partners across England, with the Early Intervention Foundation, in an endeavour to support them to integrate services and approaches to reduce parental conflict into their local services for families.

41. One representative body consultee (Young Legal Aid Lawyers) thoughtfully referred to the need for the creation of SSFAs with a *national* identity but with *regional* structures (further detailed work would need to be done on how it would be organised, funded, and evaluated). Specific other points raised by consultees about the composition of the SSFAs included:

    a. SSFAs should be sure to include organisations with expertise in supporting minority and marginalised sectors of society;

    b. Arbitration has a greater role for separating parents than had been credited in our First Report; more should be done to signpost arbitration as a suitable dispute resolution method within any SSFA, including arbitration of children disputes;

    c. SPIPS and WT4Cs should be part of the alliance network;

    d. The creation of the SSFA in Wales will have to take account of the different legislative and funding context;

    e. Information about support services should be available in many languages, including the Welsh language;

    f. Generally in this regard (but also in others) government departments should work together to achieve better cohesion, instead of working (as at present) in silos;

    g. There is the potential for organisations such as the 'Working Together with Parents Network' to be a model for what we propose[14];

    h. Lawyers need to be part of the alliance, also financial advisers, Relate, divorce coaches;

    i. Thought needs to be given to services directly for the benefit of children affected by parental separation.

42. It was suggested that the FAInN (Family Advice and Information Network) could be revived and/or re-modelled for this purpose.

[14] http://www.bristol.ac.uk/sps/wtpn/

While there is much in these responses with which the PrLWG agrees, it is nonetheless unconvinced by the proposal that FAInNs should be revived: for reasons see footnote[15] below.

43. The funding of the operation of the SSFA inevitably provoked considerable comment. Many consultees expressed the strong view that this wholly worthwhile initiative would fail unless it is properly funded – it should not be reliant on 'goodwill', or on the beneficence of voluntary organisations. At the very least there would need to be a budget for a co-ordinator. It was argued that Government departments (including the Ministry of Justice, Department of Work and Pensions, Department for Education, Department of Health) need better to co-ordinate their funding in this area, and their energies, in order to capture those who would otherwise be driven into the court system.

44. While some acknowledged the rationale for vesting responsibility for the alliances with the Local Family Justice Boards ('LFJB's), there was significant doubt expressed about whether LFJBs have the appropriate resources to be the co-ordinating agency, and whether they have the "institutional capacity" (Magistrates Association); the proposal that LFJBs should play this role was described by one consultee as "aspirational rather than practical" (lay magistrate). One representative organisation (the PSU, now 'Support Through Court') responded:

> "We disagree that Local Family Justice Boards would be well-placed to oversee and manage the alliance. If

[15] FAInNs: *Section 29* of the *Family Law Act* required potential publicly funded applicants to explore the mediation option first, but the evaluation of these provisions found that they did not lead to a significantly greater take-up of mediation; FAInNS had little impact on what solicitors do with their clients; there was little change in the provision of information to clients and no increase in referrals to other agencies. Despite the emphasis on FAInS providing a gateway to other agencies, few referrals were made to services other than mediation or services offering help relating to domestic violence; the FAInS approach has not changed the way cases are managed; moreover, researchers (Prof Janet Walker & others *The Family Advice and Information Service: A Changing Role for Family Lawyers in England and Wales?* (Legal Services Commission, 2007); Angela Melville et al, 'Family Lawyers and Multi-Agency Approaches: Why Don't Lawyers Work with Other Service Providers?', in Mavis Maclean et al (eds), *Delivering Family Justice in the 21st Century* (Hart Publishing, 2015)) found no differences with regard to the progression of cases beyond the first meeting with a solicitor, applications for court orders and the completion of work on a case.

> a key objective of SSFAs is to assist in the shift from perceiving court as the default, placing them under the management of the FJBs will likely undermine that objective".

This view was echoed by others, who referred to the proposal for the LFJB to play this important role as 'incongruous' with its main role; there was concern expressed that using the LFJB may turn the SSFA organisation into another form of 'court user group'. In other responses, it was noted that in some areas LFJBs have so far had a limited effect on their communities and have meagre funding; it was said that LFJBs are perceived as closely aligned to the court system. Interestingly, one LFJB which responded to the consultation expressed its *own* misgivings about its ability to effect change across its geographic region in this role.

45. Our consultees pointed up a concern that there would be too much regional variation in the delivery of the service of the SSFA were it to be co-ordinated by LFJBs. This fed into the theme of the responses (above) namely that the alliance should be co-ordinated by a national body with a discrete identity. It was said that "it takes time, energy and funding to establish and administer such a group if it is to be effective" (Family Court Support Service), and that LFJBs are not sufficiently or reliably resourced or energised to take this on (i.e. currently generally meeting quarterly after work; a low priority for some). Another consultee remarked: "one must be cautious to not 'sell' the alliances short by providing them with leadership that cannot dedicate sufficient time and attention" (Young Legal Aid Lawyers).

46. It was proposed by some that Cafcass' statutory powers could or should be extended to have this responsibility (among other consultees, this was the view articulated by the Association of District Judges ('ADJ')). Ofsted agreed that a 'voluntary alliance' is not robust enough, and may not deliver the desired outcomes; Ofsted suggested that local authorities may have an important role to play in this regard under *section 10 CFA 2014* (a view also shared by the ADJ). It is noted that unlike Cafcass which is a sponsored body of the MoJ, Cafcass Cymru carries out its responsibilities on behalf of Welsh Ministers.

The PrLWG welcomes the engagement of our consultees in considering the formation and composition of the SSFAs; it does not wish at this stage to comment specifically on the appropriateness or viability of any of the 'alliance members' proposed by our consultees; we consider that if alliances are founded, they should be allowed to grow organically within regions.

The PrLWG accepts, on reflection, that if the SSFAs are to be developed widely and nationally, it would not be appropriate to vest the challenging task of their administration and support to the LFJBs. While the LFJBs may have useful information about local services, and may be able to take some steps in engaging some of these services, we accept that they are not well-equipped or resourced (either financially or in human terms) to undertake the role of co-ordinating agency. The underlying needs of families going through separation extend well beyond those that can be expected to be within the purview of LFJBs, and family justice agencies are not well represented in local commissioning processes for relevant services. If support services are to be managed nationally it would be appropriate for there to be a dedicated, funded, agency to do so.

There is a balance to be struck between a commissioning model which is tailored to local need, and the need for a nationally consistent blueprint which avoids a postcode lottery. Given the range of services proposed, the PrLWG does not consider that Cafcass itself (which is, as defined by statute[16], a '*court* advisory' body) could or should be adapted for this role.

The PrLWG would like to stimulate further high-level discussion about a budget, and an infrastructure, for the delivery for these services, together with a rigorous analysis of the realistic options available; the immediate priority is to develop some properly costed models based on actual evidence of need, likely uptake and effectiveness and then make a bid for funding.

47. One consultee (mediator) advocated for a model akin to the Health and Social Care framework where support is at the centre of the framework and the court is on the "edge". This suggestion corresponds with the fact that the great majority of the separating population do not end up in court (the large numbers who do are only a fraction of those who separate) but may benefit from community-based support. Those who do end up in court are *different* from the general separating population – i.e. they have serious problems which are not amenable to self-resolution.

48. There was a wide recognition of the need for the SSFA to have 'high visibility' locally.

[16] Under the *Criminal Justice and Court Services Act 2000*, see *section 11, section 12* (in "family proceedings"), and *schedule 2*

49. 'Early intervention' was a phrase often used in the responses. Many consultees spoke of the benefit of the SSFA grappling with the problems surrounding family breakdown early, and 'triaging' families into the right resources.

50. Aligned with these views, we received many submissions advocating for the publication of standard 'framework' guidelines about the court's approach to certain types of case and certain 'standard' facts, for the assistance of separating parents. The rationale is that these guidelines would steer parties towards d.i.y. resolution of their problems, knowing what the court would be *likely* to order if they were to litigate. In this way, it was argued, the number of families turning to court would *reduce*. As to the detail, it was envisaged by the consultees that a standard set of expectations should be published (i.e. how much contact is 'normal' for a child of a particular age, what forms of contact are appropriate/available, sample handover arrangements; these could be reasonably general or specific: it is useful for children of X age to be back in their main home by Sunday evening; children of Y age can more easily accept being dropped back to school on a Monday morning by the parent who they are 'spending time with'). The judges of the Central Family Court for instance felt that "clear statements of principle as to norms for 'time with' arrangements would help". This proposal was referred to as a *ceteris paribus*[17] arrangement by one well-informed consultee. It was proposed that the guidelines would be rebuttable where there is proven evidence of abuse.

The PrLWG supports the notion of early intervention, and its members are keen to see some 'pre-application protocol' and/or 'triaging' of services for families. The Family Solutions Working Group is considering this (see below Chapter 2). In an ideal world, both parents would see a professional for parent information/family separation meetings (whatever the name) at an early stage and their needs would be assessed. The person conducting those meetings would have proper training in domestic abuse screening, have social work assessment tools, and would be able to direct those who are vulnerable immediately to court, at that early stage. For others, there would be information and support about co-parenting, about meeting the needs of any children and about resolving legal issues. Catching parents early would/will hopefully set them down a better road

[17] 'All other things being equal'

than leaving them until they are reaching for a court application, and are told they need to go to a MIAM. It was felt that this is key to effecting change.

The PrLWG further considers that while 'standard guidelines' may have superficial attraction, their introduction would nonetheless be contentious, not least because of the lack of evidence of what is or should be 'the norm'; moreover, it is not clear whether what is 'the norm' is necessarily in the individual child's best interests. The PrLWG considers that emphasis should in any event be given to the *quality* not the *quantity* of contact. The PrLWG is further concerned that any 'guidelines' would be contrary to the individualised decision-making ethos of *section 1 CA 1989* and specifically contrary to *section 1(2B)* "(2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time". That said, we do accept that it may be useful for there to be clarity for the public about what *factors* are (or should be) relevant for the setting of arrangements by themselves or the court.

51. Our consultees spoke of the need for services to assist families to resolve disputes without the need to engage in court process, and to support them *through* court. On the latter point (support *through* court):

    a. One consultee observed that: "policy focus should be on improving the experience of those families accessing family justice, not trying to stop them from doing so. … [the SSFA] could also be used as a way for families involved in proceedings to receive support throughout those proceedings. … with careful development, family courts would see the benefits of professional support for families being available throughout proceedings as well as before proceedings start";

    b. And another said, "Early signposting to relevant support will be a significant benefit in *helping litigants to navigate the court process*, and may reduce the need for changing track at a later stage" (emphasis added).

The PrLWG does not envisage "trying to stop" families who need access to justice from making applications to court. Whilst the group is clear there should be better signposting/provision of services to avoid unnecessary proceedings in the first place, our proposals also reflect the need for better services to support families within proceedings and to help parties navigate the court process. To that end, our proposals are focused on improving the effectiveness of the family justice system to achieve an outcome which is right for the child and the family, and safe where there are potentially harmful consequences of the parental relationship and/or separation.

52. The name/acronym (SSFA) did not attract very significant commentary in the consultation. One representative group described the name/acronym 'SSFA' as "weak" in that it did not capture the aim of helping families to resolve conflict, though, as others accepted, the SSFA is intended to include a wide range of services

post-separation, not just conflict. [**The PrLWG observes that resource issues like money and housing have been found also to be important predictors of child wellbeing**]. One consultee thought that the use of the word 'Alliance' suggested a membership organisation and that it would be preferable to work with 'Separating Families Support Centre' (Support Through Court volunteer). A further consultee described the name as "vague and fluffy" (Family Law Café). Cafcass proposes that parents should now be involved in the design of the support services 'alliance', and in selecting a name, for the delivery of this service.

53. The 'sorting out separation' website was described by some consultees as being useful but not sufficiently well used/advertised, and it has now of course fallen into desuetude. It is proposed that the alliances should tap into the 'Help and Support for Separating Families' (HSSF) network already in existence. Much work has been done on kitemarking the HSSF members[18], and one consultee thought that this could/should be adopted.

54. Other points to emerge relevant to the SSFA include the following:

    a. Judges should be more interventionist in relation to directing families into NCDR. This is in part a training issue; it is in part a recognition that NCDR can be expensive, and can create delay. It was proposed that there should be greater powers/culture of judges referring families to NCDR even if the parties do not consent;

    b. There is a case for reviewing the cost of SPIPs/WT4Cs at the pre-proceedings stage (i.e. more than one consultee asked if these could be subsidised/free); Cafcass would need additional funding if they were to provide them. There is a discrepancy between the expectation of payment for SPIPs in England (non-means tested) and WT4C in Wales (means tested), which should be ironed out;

    c. More than one consultee proposed an online SPIP/ WT4C, with the corollary that evidence of having completed the online SPIP/WT4C could be submitted with the C100. It was suggested that some key and reliable SPIP/co-parenting

[18] The HSSF mark is awarded following an independent assessment of organisations to show they meet a strict set of standards for promoting parents working together after relationship breakdown. Organisations need to show that they actively work to help parents collaborate constructively to arrange things for their children.

content could be made available online as a resource to *supplement* but not *replace* face to face SPIPs / WT4Cs;

d. Others opposed the idea of the online SPIP/ WT4C, as the fact that it is a group activity is regarded as significant/crucial to the success of the programme (see generally below re: SPIPs / WT4C). Cafcass Cymru pointed out that an online parenting course based on the WT4C course material has been developed by the Welsh Government (https://parentingtogether.gov.Wales);

e. We could/should make further reference to the MoJ out of court pathway when developing our out-of-court support services.

55. Insofar as our proposal for the formation of a SSFA was challenged at all, the Law Society considered that the proposal was an "analogue recommendation for a digital age", and that we should be considering more *online* resources, rather like the FMC webpage, backed by a *telephone advice helpline*. It was felt that there needs to be "systemic change" if alternative solutions are to flourish; the same consultee described the creation of the SSFA as nothing more than "just superficial change".

56. Finally, many parents, it is said, wish to go to court because they know that the children will be 'heard' in the dispute; this could be addressed (according to other consultees) by wider roll-out and encouragement of child-inclusive mediation, and "the output from child consultations on wishes and feelings to be made open as long as with the agreement of both parents" (see more generally below); "parties often require the reassurance that a mediator led agreement will be binding".

As we have stated above, the PrLWG agrees with many consultees who encouraged us towards promoting radical and fundamental change of the way in which services are offered for separating families in and out of the court system. We accept that there is a need for an effective delivery of services for families experiencing separation, and for the creation of a coherent and adaptable body of services, as 'one size does not fit all'. For the time being, we are keen to develop SSFAs, but would prefer to see the development of a wider national, funded, co-ordinated 'Family Solutions' service for England and Wales.

The PrLWG is not enthusiastic about the online SPIP / WT4C as a standard[19] *alternative* to a 'face-to-face' and/or group activity although accepts that as a *supplement*, it could be useful; overall, we feel that engagement with professionals running the courses is crucial, even though in general terms we take the view that online resources are important for those seeking advice on safe and supportive separation.

[10] MIAM: What more could be done to refresh or revitalise the MIAM to encourage separating parents to non-court dispute resolution?

57. We received mixed views about MIAMs.

58. There was widespread recognition that the current MIAM system is not working as intended:

    a. There are practical difficulties in booking a MIAM (solicitors' firm); it should be less difficult to do so. One proposal is that there should be an online booking system which could be hosted by the FMC;

    b. "In the experience of our service users, MIAMs simply don't work. They represent a further barrier in accessing justice for parents and grandparents who have been denied a relationship with the children they care about" (Families Need Fathers);

    c. MIAMs are too readily seen as 'obstacles' not 'opportunities';

    d. One consultee (LiP) described a MIAM as an "exorbitantly costly tick box exercise", where the signposting information was "extremely limited";

    e. "It is urgent for the FMC to put a stop immediately to the 'tick box' exercise that currently is acknowledged to be common practice in conducting MIAMs, particularly by lawyer mediators (see Edwards J. and Sandys A.(2019) *Family Law* June, vol.49)" (barrister/mediator);

    f. There was a suggestion that MIAMs should be scrapped (CFC judges and COCJ). Another suggested that the system of MIAMs needed a "total overhaul" (Family Law Café);

    g. One consultee (Chartered Psychologist) considered that the SPIP (WT4C) would be more useful as a gateway to court than a MIAM (and that, in the circumstances, the SPIP / WT4C should be mandatory); or that a SPIP/WT4C should be offered as an alternative to a MIAM;

[19] We recognise that it may be more suitable for the needs of certain individuals. We are keen that there should be a reasonably flexible menu of online and face-to-face resources, tailoring to the needs of a diverse population.

h. One consultee felt that the MIAM requirement creates delay and additional cost, and is largely ineffective in changing the approach of the litigants who, by that time, are determined to be in court;

i. The MIAM is premised on promoting a dispute resolution service which is unsuitable for the majority of parents who are involved in court proceedings (60% making allegations of domestic abuse);

j. Public funding for MIAMs would be better spent on targeted early legal help or on the re-introduction of fixed fee legal advice provided by solicitors.

59. While there was considerable criticism of the current system of MIAMs (summarised above), a large number of consultees supported the recommendations to revitalise MIAMS:

a. A great deal more could be done in order for the MIAM to be effective, and it was felt that relatively little investment in improving the system now should result in an increase in effectiveness *and* costs savings;

b. The FJC in its response considered that the opportunity and potential of a MIAM has not been realised and that it needs to be revitalised;

c. FLBA members concurred that MIAMs are not working, but only two members suggested they be abandoned, the remainder of the consultees all suggested forms of reform;

d. The benefits of the service need to be emphasised more than the compulsory need to attend.

60. We received encouragement to support more rigorous enforcement of MIAMs:

a. One consultee proposed that if one change from this consultation paper had to be selected for implementation, stronger gatekeeping would make the most difference;

b. MIAMs should be a pre-requisite before a hearing with *few* exceptions, and non-attendance needs to be explicitly justified to a bench before first hearing proceeds;

c. Robust monitoring of compliance with the statutory requirement for applicants to attend a MIAM must take place before the application is issued and a fee incurred; the court process at issue needs to be more robust regarding MIAMs;

d. If Cafcass has identified no safeguarding issue, then a MIAM (or its revitalised equivalent) should be *compulsory* and *enforceable*;

e. If there is an expectation that parents attend a MIAM, the courts should consistently ensure this is complied with;

f. The court has a role to play in revitalising the MIAM by being tougher on refusing to issue applications when there is no compliance with the MIAM procedure; in Resolution members' experience, there often simply isn't sufficient enforcement of MIAMs by the court;

g. The courts and the judiciary have a very important role to play in ensuring that existing court rules regarding MIAMs are followed.

61. Linked to this were calls for better training for the judiciary:

a. It was said that the courts and judges do not have any confidence in MIAMS at all, and this affects the whole culture of and attitude of the courts towards mediation. An education programme is needed; the judiciary need to be confident in the value of a MIAM. If they are, this will have a beneficial effect on encouraging their uptake;

b. Further training on MIAMs and mediation for ***all*** those involved in the family justice system is indicated;

c. Cafcass stated that as it is essential that judges and court staff are prepared to enforce the MIAM requirement, training should be offered to ensure this is done effectively and consistently;

d. The gatekeepers need a consistent approach endorsed by the President as to how non-compliance with this direction is to be enforced.

62. Our comments on quality control of MIAMs ([51] *et seq* R1) were widely accepted, and in this regard, we were encouraged to read from the FMC response the following:

> "As a key part of its strategic goals, the FMC is currently undertaking a thorough review of the mediation standards framework. As part of this work, the FMSB[20] will review the further steps it can take to ensure quality delivery across the mediation profession, and the FMC will ask the FMSB to

[20] Family Mediation Standards Board

> specifically include whether further training on identifying domestic abuse in assessment meetings, and specifically in MIAMs that are carried out by video conference, is necessary. The FMC supports the recommendation that delivery of MIAMs be more rigorously monitored and consistently maintained and welcomes the opportunity for the FMSB to be able to consult on and introduce requirements for MIAMs, taking the proposals from the CAP review in to account, and for those requirements to be reflected in the Family Procedure Rules."

63. In relation to our revised invitation sheet (i.e. invitation to attend a MIAM: Annex 7 of our first report), it was suggested that the letter could be improved by including a paragraph to reassure survivors that if they have experienced domestic abuse then mediation is unlikely to be appropriate, that she/he will not be forced or pressurised into mediating with the abusive parent, and that a mediator can refer to domestic abuse support services if she/he would find that helpful.

64. We received some commentary about the professionals and others who could or should be recognised as, and/or accredited to be, delivering MIAMs:

    a. There is concern about MIAMs being offered by unaccredited mediators, and yet still being accepted by the courts;

    b. Resolution felt that the FMC should urgently review the level of mediator practitioner authorised to conduct a MIAM (persons identified by the FMC as qualified to conduct a MIAM as set out in *Rule 3.9 FPR 2010*). This might be by removing the need for 'accreditation' or having an 'accreditation' for those recognised to conduct MIAMs on a modular qualification towards accreditation;

    c. A proposal was made that AIMs (Advice and Information Meetings) (instead of MIAMs) should be conducted by family lawyers, collaborative lawyers, family arbitrators;

    d. It was said that separating parents need access to a wider choice of providers including family lawyers, arbitrators and collaborative lawyers (Resolution) (it was said that many parents are potentially uncertain about the purpose of the MIAM and sometimes wrongly think that their only options are mediation or issuing a court application. Mediation is an important and successful dispute resolution process in suitable cases, but there are other NCDR options).

65. We received many comments about the fact that MIAMs are only compulsory for applicants and not respondents. Many consultees spoke of the strong case for *respondents* being compelled to attend. One consultee spoke of this as being "key" to progress… it is "imperative" (NACCC). It was widely felt that if the respondent can be encouraged to attend a MIAM, mediation is much more likely to follow (lawyer/mediator). This group was encouraged to be looking to how the civil and tribunal services make out of court resolution more of an expectation (Resolution). Other comments included:

    a. If it cannot become compulsory for a respondent to attend a MIAM then there should be a rebuttable presumption that the respondent should attend;

    b. One consultee proposed that the respondent would be required to pay one-half of the court application fee if they did not attend the MIAM;

    c. One consultee posed the question: should there be a specific Respondent MIAM, funded by MoJ and ordered by the court?

    d. Respondents should be given a fixed time within which to attend a MIAM.

66. One consultee advised that wider family members should be encouraged/permitted to attend a MIAM.

67. We received some interesting observations about the timing of a MIAM: when should they most optimally be offered?

    a. Some consultees thought that parties were more amenable to mediation once the court process was underway, as they may not see the benefits in the immediate aftermath of a high conflict separation. (It is recognised that many couples self-refer to mediation at an early stage of separation but most of these cases will be resolved away from court.)

Note, the evidence from the 2018/2019 Manchester pilot suggested that even for those in court for whom mediation was considered safe and appropriate, most did not consider that it met their perceived needs or concerns. In that pilot the invitation was by phone from Cafcass; our mediator member suggested that conversion rates to mediation vary considerably according to the way the invitation is presented and by whom.

    b. It was proposed that the MIAM be integrated more into the court process – an HMCTS service;

c. One consultee (LiP) responded thoughtfully: "many people do not understand the dynamics of their relationships clearly at the point of divorce. I certainly didn't… at least one and often both of the partners will be in a vulnerable place emotionally";

d. Even if a MIAM is bypassed for 'urgency' there should be a route back to the MIAM after the urgent application has been despatched.

68. The use of MIAMs where domestic abuse is alleged was a recurrent theme. There was a real mix of views about the appropriateness of a MIAM, and mediation more generally, in cases of alleged or suspected domestic abuse. We acknowledged in our report that the use of family mediation in relation to families where there is or has been a risk of, or actual, domestic abuse has remained a difficult and complex issue and there are differences of opinion within the mediation community as to the appropriateness of mediating where there is or may be domestic abuse in the couple relationship. Others responded to this:

a. even where domestic abuse is alleged, a MIAM is thought to be possible and even desirable: "Even those parties who have been subjected to domestic abuse or other exemptions under the present scheme would surely benefit from a wider understanding of the different ways in which disputes over their children can be resolved. It is important to remember that while evidence of domestic abuse may provide an exemption from mediation, it will not necessarily lead to an order that there should be no contact with the children" (a District Judge);

b. some mediator consultees considered that a MIAM could be appropriately managed even where domestic abuse was alleged; for instance, MIAMs can be conducted appropriately and safely even where domestic abuse is alleged through separate meetings and shuttle mediation etc. That said, concerns were expressed by others about the use of 'shuttle mediation' in domestic abuse cases;

c. It was suggested that the FMC could "be asked to produce a template of screening and safeguarding questions to be agreed and adopted by all FMC organisations".

69. Others expressed the view (in some instances, strongly) that mediation would "never" be appropriate in cases of domestic abuse, especially when coercive and controlling behaviour is involved. One representative body (Women's Aid) referred to research studies which have shown that mediation can help to sustain unequal

power relations between ex-partners and can mistakenly conflate domestic abuse and 'parental conflict'. This helps to conceal domestic abuse and violence, while placing blame on survivors who are seen as 'difficult' or prioritising 'conflict' over their child's best interests, citing Feresin, M. et al (2018) 'Family mediation in child custody cases and the concealment of domestic violence' in Journal of Women and Social Work 33(4) p.509-525. Women's Aid further referred to the concerns of some domestic abuse survivors of being involved in shuttle mediation. Concern was separately expressed that we should not align an imbalance of power (which is not necessarily coercive) with coercive control:

> "'Shuttle mediation' can be problematic in terms of an inability to ensure the safety of individuals outside of the mediation (especially where they may remain under the same roof) and in situations where an individual lacks capacity or confidence to speak to their own needs. We don't think 'shuttle mediation' is currently likely to improve the ability of many victims to speak on their own behalf or to feel safe in seeking a solution suitable to their needs" (Resolution).

70. Do MIAMs 'do what it says on the tin'? Is there a case for changing the name of a MIAM as part of the 'refreshing' exercise? A number of consultees addressed this issue:

    a. Even the Family Mediation Council accepted that "the term MIAM is not ideal" because it is not easily understood and is meaningless to families;

    b. Some proposed 'IAM' (i.e. drop the 'm' for mediation (barrister)). The arbitration community strongly supported re-branding, and specifically proposed that the first 'M' is dropped to IAM. They argued that it is an anachronism for the focus to be on mediation given the availability of other forms of NCDR and the terms of *section 10(3) Children and Families Act 2014* which specifically includes "such other way of resolving disputes";

    c. Another proposed AIMs (Advice and Information Meeting) (Resolution) or DRAMs (Dispute Resolution Assessment Meetings). The FJC (perhaps surprisingly, given the dubious appeal of its namesake) proposed SPAM ('Separated Parents Assessment for Mediation');

d. There is a view (which is in the view of the mediation community a misconception) that a MIAM only introduces parties to mediation, or otherwise prioritises mediation over other NCDR activities;

e. Aligned with these proposals was the suggestion that the MIAM should be linked to the SSFA (hence it should be referred to as "an SSFA introduction meeting";

f. There is a danger that because of 'M' for 'Mediation', MIAMs are being conflated with actual mediation.

71. Some commented on the complexity of court forms, and the MIAM element of the form; others on the inadequacy/inappropriateness of the forms:

a. There was a proposal for separating out the MIAM requirement from the C100;

b. MIAM information should be in multiple languages; annex 8 guidance should also raise the issue of vulnerability by reason of immigration status;

c. The exemptions should be narrower and more tightly drawn; there is a need to analyse the exemptions more rigorously, and to ensure that people are not claiming the domestic abuse exemption wrongly;

d. The MIAM exemption form is wholly inadequate; a number of alternatives were suggested (by mediators, solicitors and others).

72. Beyond the MIAM (but plainly linked to observations about its failings) we received a number of responses about the cost/funding of mediation, with a strong plea to revisit cost/funding arrangements. In our earlier report ([72] Report 1) we had said this:

> "One of the major disincentives to mediation is likely to be cost; it is almost certainly more expensive to mediate than to make an application to court without a solicitor. We wish to engage further with Ministers, and with the Family Mediation Council, in addressing this significant issue".

To which our consultees said:

a. The anomaly in mediation being more expensive than going to court needs to be reinforced. One consultee observed "Where neither party qualifies for Legal Aid, an application for Child Arrangements is often viewed as the cost-effective option compared with privately funded mediation. We would

support changes to make mediation more affordable for those above the Legal Aid threshold." (Support Through Court volunteer);

b. A proposal was made for reducing the fee for the application if the applicant has attended a MIAM; this is supported by some, but not supported by others;

c. One consultee thought that the solution was to increase the fee for court, but (as others observed) this could/would have an impact on access to justice;

d. It was noted (per FMC) that it is MoJ policy in civil cases to step fees, so parties only pay for the service they use. If non-court resolution is good for children and families, then it should be encouraged in every way possible;

e. One consultee (ADJ) summarised the position clearly and insightfully, and its contribution repays repeating in full:

> "At present (unless both parties are able to access publicly-funded mediation) a single court fee secures indefinite judicial and Cafcass resources whereas mediation requires repeated fees until resolution (or failure) with no guarantee of eventual outcome. The court system appears less expensive if lawyers are not used, and diversion to mediation after a court fee has been collected is particularly unattractive, particularly to the party who has initiated proceedings. The Government should consider much more generous funding of mediation services for children issues, such as a subsidised single initial fixed fee (less than the court issue fee). A less radical proposal would be for already-paid court fees to be refundable in full if the matter is resolved prior to first hearing (following a stay for MIAMs and/or mediation) and in part if there is a resolution without court order after a first appointment where parties divert to mediation".

The PrLWG considers that the points raised in the paragraph above, articulated clearly by the ADJ, are of very considerable significance, and should be actively and urgently considered by the MoJ.

73. We had proposed in our paper that parenting agreements reached in mediation should or could become 'open' documents (a Memorandum of Understanding

prepared in mediation remains confidential/privileged). There was much support for this. A sample of the responses includes:

a. It "would make a huge difference to the view of mediation" (mediator), and "[a] major process advantage now available to us is the freedom for mediated parenting agreements, or agreed variations to previous orders, to be formalised in a CAO 'by consent'. This should be encouraged very strongly, openly setting aside the no-order principle for such cases. This one measure will provide mediation with powerful appeal" (mediator) so that parents "can be held to account" (solicitor); many parents "want a document to confirm what has been agreed that can be used evidentially";

b. "It provides parents with a mediated agreement and a court order to support any agreement";

c. It would be helpful to have a court order with the parenting agreement attached; there should be a simple process to allow an agreement to become a court endorsed document.

74. It was proposed by a number of consultees (and in subsequent post-consultation discussions with mediators) that there should be a *cheap* (i.e. reduced fee) and *quick* (i.e. no need to fill out the C100 but something less onerous) way to convert parenting agreements reached in mediation into court orders, or have them otherwise ratified ("when explaining mediation to clients the fact that they won't get an order at the end of the process is often a stumbling block" (mediator)). While this could/would offend against the 'no order' principle of *section 1(5) CA 1989* an exception could potentially be created where this situation applied – specifically, for instance, where a mediator was prepared to issue a certificate which confirmed (a) that an order would be in the interests of the child/family, and (b) that no safeguarding issues have arisen through the mediation screening, this may be workable. Alternatively, it was proposed that consideration should be given to a mechanism for parenting agreements reached in mediation simply to be filed at court (not embodied in a court order); that is to say, rather than make a formal court order, there could there be a 'virtual filing cabinet' or 'register' of agreements reached.

75. Inevitably, and helpfully, the converse argument was advanced: "The main risk of an 'open agreement' is that it increases the incentive to litigate. If there is a subsequent breakdown of the arrangements, the parties will be more likely to resort to litigation rather than consider returning to mediation to sort matters" (barrister / mediator). The proposal was described by some as a "wholly bad idea" (solicitor / mediator), which may deter people from actively engaging in mediation (Circuit Judge).

76. One mediator interestingly encapsulated the dichotomy neatly by observing that while this would run counter to mediation principles/philosophy, "I know clients want this option to be available". Another suggested that the professional conducting the MIAM should provide a short report for the court (at a conciliation hearing) about the suitability of the case for NCDR.

77. Child-inclusive mediation attracted some interest and commentary; it was proposed that there should be a pilot to evaluate public funding of child inclusive mediation (which is more expensive than 2 party mediation). One consultee observed that "funding is a massive issue. Those who do CIM (child inclusive mediation) with legal aid do not receive payment for the meeting. That is outrageous" (mediation organisation).

78. Further evidence-based research into MIAMs has been proposed. It was said that there is no reliable data about MIAMs and mediation, and outcome. The only MIAMs visible to those working in the court system are those which have not been followed by successful mediation. MIAMs or intake meetings that have concluded with a settlement will not be captured in any data unless they have been funded by legal aid. The legal aid data is widely recognised to be a small snapshot of the MIAMS and mediation taking place. One consultee wrote that FMC statistics show a level of take-up that makes the LAA statistics quoted in the consultation wholly misleading. Fuller data is needed about the current extent of MIAMs and conversions to mediation.

The value of MIAMs and flaws in the MIAM process have been laid bare by our earlier discussion, and by the consultation responses. Overall, we have received sufficient support for the MIAM both around our table, and in the consultation responses, to pursue our proposal for the revitalising and refreshing of the assessment meeting. The PrLWG is interested to note support for the proposal that respondents should be encouraged to play a greater part in the MIAM process; if this is to be developed further, careful consideration will need to be given to the *article 6* and safeguarding issues in such a proposal. Moreover, we are concerned (and wish to highlight) that requiring respondents to attend for a MIAM would almost inevitably result in delay to the process, which may well be contrary to the child's welfare.

The 'Family Solutions' Working Group is looking actively at the MIAM, and will further consider the responses which we have received. It is important that any refreshed model should properly address the following features: (a) cost; (b) the engagement of the respondent; (c) the need to ensure that all forms of dispute resolution away from the court are addressed in a MIAM (which may have an impact on name change); (d) whether the numbers and profiles of those delivering MIAMs are meeting the need; (e) whether lawyers should be able to deliver MIAMs? (f) the high incidence of domestic abuse and whether this issue (i) is satisfactorily and effectively screened, and (ii) effectively exempts the applicant or respondent from participating in a MIAM; (g) the interaction with the court; (h) enforcement messaging for HMCTS and the judiciary; (i) the training which will be required; (j) the enforceability of mediation agreement; (k) the MIAM exemptions and the C100, and (l) whether a person is competent / capacitous to use an out of court settlement method unsupported.

The PrLWG defers to the MoJ 'Harm in Private Law Cases' panel on the controversial proposal (above) that domestic abuse cases could mediated.

[11] The application form: C100 and C101

79. Some of the consultees commented on the C100 form, proposing that it should be amended in the following ways:

    a. to identify clearly those cases with an international element or status (i.e. nationality) issue;

    b. to contain a nudge to the applicant to indicate to which *track* the case should be allocated;

    c. to provide more basic case information. It was specifically proposed that the digital C100 might be used better to collect the type of information a good family lawyer would ask for at a first client meeting, for example, about what is your case and what have the arrangements for the child been over the last six months (Resolution);

d. linked to the point in (c) above, there was a recurrent proposal among our consultation responses that we should be devising an 'Allocation Questionnaire' – to be completed alongside the C100;

e. to prompt a request for a Home Office reference number, where relevant;

f. there should be a standard request for information about proceedings other than in the family court (i.e. First Tier Tribunal);

g. ask how many passports are held for the child (Immigration Judges' response);

h. the C100 asks under 'Additional Information', "Is this a case with an international element or factors affecting litigation capacity?" These should be *two separate* questions, and the way the question is phrased suggests the form will be completed by a solicitor. An LiP is unlikely to understand 'litigation capacity' – they may understand if the question is differently formulated so that it asks about specific difficulties in taking part in the proceedings or for identification of any factors impacting on the parent such as learning difficulties or mental health issues;

i. the applicant should be asked whether they have already attended a SPIP or at WT4C session, with a nudge to attend;

j. should the C100 be amended to ask the question: "Is the child seeing both parents currently?" It is proposed that if the answer is no, then it is fast-tracked. It is suggested that waiting for an ineffective FHDRA only serves to delay the resumption of contact (barrister);

k. it was said that if the C79 is to be abolished, there should be a clear indicator on the front of the C100 form that this is an 'enforcement' case (FLBA and solicitor);

l. the requirement to include the Unique Reference Number of the mediator in the online form would enable monitoring not only of general trends in relation to MIAMs but the tracking of individual mediators and any misuse of the current system (FMC).

80. It was further proposed that the respondent should be required to file within 14 days of the receipt of the C100 a response which is more detailed than the current acknowledgement of service (the form C7). It was proposed that this should be *a form C101* limited to say 4-5 pages. The information contained in a more detailed response could usefully feed into the 'triage' process (see below) and give the respondent more opportunity to provide similar information to the applicant (albeit not a position statement) to assist the 'triage' judge to identify and consider the

genuine issues and assess engagement with the MIAM process and out of court processes (Resolution).

The PrLWG is sure that the MoJ will be pleased to receive the thoughtful consultation responses insofar as they relate to modifications to the C100 (incorporating information otherwise included on form C79); it may be helpful to require the applicant to set out the usual arrangements for their child, any recent change and what has led to the application. It may also be useful (subject to further discussion) if the application form could encourage applicants to be candid about any risk issues / allegations pertaining to themselves in the interests of their child and of a swift resolution.

We welcome the suggestion of a revised acknowledgement of service – a new C101 – for the respondent; it may be appropriate to model this on the form of 'Respondent's Questionnaire' used digitally with apparently good effect in relation to Online Civil Money Claims.

The PrLWG has started conversations with the MoJ about these reforms; the proposals can therefore be carried forward by MoJ as appropriate, and this can be overseen by the PrLWG and the Judicial Engagement Group (there is useful overlap between the membership of this group and that group).

[12] Gatekeeping and 'triage': Do you support the changed arrangements for gatekeeping? And for 'triaging' cases?

81. Many of the consultees were broadly in favour of the 'triaging' proposals. Some supported the wide range of powers available to 'triage' judges, including referral to SPIP / WT4C and forms of NCDR.

82. It was noted/accepted that 'triage' has to be "active case management" (Justices' Clerks' Society), and should be undertaken by an experienced judge (Resolution) given that it is a judicial function, with the benefit of all the relevant information; it will be important to avoid the delays in the provision of third party information (academic); where families have had local authority involvement, local authority children's services should be ready to prepare a report/statement at the earliest possible stage in the process (magistrate). One consultee advised that a form of 'triage' ("informed allocation") was in operation (successfully) in the Reading Family Court "whereby cases are allocated between the magistrates and district bench after the safeguarding letters/reports have been provided by Cafcass and therefore at a

time when the allocating team can properly assess the complexity of the case and direct it to the appropriate tier of the family court rather than doing so based upon the very limited (and often partial) information contained in the C 100" (District Judge, Reading). We return to this proposal in **Chapter 3**.

The PrLWG would like to observe here that 'triage' is not just about allocation of a case to a particular level of judiciary; it is about identifying the right track, and path within that track, for a case.

83. Some however, expressed concerns:

a. It is impossible to 'triage' a case effectively without seeing the parties: "Triage in medical practices is usually carried out by trained practitioners after personal contact with the patient. The FHDRA judge currently performs that role in private law proceedings. I have always regarded the FHDRA as a filter process in which the judge decides whether there is sufficient information available to be able to resolve justly the dispute between the parties at that hearing and, if not, what further information and process which will be required to do so" (District Judge). There should be "robust guidance" given to judges effecting the 'triage' (CFC Judges);

b. This concern was repeated… that it is wrong for the case to proceed without the parties being seen (which at least they are in a FHDRA) (Resolution): "It is our view that FHDRAs properly conducted with the parties and Cafcass are a crucial and effective tool in identifying the relevant issues and case managing effectively from the outset. We do not believe a 'triage' judge in the absence of the parties will be able to formulate a 'clear direction' for the case and make key case management decisions such as whether a fact-find on domestic abuse allegations is necessary" (Family Judiciary joint response from one DFJ area);

c. There needs to be clear analysis by the judge of allegations of domestic abuse, forming a view about whether they are likely to be relevant to the welfare outcome (CFC Judges);

d. Concerns were expressed about the delays which could be created around the 'triage' stage (FLBA); this fed into a wider concern that the suggested changed arrangements will just build in another administrative tier and/or more delay (Resolution). It is pointed out that 4 to 6 weeks after issue is a long time for parties to wait for the 'triaging' of cases to take place and is a *particularly* long gap when there is a conflict building and/or the child is not seeing an absent parent; overall the whole process from gatekeeping through to 'triage' should be quicker than the PrLWG has proposed;

e. This needs therefore to be piloted carefully so that undue delay is not introduced;

f. A question has been raised whether LiPs will be able to understand directions given in 'triage' without the opportunity for them to be explained? (Circuit Judge);

g. There would need to be protected time for a judge to perform the 'triage' (Circuit Judge / DFJ); there is a concern about the amount of judicial time which will be saved by this;

h. An alternative suggestion is that the parents attend the 'triage' (called 'an attended CMH'), with the case being allocated to the track at that stage (Circuit Judge / DFJ).

84. There needs to be transparency on the face of the 'triage' order why a given order (re track or otherwise) has been made (Young Legal Aid Lawyers).

85. On application, the parties should be sent the 'What the Family Courts expect from Parents' document…(Legal Adviser) (although it may need revising and updating) perhaps with the FJYPB Top ten Tips. It needs to include reference to the MIAM.

The PrLWG proposes that this document ('What the Court expects from parents') is indeed updated and expanded; our proposed amended version is to be found at Annex 2.

86. There is support for the view that judges and staff should be robust in rejecting claims at 'triage' where the MIAM has not been attended. This is linked to the requirement to educate the judiciary more fully on NCDR services locally, and to arbitration. Judges are loath to adjourn cases for NCDR or arbitration in order to avoid delay, but it was suggested that at the 'triage' stage, judges should be prepared to direct families, where it is safe and appropriate to do so, to NCDR or arbitration.

87. Too many cases are being listed for fact-finding hearings (solicitor); there should be more careful review of when/where it is necessary at the earliest stage.

88. At gatekeeping, if status is or may be in issue then an EX660 should be issued at this stage (which will be done quickly particularly if a Home Office reference number is supplied). At 'triage', the judge should quickly identify the cases where contact has completely broken down and it is proposed that *these cases* should be 'fast-tracked'.

89. Two important ancillary points were raised about the 'triage' stage:

    a. There should be more widespread availability of funded and supported or supervised contact in the interim, as there is in public law cases (barrister);

    b. There was a strong view that (unless safeguarding issues were evident) SPIPs / WT4Cs should be encouraged as early on in the process as possible, including at 'triage' stage (with Legal Advisers having the power to order these: Justices' Clerks' Society). There should be an automatic direction for a SPIP / WT4C before a first hearing in a non-urgent case (solicitors' firm), where domestic abuse is not alleged or detected. SPIP / WT4C referrals should be made at the gatekeeping stage; when issuing the direction for 'next steps', the court should direct the parties to attend a SPIP / WT4C.

The PrLWG welcomes these insights, and remain of the view that a 'triage' stage would be valuable, and more likely to achieve better 'tracking' / allocation of cases than on the basis of the application alone (the present position).

Further careful consideration will need to be given to the format, process and criteria for 'triaging' as part of any pilot. We recognise that while delay is particularly inimical in cases where contact has completely broken down, this should not lead the court or professionals to 'rush to judgment' to restore contact; the parent and/or child may have entirely appropriate reasons for resisting post-separation contact.

[13] Tracks: What are your views about placing cases on 'tracks' once in the court system? Do you agree with the distribution of work between tracks 1 and 2 based on complexity?

90. The stratifying of cases onto tracks was *generally* supported by our consultees, even if the comparison with the civil tracks was not universally seen as helpful or appropriate (e.g. Young Legal Aid Lawyers). The giving of numbers rather than names to the tracks was also generally supported.

91. That said, the ADJ expressed themselves unpersuaded by this proposal, and suggested that this reform should be subject to a properly evaluated pilot before it is adopted nationally; they felt (as did others) that in reality the majority of cases would fall into 'Track 2' and 'Track 3' and there would therefore be limited benefit in having a 'Track 1'. The Law Society also felt that it was too "simplistic" to categorise cases in the way proposed by us (in such "discrete and defined categories").

92. The proposal to enhance the information provided by Cafcass/Cymru at the 'safeguarding letter/report' stage (prior to 'triage', and allocation to tracks) was seen by some as "constructive". It is said (rightly, as we understand it) that in Wales, Cafcass Cymru letters/reports already contain significant amount of information (Magistrates Association), including whether a case is suitable for conciliation, and this was offered up as a model for national adoption. Cafcass / Cafcass Cymru seek to clarify that:

> "… it is the *purpose* of the safeguarding letter, not its length, that will be expanded. … the safeguarding letter will in addition provide more focused analysis with clearer recommendations about which 'track' and associated next steps are in the child's interests. In low risk cases the report may be shorter. Recommendations made by Cafcass Family Court Advisers may include attendance at a Separated Parents Information Programme (SPIP), referral to a service provided under the Support for Separating Families Alliance, and/or the allocation to a track (with reasons), to help inform the triage process" (Cafcass/Cymru).

93. The general practice in Wales is that the safeguarding report from Cafcass Cymru summarises safeguarding information from police, social services and parties and makes a recommendation whether the case is suitable for dispute resolution (conciliation) based on:

    a. the presence or absence of domestic abuse allegations, findings or convictions;
    b. the child being subject to child protection registration or open to children's services care and support plan;
    c. whether there is a need to consider a fact-finding hearing;

    but in general, does not make recommendations as to the likely need for a *section 7* (Child Impact Analysis) report. Most courts in Wales do require the attendance of a Cafcass Cymru officer at FHDRA even where it is clear that in court dispute resolution is not appropriate for either of reasons a) and b) above.

94. The practice which has developed in Swansea broadly follows the general arrangements described above; however:

> "Cafcass Cymru are not required to attend the FHDRA cases listed before the bench UNLESS they are cases where conciliation is going to take place. This enables the mags to list up to five FHDRA cases for conciliation in their list, backed up with other cases which are simply listed for "directions" and can be dealt with whilst the other parties are out conciliating with Cafcass. In this way progress is made in all cases and performance, in terms of disposal of private law cases, is impressive despite the ever-increasing volume. We therefore agree with the recommendation to only list those cases which stand a real prospect of resolution through conciliation for conciliation, and for others to be listed for case management/directions, which is a system that is tried and tested by the magistrates in our area." (LFJB: Swansea)

95. A number of consultees were concerned that Cafcass/Cymru should have a role in making a recommendation about the allocation of cases to given tracks, as they thought that, in this way, Cafcass/Cymru would be usurping judicial decision making. Some consultees expressed concern that Cafcass/Cymru may not pick up domestic abuse issues sufficiently or consistently (undertaking safeguarding enquiries by phone is not always likely to yield the relevant information) and thus recommend a domestic abuse case onto Track 1.

The PrLWG maintains its view that Cafcass/Cymru could have a useful role in making a recommendation about allocation to a track which is likely to be informed, in part, by identified welfare issues. To emphasise, the PrLWG sees Cafcass/Cymru as making a <u>recommendation</u>, not the <u>decision</u>. We would also stress here that allocation to track is distinct from allocation to tier of judge.

96. There was concern that the safeguarding letters/reports should be sent to the parties in good time prior to the hearings; too often (it is said) they are presented at the court door. This point led others to raise questions about how the parties may be able to make representations about the allocated track. Indeed, one stated in terms that it will be important to have a clear mechanism in place to *challenge* any cases

mistakenly allocated to Track 1, or directed towards measures of conciliation, mediation or early resolution that are inappropriate or unsafe. This mechanism should be accessible to parties.

The PrLWG agrees that there should be a mechanism for the parties to be able to make representations about allocated track.

Track 1:

97. The CFC judges felt that a high proportion of cases (they suggested c.80%) should be allocated to Track 1. One representative body (FLBA) thought that Track 1 cases would be better managed by an experienced judge than magistrates if there was to be robust (and reasonably summary) decision-making, a view shared by a DFJ. There was some scepticism expressed about the ambition of achieving outcomes in Track 1 cases within 8-10 weeks. There is also a concern that the voice of the child is not heard in Track 1 cases; this raises a question over compliance with *article 12* of the *UNCRC*. It was said (as referred earlier) that this proposal needs proper piloting (with full evaluation).

The PrLWG remains of the view (supported by the majority of our consultees) that 'Tracking' of cases is a good idea, though accept that it would be appropriate to pilot arrangements.

The PrLWG does not consider that 80% of the cases could fall onto Track 1 (as currently defined); our concern (on reflection) is that too few cases would be on that track to make it a worthwhile route for the cases coming through the court. The magistrate members of the PrLWG felt that with proper training magistrates *could* offer robust (summary) decision-making, pointing out that they are not advised to adopt that approach in family cases now.

The members of the FJYPB with whom we spoke were concerned that their voices should be heard in private family law proceedings; they also expressed the view (see [160] below) that in cases involving disputes with limited complexity they should not necessarily be seen by the judge; they were clear that in all cases their contribution should be proportionate to the issue involved.

Track 2

98. Those cases suitable for Track 2 were identified by our consultees as:

a. all cases concerning the breakdown of contact;

b. domestic abuse cases; although a number of consultees suggested that fact-finding hearings are being ordered too often. There were calls for much greater clarity about the import of *PD12J*.

c. cases with a real/material immigration issue (Immigration Tribunal Judiciary).

Track 3

99. See the section on 'Returners' below ([122]-[130]).

Moving between tracks

100. There need to be "fluid" arrangements for cases to be able to move between tracks; tracks should not be "rigidly adhered to", and the allocation should be "kept under regular review" (FLBA), given that some cases become more complex and other cases become simpler. The Magistrates Association agreed that easy transfer of cases between tracks was important. Further detail was sought about how cases could be moved between tracks.

101. Cafcass usefully identified some further issues which should be considered at the point of 'triaging' and allocation to the three tracks:

> • "how to bring together the different sources of information into an integrated assessment; • the need for inter-disciplinary agreement on the appropriate risk thresholds or other criteria for allocating cases to tracks; • the mechanism and basis by which parties can appeal any decisions made at 'triage'; • the dynamic nature of risk, and the need to allow for cases to switch tracks or access different support tailored to need; • whether the proposed timing of 4-6 weeks is realistic, it should be about getting it right for children and their families, rather than necessarily having to do it quickly; • the need to factor in the possibility of incomplete safeguarding information in the safeguarding letter; • the need for a thorough appraisal, development and testing of the proposed changes to ensure the potential benefits

> are realised and to identify and manage any unintended consequences".

As indicated above, the PrLWG agrees that the tracking of cases will require careful piloting (see Chapter 3 below).

It is possible that, through the experience of piloting, we will need to re-think the features which govern how cases are allocated onto one track rather than another. In light of our responses, and further discussion, we feel that we should review whether a dedicated track for returning cases is appropriate, or whether these cases should simply just be *'triaged'* differently. Furthermore, a large number of consultees raised the plight of children and parents in cases where contact has recently broken down altogether. These may well need reasonably urgent scrutiny by the court, and a dedicated track.

We accept that there needs to be a mechanism for a party to challenge the allocation of the case onto a given track, and would suggest that this can be done via *rule 4.3(4)/(5) FPR 2010*.

[14] SPIPs / WT4C: Could/should we encourage more parents to attend SPIPs / WT4Cs? If so, when and how?

102. Our consultees were generally positive about SPIPs / WT4C and regarded them as beneficial; many thought that it would be best if these could be delivered as early on (post-separation) as is possible. One group of consultees (the Cheshire and Merseyside judiciary) felt that SPIPs/WT4Cs should be *compulsory* (where there is no safeguarding issue). Another consultee (District Judge) wrote that

> "I believe it may be beneficial if the parties attend a SPIP at an earlier stage and would be very interested to see a pilot where all parties were required to attend a SPIP prior to the FHDRA unless it was assessed that it was unsafe for them to do so".

103. Overall, it was appreciated that SPIPs / WT4Cs do help parents to understand – and focus on – the impact of their behaviours on their children. One of their particular advantages is that parents hear experiences from other parents, rather than from an authority figure (Support Through Court volunteer). More than one consultee thought that SPIPs / WT4Cs should be offered before a MIAM. Ofsted suggest some video testimony should be used to advertise their benefits.

104. We received very little contrary opinion on SPIPs / WT4C; only one consultee (a LiP, a party to concluded family proceedings) expressed strongly negative views about the SPIP / WT4C, describing them as "not fit for purpose", they "give zero information to parents"; Families Need Fathers also questioned their value, referring to the "the evidential basis for these courses adding value [being] poor".

The PrLWG draws attention to the research evidence in this regard: see Liz Trinder et al, *Building Bridges: An Evaluation of the Costs and Effectiveness of the Separated Parents Information Programme (PIP)* (DfE, 2011); Liz Trinder et al, *Evaluation of the Separated Parents Information Programme (SPIP Plus) Pilot* (DfE and Cafcass, 2014), which is also referenced elsewhere in this report.

105. We received a number of representations about the content and delivery of the SPIP / WT4C:

a. A number of consultees argued for a review of the content of the SPIP / WT4C; the Magistrates Association cited feedback survey undertaken by Cafcass regarding SPIPs / WT4C, which they believe showed that *under 50%* of respondents agreed that "The SPIP programme will be helpful in sorting out child arrangements with the other parent/carer." [Cafcass point out that a more recent satisfaction survey shows 72% are 'satisfied' (i.e. agree/strongly agree with the sentence above)];

b. One representative consultee (Cheshire and Merseyside Judiciary) suggested that there should be an 'advanced SPIP' (WT4C) which can offer "more in-depth counselling and advice to warring parents";

c. This was in line with another consultee (magistrate), who proposed that we could/should consider a SPIP-lite (for a Track 1 type case) and an enhanced SPIP / WT4C for a Track 2 type case;

d. The Official Solicitor helpfully proposed that SPIPs / WT4Cs should also be designed for parties who lack the capacity to litigate or to negotiate a settlement in respect of their issues. They may require a re-design in order to enable parents with, for example, learning difficulties to assimilate the information delivered within them. More use of pictorial papers might be required, or information may need to be repeated until it can be retained.

106. While one consultee proposed that SPIPs / WT4Cs should address issues of domestic abuse and should be available for those even who allege domestic abuse (magistrate), there was a countervailing concern about early referral to SPIP / WT4C: "ordering these in an unidentified domestic abuse case could alarm a victim, or give

a perpetrator the opportunity to exploit the process and continue the abuse, placing the victim at further risk" (Support Through Court volunteer)[21].

107. More than one consultee (barristers/solicitors) proposed an amendment to *section 11A(7) CA 1989* to allow a court to order a SPIP / WT4C at the time of a final order given that the court cannot make an activity direction and a final order at the same time. This was proposed in order to seek to reduce the number of returners.

108. Cafcass is currently working with Sheffield City Council in facilitating the delivery of SPIPs / WT4Cs pre-court as part of Sheffield City Council's commitment under the DWP's Reducing Parental Conflict Programme, to provide multi-agency workforce skills and programmes to support parents where parental conflict is a concern. It was pointed out that this is a useful opportunity to test the model.

The PrLWG is unsurprised by the generally positive views about SPIPs/WT4Cs and welcomes these more general thoughts outline above. The PrLWG considers that it is important to consider carefully what might enhance the effectiveness and take up of SPIP/WT4C programme (i.e. better targeting, changed content, longer duration etc); we would then like to encourage consideration of a revised programme which could be piloted and evaluated. It considers that the proposals for creating more bespoke SPIP/WT4C programmes (enhanced SPIP, SPIP-lite) is worthy of further analysis and investment.

We recognise that although the court cannot make a SPIP/WT4C as an Activity Direction at the same time as final order, the court *can* make a SPIP/WT4C as an Activity Condition under *s11C CA 1989* at the same time as a final order; there should be greater awareness and use of this power.

[15] FHDRA / Conciliation

109. There were mixed views about our proposal for the abolition of the First Hearing Dispute Resolution Appointment ('FHDRA') as a 'standard' hearing in all cases, introducing a substituted and expanded 'conciliation' appointment in a limited number of cases. The Magistrates Association observed that conciliation is ***un***likely

[21] Again, see the research evidence referenced above.

to be suitable in Track 2 cases. There was some support for a "directive" form of conciliation at court conducted by Cafcass/Cymru in the right case.

110. The time afforded to the FHDRA/conciliation appointment was thought to be material to its overall effectiveness. The Justices Clerks Society advised that: "The present system has resulted in huge pressure on the FHDRA hearings meaning that hearings can lose some of their effectiveness. The proposed system [under the PrLWG recommendations] allows for time to be taken properly to direct a case, and this is likely to improve outcomes for children significantly". It was said that in Wales the FHDRA (at which Cafcass Cymru offer up to 75 mins for parents – though more usually 45/60 mins) has been successful in achieving negotiated settlement in >30% of the cases (Wales Family Magistrates and the Family Legal Managers). In England, the settlement rates are similar – per Cafcass. The CFC judges considered that parties would benefit from routine access to a 'duty solicitor' on FHDRA days.

111. Resolution expressed concerns about the re-introduction of conciliation appointments in place of the FHDRA citing (a) the risk of achieving agreement, but not resolving the essential difficulties, (b) whether sufficient time would be allotted, (c) training of judges (and Cafcass) and (d) that 'conciliation' sounded too much like 'reconciliation' and would be confusing to the parties. Others felt (including the Young Legal Aid Lawyers) that "all cases absent significant safeguarding features should be considered as in scope for conciliation".

112. As for the 'label' for these hearings (and picking up the point at (d) in the paragraph above), no strong support was offered for the retention of FHDRA as a name/acronym. We were offered a range of views as to alternatives:

a. these appointments may better be called "resolution" appointments or "negotiation" appointments (barristers chambers).

b. another proposal was the use of the label "Conciliation and Case Management Appointments" (CCMA) instead of FHDRA; this title, and the

model of a CCMA is supported as offering the greatest flexibility (solicitors' firm).

The PrLWG tentatively proposes that FHDRAs be re-named 'Child Arrangements Appointments'; this would help focus everyone's attention on the child.

113. Aligned with this,

a. The Cheshire and Merseyside Judiciary proposed wider use of 'settlement conferences'; these are privileged meetings[22]. In Cheshire and Merseyside, it is said that settlement conferences are now part of the culture of the courts, and have been extremely successful. The Cheshire and Merseyside Judiciary suggested that these should be compulsory;

b. There is separate support for the proposal that Cafcass / Cafcass Cymru undertake conciliation appointments in court as per the 'Essex Model' (Trinder) (FLBA), though it is pointed out (Resolution) that this research was done when magistrates were undertaking less of the private law work;

c. There was almost universal support for Cafcass remaining involved at the conciliation in some capacity ("their involvement is usually valuable… in facilitating agreement or defining the issues").

114. There were some mixed views about whether Judges should undertake the 'conciliation' activity, including some strong opposition. Those who opposed judges delivering conciliation referred to the following: (a) many judges will need training (accepted, and see below); and (b) the court is too pressurised (alienating and stressful) a place for the parties to be subjected to 'conciliation' by a judge (Welsh Women's Aid). The view that 'conciliation at court by a judge' can be pressurising to

[22] We would like to point up here that at [122] of our First report (July 2019) we said that "[o]n balance, we considered that judges / legal advisers would still be able to conduct effective conciliation in a ***non-privileged*** environment, and that there was not a strong enough argument to change the current practice". **We remain of that view**.

parents was repeated elsewhere (LiP consultees). Attention was drawn to recent research from other jurisdictions which has highlighted both the benefits of judge-led conciliation in reaching safe, equitable settlements in cases involving domestic abuse, and the areas for careful consideration if this route is taken (Neilson, L. (2014) 'At cliff's edge: Judicial dispute resolution in domestic violence cases' in Family Court Review 52(3) p.529-563). Where judges are to do this work, one proposed that they should be willing to be reasonably robust at conciliation and 'give indications' as to outcome (barrister). There was a concern by one consultee that magistrates are not prepared to undertake conciliation. One magistrate consultee asked for more training of magistrates given the "huge variation in their ability and approach".

115. The availability of 'at court' mediation garnered support in many quarters, with anecdotal evidence that where it is offered, higher settlement rates are achieved at FHDRA appointments; it was argued that this facility should not just be (as we had suggested) available at the larger court centres. One DFJ wistfully recalled: "we all recollected how helpful it was to have mediators at court". Another DFJ commented: "We would support the suggested piloting of mediation services in court venues. Despite existing promotional activities, we see many litigants who do not fully consider mediation before attending their first hearing. The formal setting of court may focus minds and improve engagement, while ease of access is likely to enhance take-up". Cafcass indicated its willingness to investigate a more integrated model with mediators.

116. We were advised that the organisation 'Oxfordshire Family Mediation' had at one time offered initial mediation sessions at court, which often assisted parties to resolve simple points of dispute, and also led participants to return to mediation thereafter (the inference in the response is that this is no longer on offer). Cambridge Family Court provides an 'at court' mediation service on FHDRA days successfully. Several proposed a duty mediator scheme rather like a duty solicitor scheme, though they acknowledged that this would need public funding support. We were made aware of a number of 'at court' mediation projects which have taken

place or are already taking place but a sustainable and agreed model has not yet been found. Experiences of these schemes would need to be mapped and collated and there is a need to analyse the information to help identify the best model to use for any future project or pilot, rather than seeking to reinvent the wheel by introducing another pilot similar to those that have already been conducted.

117. The views were not all one-way. One consultee suggested that research shows that family mediation is best provided independent of the coercive context of the court. Other consultees opposed the idea of 'at court' mediation, as the court building is not felt to be the right place to mediate. And it was suggested that previous at court mediation arrangements have not been workable, sustainable or cost effective (Resolution). Confusion may also arise in the minds of the litigants between conciliation and mediation (ibid.). Some consultees wrongly interpreted our references to mediation during court proceedings as occurring only at court; this is not what was intended.

118. One consultee (a family court support service) pleaded for more space in the court building to undertake mediation (more interview rooms required), and raised concerns about (a) the cost of mediation at court and (b) the impact on the court list where parties may wish to mediate at court.

Distilling these views, the PrLWG accepts the general views which are supportive of 'conciliation' appointments in the right cases. Plainly the 'labelling' of these hearings needs some thought (though see our view that replacing FHDRA with 'Child Arrangements Appointments' may be appropriate). The messages from the consultation are clear: that judicial training, sufficient time for the appointment, access to professional views (Cafcass / at-court mediator / even a lawyer), and space to talk are all important ingredients in achieving negotiated outcomes at a FHDRA.

We note that there are reports of successful 'at court' mediation services (see Cambridge above; Dorset run a telephone 'duty mediator' scheme on FHDRA days, and we subsequently learned of a scheme in Southampton – crucially, supported by Cafcass, the court staff (provision of a room) and the local judiciary – where a mediator offers a mini-MIAM at court). However, the general view of the consultees is that the court building is not the best place to mediate, and mediation schemes have foundered generally for lack of funding.

We know that an at court mediation scheme has just been launched (since 5.2.20) at the Family Court at East London, at which mediators attend on FHDRA days; this is currently (for the purposes of the trial) being offered free by the mediators for one day a week for 6 months. It is expected that (subject to funding) the results will then be evaluated.

The PrLWG notes that the LCD/DCA/MoJ research compared the effectiveness of three conciliation models side by side. The research showed that by far the most effective model, in terms of settlement rates and litigation satisfaction was the Essex model of Cafcass-led conciliation leading to a report-back to the judge. The least effective model, again based on settlement and satisfaction, was the judge-led model. See Trinder, L., Connolly, J., Kellett, J., Notley, C & Swift, L. (2006) *Making contact happen or making contact work? The process and outcomes of in-court conciliation.* London: Department for Constitutional Affairs. But see also [2013] Fam Law 472, for a review of a 5-year judge-led conciliation scheme which led to high levels of settlement.

The PrLWG proposes that an effective 'triage' and safeguarding model, teamed with well-trained and risk-aware Cafcass/Cymru conciliators reporting back to judges/magistrates with a proposed consent arrangement (order) or a request for directions, would greatly reduce the pressure on the increasing numbers of judges/magistrates hearing private law cases. Contrary to the general direction of our first report, it is to be noted that conciliation research showed that the low-judicial involvement model was the most effective.

The wider roll-out of Settlement Conferences justifies further consideration, taking account (to the extent that it is relevant to a private law regime involving largely unrepresented parties) the review of settlement conferences in <u>public law</u> cases, which was undertaken by Dr. Julia Brophy (on behalf of ALC) and Amy Summerfield (on behalf of MoJ).

Generally, we are alive to the legitimate concerns expressed about the durability (and possibly the safety) of negotiated outcomes achieved in the court setting, and this important point will need to be weighed in our development of the 'tracks' and overall piloting of case progression through the courts.

[16] The voice of the child

119. We received a number of general comments among the consultation responses about the voice of the child in family court proceedings and in out-of-court dispute resolution. There was no dissent. All those who spoke on the subject were of the view that more should be done to involve children (where appropriate) in in-court and out-of-court processes. There was a clear steer for judges directly to

hear the views of children more often than at present; there was a recognition that very little has been done to achieve a change of culture in this area.

120. There was a plea from some quarters for the return of the simple 'wishes and feelings' reports for those cases where the issue would benefit from some input from the child.

121. We felt that we have something to learn from 'Voices in the Middle'. This is a national service co-led by young people and over 50 family law and mediation firms which delivers age appropriate information, advice and guidance for 13-19 year olds on what happens when their parents separate and the ways in which they can have a voice that can be heard in the process as well as providing them with support. Since its launch in May 2018 the service's website www.voicesinthemiddle.com has been accessed by more than 220,000 young people. The website has content which has been contributed to by many young people and which includes video films for parents made by young people and family experts to support and promote the importance of parent-child relationships. The stress that 'Voices In The Middle' places on the voice of the child being heard resonates strongly with the views expressed by the PrLWG.

The PrLWG is very concerned that not more has been done to advance the recommendations of the Vulnerable Witness Working Group (2015), and in particular its review of (a) the *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872, and (b) the Family Justice Council's Working Party's December 2011 *Guidelines on Children Giving Evidence in Family Proceedings* [2012] Fam Law 79.

In that 2015 report, it was said that "a fresh approach to the evidence of children and young people, including the expression of their wishes and feelings (it needs emphasising that their wishes and feeling are part of the evidence which must be considered by the court as a matter of law and statute) is long overdue" [25] and [37]. This remains unfinished business 5 years on.

The PrLWG was keen to receive the views of young people directly on our reform proposals. We therefore asked Cafcass to set up a discussion group of some FJYPB board members. Six board members met with Cafcass (and Cobb J) on 20 January 2020 (see [158] *et seq*. in Chapter 2 below) and made a number of important points about child

participation in the court process; we were struck by the maturity of their views and their insights into the 'system'. They have given us much to reflect upon, none the least of which is the suggestion for a child 'impact' statement in family proceedings. We also need to be clear (as the young people have told us) that it is sometimes unwelcome to young people to have to become involved in the court process.

[17] Returners: What are your views on the arrangements for 'returner' cases, specifically, their early re-allocation to the original tribunal for 'triage' (proposed to be on Track 3)?

122. One consultee (a litigant in person) expressed no surprise at the number of returning applicants, referring to there having been a "final hearing but no solution". Another representative body consultee (Rights of Women) made a similar point: "the fact that so many cases are returning to court so quickly after an order has been made must be an indication that the court is not resolving the real issues that lead to litigation and that should be the focus of policy work and reform". And another consultee (a psychologist) added "a case which returns to court likely suggests a failure to address the pertinent issues originally…".

123. There was some pushback on our proposal that safeguarding checks should be done only in *some* (not all) cases (i.e. where this was indicated on the information provided). It was proposed by some that safeguarding checks should be done in *all* cases, including returners, or at least where specific allegations of harm / risk of harm to the child (as we indicated) or a *parent* is made since the final hearing. Cafcass proposed that urgent re-listing before the judge who had dealt with the case previously was more important than automatic safeguarding; the judge could then make a decision about the need for further safeguarding checks (Cafcass response); this approach needs to be tested in practice.

124. Judges should deal with enforcement cases quickly (FLBA). "Rapid referral" is indicated for all returner cases (Council of Circuit Judges).

125. There was some argument that the reduction in the number of review hearings has led to greater numbers of returners as "many parents who would

otherwise be unco-operative demonstrate different behaviour if they know that at some stage in the foreseeable future they will be accountable for their actions" (solicitor mediator). In this sense, we wonder if there has been too great a rush to make final orders, and/or have final orders been made at a time when too much uncertainty still exists around future arrangements? In short, has the CAP been a victim of its own success?! A number of consultees think so. The FLBA has asked whether the number of returner cases may reduce if more reviews were contemplated (so that the progress of contact could be monitored). NAGALRO observed that "there is pressure on courts to bring cases to a close as soon as possible rather than keeping control over matters until a tested and working solution is in place", and there were many calls for final orders to be 'future proofed' (phrase used by barrister consultee).

126. Judicial continuity is supported, though the challenge of placing a returning case before the *same* panel of magistrates was highlighted in a number of responses, and is acknowledged. The important point was made that the benefit of continuity must be balanced with any urgency that the case must be heard. It may be that it is more important for a case to be dealt with quickly than to ensure it is heard by the same bench (Magistrates Association). It was also proposed that explicit consideration should be given in these circumstances to whether the case was before the correct tier of judiciary first-time around (Resolution).

127. Understanding the true basis of the new dispute, when arrangements (pursuant to an earlier order) have broken down, is the key. Continuity of legal adviser at the magistrates' tier is important; but are there the resources for this (magistrate)? Achieving judicial continuity for the lay bench / legal advisers may be challenging particularly if the case is to return to court within 10-15 days of the application (Young Legal Aid Lawyers).

128. One consultee referred us to the keynote speech to the Families Need Fathers conference in 2010, where Sir Nicholas Wall observed that:

> "… [s]itting in the Court of Appeal, [he] still came across cases in which as many as nine or ten judges had all dealt with the same case. Each had had to read the papers: each had had to make a decision and, inevitably, the decisions are sometimes inconsistent… For a number of judges all to have to read the same bundle of papers is not only a waste of valuable judicial time: it is inefficient and leads to inconsistency".[23]

And then posed the question, how realistic is it to expect that judicial continuity can be achieved?

129. Post-order mediation is recommended by some of our consultees to help parents to work out how to make the order operate in practice; this ties in with our proposal that services operating within the SSFA would be available *pre*-court, *during* court and *post*-court.

130. It was proposed that applications in returner cases should be made on a separate form altogether – a C200: "The focus in the new form C200 should be upon the asserted change in circumstances since the previous order was made. A copy of the previous order should be required with every application" (District Judge).

The PrLWG acknowledges that there are a number of reasons why cases return to court[24]. It accepts that in some cases, the court is not resolving the real issues first-time around, or indeed the court may be making the wrong decision.

In view of the consultation responses, and its further discussions, the PrLWG wishes to reflect on whether it is right to allocate a specific track to returner cases, or whether

[23] 5 N. Wall, 'Is the family justice system in need of review?', Families Need Fathers Conference 2010, accessible at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/pfd-speechfamilies-need-fathers-19092010.pdf

[24] There is a certain amount of research which sheds some light on the issue: see Trinder, L. & Kellett, J. (2007) *The longer-term outcomes of in-court conciliation.* London: Ministry of Justice. Hunt J. and Trinder L. (2011) Chronic litigation cases: Characteristics, numbers, interventions. A report for the Family Justice Council. London: Family Justice Council. Trinder., L, Hunt, J., Macleod, A., Pearce J. and Woodward H. (2013) Enforcing contact orders: problem-solving or punishment? University of Exeter Law School. M Harding & A Newnham, *How do County Courts share care of children between parents?* (2015 University of Warwick). E Halliday et al, *Private law cases that return to court: a Cafcass study* (2017, Cafcass). M Jay, et al, *Using administrative data to quantify overlaps between public and private children law in England* (UCL, 2019);

'returner' cases should simply be 'triaged' differently. This needs further work, and probably piloting.

In order for the proposals for 'returner' cases to work effectively, we *currently* take the view that there should indeed be a "rapid referral", and we remain of the view that there is a case for returning the case back to the same judge/lay bench/legal adviser.

We will consider whether a separate form for a 'returner' case should be created. We can see the advantage of inviting the applicant to provide specific information relevant to the reasons for return; on the other hand, we do not wish to complicate the application process by offering a multitude of forms.

The PrLWG further accepts the possibility that the reduction in the number of review hearings under the CAP *may* have contributed to the numbers of cases 'returning' to court; in the circumstances there is a case for considering a formal pilot by which para.15.3 of CAP is suspended to allow child-focused reviews, which could be permitted or even encouraged where circumstances warrant it and it is in the interests of the child.

[18] Other recommendations: These are set out in **Annex 3**. Do you have any comments on any of these recommendations not covered elsewhere in your response?

Police disclosure

131. Many consultees wrote about the frustrating delays to the proceedings caused by the slow response of some police forces to requests for disclosure, and (in some instances) the prohibitive cost. There was a specific plea from Cafcass Cymru for more conscientious and timely provision of information from the police (and other third-party agencies) in order for them to complete the safeguarding letters/reports. One consultee raised legitimate question about the time requirement for the police to respond to request for information from national database; these could/should be accessible within 24-48 hours: "the organisational methodology must be reviewed". A suggestion was made that the courts could/should have a police liaison officer for each court who could be authorised to access the PNC and check for the existence of enhanced information, particularly on FHDRA days.

132. Within the response from the National Police Chief's Council there was a request (a request with which we agree) to review the present disclosure procedures relating to family justice. They recommended:

> "… a review of the existing 2013 Protocol by relevant representatives in order to consider whether there may be any opportunities to reduce duplication and streamline the provision of police information into the family justice system might be beneficial to all parties."

133. The sense from many of our consultees was that there needs to be a nationally uniform and clear process for *free* disclosure of police records where the request is made by litigants in person. It appears that Subject Access Requests under the *Data Protection Act 1998* are not automatically yielding documents/information free of charge as they should under the *Data Protection Act 2018* (*GDPR*). Furthermore, disclosure which is ordered by the court often generates a fee by the police; if the party is legally aided, we understand that this can be funded using devolved powers, but if the parties are not legally aided or able to pay, we learned of regular stand-offs being created, and the information then remains unavailable creating delays and sometimes confusion. Additional difficulties complained about include:

a. The documents which are the subject of the application for disclosure often require redaction (National Police Chief's Council), which is a burden for the judge;
b. The requests for information are often unfocused, and are more widely drafted than is appropriate or necessary (contrary to the 2013 Practice Guidance).

134. The 2013 Good Practice Model did not appropriately deal with private law cases, nor did it focus on the kinds of disclosure applications made routinely in private law. It did however encourage local practices to develop. The NPCC makes the observation that as digitisation becomes commonplace throughout the justice system there is a greater chance of increased efficiency. The NPCC Lead police officer ended his response to our consultation with this comment:

> "My observations in relation to this consultation are offered with a view to generating some discussion around police disclosure. Perhaps a review of the existing 2013 Protocol by relevant representatives in order to consider whether there may be any opportunities to reduce duplication and streamline the provision of police information into the family justice system might be beneficial to all parties".

There is a <u>pressing need</u> for a uniform, clear, code for the provision of police disclosure in private law proceedings.

Given that many of the parties to private law litigation are unrepresented, and unable to afford costly fees/expenses of disclosure, there should be an easy and coherent method of providing this disclosure free of charge. Anecdotal evidence from the consultation responses, and from judicial discussions at private law Judicial College training, reveals that there is wide discrepancy of practice nationally as to timeliness and cost of police disclosure. Indeed, we are aware of many DFJ areas which have had to establish different arrangements with its local police forces, and different expectations for timeliness and cost. As we say, there is an urgent need to resolve this issue, which is having an impact on the delays in certain private law cases.

We urge the President of the Family Division to take up the NPCC's offer for a review of this issue.

Subject to the direction of the President of the Family Division, a small sub-group of the PrLWG is willing to take up that invitation without delay.

<u>Rule 16.4 appointments</u>

135. Some of our consultees noted the increase in the number of *rule 16.4* guardians appointed in private law proceedings, and welcomed this. Statistically, Cafcass/Cymru data does indeed show a significant rise. In Wales, for instance Cafcass Cymru told us that there has been an increase of *119%* in *rule 16.4* appointments over the last four years; a similar picture obtains in England. Cafcass/Cymru indicated that they wished to understand the reason behind the rise in these cases, which are often resource intensive and complex.

136. By contrast, one consultee (NAGALRO) commented that "far *too few* children are separately represented …" (emphasis added). They further suggested that *section 8* orders should be added to the list of automatic 'specified proceedings' in *section 41(6)/(6A) Children Act 1989*, so that a child can be routinely added as a party to private law proceedings. This view was not shared by Cafcass/Cymru.

Legal adviser powers

137. Where consultees expressed a view on legal advisers acquiring the power to make a final order at a FHDRA or conciliation appointment, they were supportive of it. It is notable that many of the judiciary were in favour of these powers being extended in this way (note this includes the CFC judges and the COCJ). The *Courts and Tribunals (Judiciary and Functions of Staff) Act 2018* provides a new legal framework for the role of legal advisers (now known as "authorised officers"). The Family Procedure Rules Committee have approved the re-enactment of the current powers and qualification requirements for legal advisers after holding a consultation. The consultation responses were complex and nuanced, with consultees suggesting tighter restrictions of some powers whilst proposing a relaxation of other powers. What became apparent was that the functions delegated to legal advisers had arisen piecemeal over time, in large part before the creation of the single family court. We understand that the FPR Committee has therefore decided to "roll over" the existing delegated powers to meet the legislative timetable, but will be taking time to look carefully at the consultation responses and the underlying rationale for delegation.

The PrLWG has deliberately not made any specific recommendation about legal adviser powers, as this now appears to be under the scrutiny of the Family Procedure Rules Committee.

It was nonetheless interesting to note that of those who commented on the issue of legal advisers making substantive final consent orders after a FHDRA, all (including judges) were supportive.

After Care: Family Assistance Orders

138. It was proposed that Local Authorities should be required to file support plans where courts are considering a Family Assistance Order. Cafcass helpfully observes: "More work needs to be done to better understand the use, effectiveness, and implications of Family Assistance Orders and Child Contact Monitoring Orders. Cafcass figures suggest use is currently low and varies across the country. It would be helpful to establish when and why courts make such orders for post-proceedings involvement, and how effective they are in maintaining court-ordered arrangements, before encouraging their use in the revised CAP." After care through an alliance service also needs further investigation.

The PrLWG considers that more work could/should be done on the incidence and effectiveness of Family Assistance Orders and Child Monitoring Orders.

We recognise that *in some cases*, oversight by the court or Cafcass in the early days of the implementation of an order may reduce the need for one or more party to make fresh application(s).

Pilots

139. Many consultees spoke of the need to 'pilot' initiatives to test whether they really make the difference proposed.

The PrLWG firmly agrees.

140. A form of SSFA is currently being tested in Dorset and Kent; our consultees indicated that this idea would need to be further piloted in other rural and urban areas, in England and separately in Wales. There was a clear view that the 'tracking' of cases requires proper piloting with robust and frank evaluation; the doubts about the effectiveness of tracking need to be addressed head on (ALC). It was proposed that we could usefully involve an Upper Tribunal Judge of the Immigration and Asylum Chamber at the stage of devising any pilot on tracking.

The PrLWG is of course committed to support the piloting of its initiatives in England, and also in Wales where funding sources are different. We very much hope that the Family Justice Board Implementation Group will actively carry our proposals forward.

We discuss piloting in Chapter 3 below ([175]-[181]). In short, we know that we need to identify best practice in each area, articulate a clear aim and purpose of any pilot, and establish a good evaluation strategy. Evaluation is generally expensive and time-consuming; pilots are worthwhile if there is a well-designed and promising intervention to assess. We hope for cross-governmental support for our properly devised pilots.

Training

141. Proper and effective training for professionals and judges featured in a number of areas under consultation. Better training for the DFJs was proposed – in order to achieve a greater degree of homogeneity in delivery of family justice nationally. Better quality training for magistrates was a constant refrain; specifically, the training of magistrates undertaking FHDRAs or conciliation appointments or early Dispute Resolution Appointments on Track 1 cases was encouraged (magistrate consultee). One magistrate remarked that training for the magistrates in family was "poor".

142. Specific training on domestic abuse for all court professionals, specifically judges, is indicated (Women's Aid). There was general support for more training in issues of domestic abuse (particularly coercive control). The Freedom Programme was praised (LiP, mother).

143. Training for judges undertaking conciliation appointments would be no less necessary (Women's Aid). Specific training for the judiciary is required as to the benefits of mediation and other forms of NCDR (solicitor's firm): when it may be appropriate and the benefits of running it alongside court (ibid.). There should be further Judicial College training in conciliation skills for the judiciary (Council of Circuit Judges).

144. Some consultees felt strongly that judges should be more robust to enforce their orders (LiP, father): the 'flabby judicial response' comment of Sir James Munby

and Parker J (children are given very damaging messages about the extent to which authority can be disregarded…) were cited more than once. Other consultees indicated that judges should impose 'tougher consequences' on those who break orders (Only Mums and Only Dads). It was also said that tougher consequences should be visited on those who make false allegations in court (ibid.). Judges should be better trained to deliver these hard messages.

The PrLWG supports regular and effective training of all professionals in the family justice system (including judges and magistrates) in relation to domestic abuse, child development, and court processes and procedures.

Further training of the Judges and Magistrates (and other family justice professionals) will be required to address changes to practice, procedure and / or culture as a result of these recommendations.

Legal Aid Funding

145. A great many consultees commented on the removal of public funding for litigants in the family justice system – a system which is creaking under the weight of unprecedented volumes of cases. The Law Society observed that the *LASPO Act 2012* amendments "have had a devastating impact on the area of private family law and have significantly increased the risk of harm to children and parents in these cases.". There were pleas for "something to be done" to resource the system better (barrister): "we see the absence of legal advice (either through legal aid or as an affordable private option) as an essential barrier to justice for … most litigants in person" (BASW). Many proposed the availability of a one-off initial consultation with a lawyer in order to promote mediation and to spell out their options and legal processes through the court, and/or a revival of the 'Green Form' scheme.

146. In relation to the abolition of legal aid in many private law cases, and the unexpectedly serious consequences of this on the administration of family justice, one DFJ wrote:

> "… the clearest and biggest challenge facing the family justice system in this area is the

> absence of legal aid and the resulting numbers of litigants in person. Parents seeking to navigate the system without the benefit of sound (often basic) legal advice are confused and bewildered by the process and have unrealistic expectations of what can be achieved. Moreover, serious allegations of abuse directly impacting on the safety and welfare of children are being litigated on a daily basis by litigants in person on evidence which is very often incomplete and in a process which cannot be described as either just or fair".

147. One constructive proposal was that the parties be entitled to non-means non-merit public funding where a *section 37* investigation is ordered. We were also made aware that the Law Society had proposed (as part of their response to the *LASPO* review) that a more general but still relatively modest legal aid fee scheme should be re-introduced for private family law, around early legal advice. They had referred to the clear statistical link between receiving advice and resolving a problem.

148. As the material for this report was being compiled, Baroness Hale of Richmond publicly voiced her concern (27.12.19) about the lack of funding in the family justice system in private law. She said this:-

> "I don't think that anybody who has anything to do with the justice system of England and Wales could fail to be concerned about the problems which the reduction in resources in several directions has caused for the system as a whole" …
>
> "It's unreasonable to expect a husband and wife or mother and father who are in crisis in their personal relationship to make their own arrangements without help."
>
> In such family dispute cases "there may be an imbalance in resources because of the lack of access".

> "Most people require legal help at the beginning of cases: "It is that lack of initial advice and help which is a serious difficulty."

The PrLWG recognises the force of these comments, and indeed had to some extent foreshadowed them in its First Report.

It notes that the Government's Response to the *LASPO* review reflects an awareness that that the *LASPO* reforms had been "not entirely successful" in delivering desired changes in behaviour [CP37]. The judges, lawyers and other professionals around our PrLWG table would go further: the lack of access to publicly funded or affordable legal advice in private law has materially increased the number of parents issuing court proceedings who might otherwise have been assisted to resolve their disputes out of court; this increased volume, together with the unrepresented status of the majority of parties themselves, has placed an unsustainable strain[25] on the family justice system.

The family court 'system' and its rules were designed at a time when lawyers were routinely involved in the representation of the parties, and in its operations more generally. This is no longer so. Given the high numbers of LIPs in private law, the system needs an overhaul; it needs to take a different approach. All re-designed processes need to be LIP-friendly.

We should not shrink from seeking to incorporate lawyers and legal advice services into SSFAs as appropriate, recognising the immense value of early legal advice as an important adjunct to NCDR and support for mediation.

We would specifically favour further exploration of the viability of parties receiving non-means non-merit public funding for 'early legal advice' (and/or a 'green form' scheme) or where a *section 37* investigation is ordered, at least for the duration of the investigation.

We further endorse the recommendations of the Civil Justice Council in its February 2020 report on vulnerable parties at [362]/[363]: "The Ministry of Justice should take every opportunity to improve further still its financial support to the Litigant in Person Support Strategy (and through that to Support Through Court and the other key charities within that Strategy). The partners in the Litigant in Person Support Strategy (including Support Through Court) should take every opportunity to continue to work together in a strategic and collaborative way".

[25] Particularly when considered alongside the pressures imposed by public law family applications.

Public education

149. There is widespread acknowledgement of a pressing need for the creation and delivery of a public education campaign about:

a. The harm done to children and adults through conflict post-separation;

b. The availability of resources to assist families to separate in a safer way.

150. The shift to 'no-fault' divorce through the *Divorce, Dissolution and Separation Bill 2020* is a timely opportunity to promote the messages around the harm to families caused by separation conflict (Family Mediation Council). Resources will need to be found and applied to achieving culture change, helping people to understand where court is inappropriate, and to early analysis of those cases coming before the court to make sure they set off in the right direction (Resolution). The use of videos should be considered as education tools for those going through separation (to support diversion to NCDR etc) (Family Mediation Council).

The PrLWG does not purport to have any expertise in the field of 'behaviour change', but it earnestly recommends that a MoJ commissioned behavioural insight team should be engaged to assist in the 'messaging' around reducing the conflict in family separation.

We know (reference [45] Report 1) that the President of the Family Division supports greater awareness (by public health/education campaign) of the harm done within families by the incidence of conflict.

CAP for LiPs

151. The proposal for a 'CAP for LIPs' attracted support from our consultees, in principle; it was suggested that this could be a 'pack' for LiPs including a witness template for them to complete within their proceedings. However, at least one consultee queried whether by simplifying the CAP this may end up causing confusion/problems: "[a]ppeals based on procedural irregularity would be based on the more detailed CAP and, therefore, is there a risk of disadvantaging those unrepresented parties who rely on the easier to understand CAP and may not be aware that the court has not followed the rules" (Rights of Women). We understand

that the Family Procedure Rules Committee has repeatedly discussed how to make the law and procedure more accessible for those representing themselves. It has not re-written the rules in a less formal way because there is a need for legal precision and certainty, and ambiguous drafting would give rise to a new set of problems.

The PrLWG recognises that there is great merit in an easy-to-use guide (or guides) for those representing themselves (which could emphasise that there is a need to read the rules for the precise detail).

There are many good booklets and guides available but one "official" guide would be helpful for those trying to navigate the rules and practice directions.

The PrLWG considers that information about family court (and non-court) processes should be much more generally available (online and in paper form), and presented in an intelligible and easily navigable format for separating families; it should be in Welsh and other languages. We accept that it may be better to provide targeted information to separating parties (including the signposting of services) rather than producing a different version of the CAP, which (we accept on reflection) may lead to confusion.

Digitisation / forms

152. There is much support for digitisation of the court processes, but it is fairly pointed out that a proportion of the population does not have access to digital services. It was further rightly observed that any digitisation must take into account the needs of those with ESOL[26]/sensory impairments and/or learning or literacy needs. There is a plea (Family Court Support Service) for making court orders easier to understand – i.e. in plain language.

153. A number of important discrete points were made:

a. The storing of information in family cases digitally must be secure;

b. Digitisation will provide an opportunity for capture of more information about people's behaviours and the type of issues which they are dealing with;

c. There is a need for simpler orders so that judges can easily and quickly generate these;

[26] English for Speakers of Other Languages

d. Digitised forms can be used to 'nudge' people into NCDR.

154. There is also support for reform of the court forms to prompt litigants to provide the right information at the right time. The court generated documents should avoid the use of jargon. Many litigants and would-be litigants struggle with the court forms. One consultee advised that the digital version of the C100 has been positively received, as using more accessible language, and a more intuitive information-gathering process.

The PrLWG accepts that court forms are often difficult to navigate due to their language and length; the C100 form is 24/26 pages long, with around 8,000 words of questions and guidance, and we feel that it could therefore be off-putting.

The PrLWG supports the digitisation of the processes. The first 'public beta' version of the digital C100 is in many ways impressive but there is still considerable room to improve the journey and the 'messaging' around non-court dispute resolution. At present, there is a somewhat uninspiring invitation to look for other ways of resolving the dispute.

The MIAM is introduced by the question "Check if you have a valid reason for not attending a Mediation Information and Assessment Meeting (MIAM)" which we do not feel is 'messaging' the importance of the MIAM correctly.

We have started discussions with MoJ about this already, and look forward to working with them on improvements.

CHAPTER 2

[19] Discussions beyond the Private Law Working Group

Nuffield Family Justice Observatory: Scoping event

155. The Nuffield Family Justice Observatory (NFJO) hosted a 'scoping event' on 17 November 2019, in partnership with the Cumbria Northumberland Tyne & Wear NHS Foundation Trust (CNTW Trust)[27], to take forward the thinking of the PrLWG in relation to proposals for a Support for Separating Families Alliance (our working title). This was a well-attended and highly inspirational event; it took the form of a participative workshop. The discussions largely confirmed the analysis of the current problems and (in general terms) the solutions offered by the PrLWG in its interim report; those attending emphasised the importance of formulating a robust methodology for change, designed around the needs of children and families, not just professionals. **The clear message to emerge from this scoping event was that there is a pressing need for time and resources to make fundamental change to the arrangements for separating families, rather than tinkering around the edges**.

156. The CNTW Trust encouraged the participants to consider the parallels between the 'drivers for change' in their mental health services in the North East, and the analysis of the PrLWG. In particular, in effecting any change in private law, it was necessary to establish:

- clear design principles in advancing reform;
- a shared (and detailed) understanding of the current situation as a necessary precursor to designing change (if you want to get from Point A to Point B you need to understand Point A);
- engagement of all stakeholders including children and families in the design process;

and

[27] Led by Dr Carole Kaplan who is Director of the Transformation Programme at Cumbria Northumberland, Tyne & Wear NHS Foundation Trust. She has been a consultant in Child and Adolescent Psychiatry and group medical director. She has served on a number of national bodies such as the NHS LA, ABFL and others.

- development of differentiated pathways tailored to the needs of children and families (how they access services, how their needs are assessed and developed into a plan, what package of help they need and how they will get to a point where they don't need the service any more).

157. It was also possible, through discussion, to identify real barriers to change: including the fact that (a) many current services are in competition with each other; (b) current demand and delay is becoming engrained; (c) change will mean reconfiguration of current professionals and services (we need to be open to radical change); and (d) change will need some investment of time, relationships and resources. These discussions were invaluable, and should be continued…

FJYPB: The views of Young People

158. On 20 January 2020, Cafcass hosted a focus group meeting of young people, board members of the FJYPB. The young people shared many interesting insights into the private law process, largely driven from personal experience. They supported the general proposal for the creation of stronger and more coherent support services for families: they rightly felt that parents need support so that they in turn can support the child/ young person ("How can they support us if they don't have support?"). They strongly favoured the development of strategies to resolve conflict and to improve parental communication.

159. They made a number of specific proposals, some of which we outline below;

Specific support for *children* of separating families

- They felt that it would be helpful if an advocate who is independent of the court proceedings could be available for the child during the post-separation period. This person should be someone who the child can trust and can share information with the court if the child wants them to (and easy to access, as with a school counsellor): "Make it less of an investigation and

more someone to support the young person other than getting info out of them".

- This service should be available nationally, and not dependent on local *ad hoc* services (leading to postcode lottery).
- Parents should be required to state on any court application form whether the child has availed him/herself of this service.

Non-court dispute resolution should routinely involve children

- The young people supported child-inclusive mediation; they felt that they should have the opportunity to have their voice heard in relation to any decision which has a direct impact on the child. They may feel ignored if they are not 'heard' when they know things are happening. Family separation may mean that a child is "missing out on things", and they should have an opportunity to say how that affects them.

Children's communication with the court

- They felt that there should be an assumption (or presumption) that every child should have the chance to communicate directly with the court in some way. This could be via Skype, voice note, or letter; it need not be a personal meeting. There should be a duty on the professionals to provide reasons as to why the child has *not* communicated with the court. This may be different for each child in the family.
- Judges should reply to any communication from a child; it was concerning to learn that many judges fail to respond to messages sent from children. They felt that direct feedback from the court about the outcome of the process would be very helpful.
- They expressed the view that the proposal for the child to be seen by the judge should be determined on a case by case basis; cases should be

reviewed (particularly those which are lengthy and complex) to consider whether the child needs to contribute to the proceedings in this way.

Provision of an 'impact statement' of the child to the court

- The young people spoke of the value of a child "impact statement" being made available to the court; they felt that the opportunity to provide such a statement should certainly be offered. This 'impact statement' would be different from a statement of their 'wishes and feelings'; it would be directed to the parents so that the parents can learn from the child what effect the proceedings are having on them: so that they "know how [the separation is] affecting me, know the impact on my life, know the changes it's making in my life, know the pressure it's putting on me".

The assumption of contact

- The young people referred to the pressure which many children feel to see both parents, even when this is not always want the child needs or wants; they felt that pressured contact could have an adverse impact on their mental health, and should therefore be carefully considered before it is ordered. Children should have options as to how often and for how long they see a parent and be involved in creating those options.

160. The young people felt that if it is possible for the proceedings to be resolved at the first hearing, then it could be counter-productive for the child to be directly involved in the process. They felt that the involvement of young people in the court process should be proportionate to the seriousness of the impact of the issues on them.

161. One young person imaginatively suggested that there should be a 'threshold' of seriousness below which private law cases should simply not be allowed in court. This evolved into discussion about national guidance (it was suggested from the President of the Family Division) about the types of case which should be in court

and those which should not (i.e. should be disposed of in non-court dispute resolution). This has transformed into a statement of expectation which (if not met) could/should be visited in some sort of costs penalty for the parent who did not co-operate.

162. The young people felt that proceedings shouldn't be rushed if a delay in the resolution of the case is going to be beneficial to the child. They felt, as we do, that it is better to "get things done right first time"; this would avoid the need for returners. They proposed that there may need to be "an extra appointment" (review) if needed or a meeting with the child to discuss what happened at the end.

163. They wisely and pertinently observed that "All cases are different, which means there isn't one answer".

Family Solutions Working Group

164. The consultation responses confirmed the widespread recognition of a number of failures with the current private law system, starting with the lack of co-ordinated support for separating parents and their children at a local level, the difficulties with the current MIAM system, and problems within the court process itself. There are many calls from those with whom we consulted for a move away from an automatically adversarial system towards more tailored support for parents and children within a 'family solutions' system. This would involve more holistic assessment of the needs of children and families and offer a range of legal, dispute resolution, relationship support, and therapeutic services that would be better integrated with each other, and with court services for those who cannot safely agree arrangements for their children. This type of systemic change will require proper commissioning, governance, funding, pathways, and so on and will take time. The expectation is that this longer-term work will be led under the auspices of the Family Justice Board.

165. A satellite working group has therefore been established (under the aegis of the PrLWG) to consider family solutions generally, including (and specifically) those which fall outside of the court system. Membership of this group is identified at **Annex 1**. The primary focus of the group will be to consider recommendations for families where issues have arisen, and parents are thinking of applying to court. The questions for this group are:

- How can we support parents to address their 'dispute' collaboratively and make sustainable child arrangements going forwards?
- Equally, how can we be sure that those who are vulnerable and need court protection have a fast-track route to court?
- How are the tensions between these objectives managed in a child-focused way to ensure the assessment process works for all?

166. The Family Solutions Working Group have divided their ongoing work into four areas:

a. **Education**; in this area it is looking at the need for public education/culture change, the provision of accessible and clear information and videos for parents (such as the statement of expectation referred to above), and information about the harmful effects of domestic abuse on children; plus clear information for others who will come across the separating family, such as schools, GPs, Citizen's Advice. Some form of education for legal professionals has also been suggested; it was believed that family law solicitors do not generally or routinely receive training on the psychological impact of relationship breakdown on parents and children, and very limited training on NCDR. A better understanding by legal professionals of the wider issues facing clients and children, and the differing types of non-legal support available was thought to be desirable, to promote closer working practices between solicitors, mediators and those providing parenting and therapeutic support.

b. **Better support for children** (this ties in with the comments from the FJYPB – see above); in this area the group is looking at increased child consultation at an earlier stage; it proposes to prepare a summary of 'what's out there' for young people; the provision of accessible and clear information and videos for children and young people; education through schools, mobile apps, youth workers etc;

c. **Greater use of parenting programmes, and reducing parental conflict in appropriate cases**; in this area, it will map what is currently available by way of parenting programmes; promote the co-ordination of existing parenting programmes; consider the need for nationally consistent quality standards; examine the resources for reducing parental conflict;

d. **Assessment meeting**: Various proposals were made in the PrLWG's initial report to 'revitalise MIAMs'; while these were generally supported in the consultation responses, there are clearly a number of important issues which need addressing (see above); these issues are not limited to MIAMs themselves, but as to the nature and support needed for parents thinking of turning to court and the professional skills needed by those who come alongside them for the all-important assessment meeting. Therefore, the Family Solutions Working Group will be clarifying what are the key elements of the assessment meeting, to include consideration of assessment of emotional readiness, of capacity, screening for domestic abuse or other vulnerabilities, parenting support, the full range of suitable dispute resolution options, and possible child consultation. The questions for consideration in this regard are: how can these assessment meetings work safely for all and better within the system? when and how should they be presented and what are the professional skills needed by those who deliver them? The Working Group will also consider methods of fast-track referral to court where this is necessary and without the delay of an assessment meeting.

'Alliances' (SSFA) in Dorset and Kent

167. As we mentioned in our First Report ([53] Report 1), a form of SSFA is developing in Dorset and in Kent. It has been extremely useful to gather important insights into the development of co-ordinated services by these initiatives.

168. **Dorset**: In order to develop a Supporting Separating Families pilot in Dorset, a Working Group has been formed including representatives from local authorities (Early Help and Commissioning), Citizens Advice and the DWP Reducing Parental Conflict Programme, together with the Designated Family Judge. The group is considering who is best placed within the county to oversee implementation of a strategic delivery of services to separating families. Current services are being mapped to identify what is available now and what gaps might need to be filled, both as to type of service and geographically. A working set of core principles for services has been drawn up.

169. The Working Group in Dorset considered it important that, before setting off in any particular direction regarding the structure of services in the county, there should be an understanding of the experience and needs of separating families. To that end, Bournemouth University and Nuffield Family Research Observatory have been approached to undertake research of families in Dorset, including children and young people, about their experience, what is/was and isn't/wasn't helpful and what they would like to see. This will be followed by a professional's conference, informed by the research findings, to seek further views before shaping the service.

170. **Kent**: The Supporting Separating Families Alliance in Kent met on two occasions in the autumn of last year, and is due to meet again in March 2020. The aim of this regional alliance is to provide a more informed and coordinated support network for separating families in Kent. A steering group is in the process of developing a "systems map" to set out the routes open to Kent Families who separate and the resources available at each stage. They are also planning a "listening exercise" involving local separated families. There are also plans to

develop a website with information about, and a link to, organisations in Kent. This is all work in progress. Meanwhile, a local domestic abuse service, which is an Alliance member, has offered to provide multi-disciplinary domestic abuse training to the judiciary, private law social workers, Cafcass and all members of the alliance over the course of the next few months. This is a direct consequence of the connections made by forming a local alliance of services who support separating families and is a good example of the Alliance responding to topical issues at a local level.

CHAPTER 3

[20] Next Steps:

171. So, where do we go from here?

172. As we reflected earlier in this report ([12] above), the consultation responses largely supported the provisional recommendations outlined in our First Report.

173. We have earnestly and anxiously looked for some 'quick fixes' to resolve, or at least relieve, the current and immediate pressures in family court dealing with private law. We know that those who replied to us, and are reading this report, will be looking for instant and ready-made solutions. This remains an anxious and 'live' issue for our group. Currently, and to our regret, we have not identified any clear 'quick fix' solutions which are necessarily going to offer any reprieve, or create immediate system change. Despite the number and the high quality of the consultation responses across a range of professionals, no consultee offered us any clear, easily-deliverable, 'quick fixes' either. What has become increasingly clear through the consultation process and our further discussions is that it will take some time, and some up-front financial and human resourcing, to turn around the long-established patterns of behaviour of private law litigants, and the deeply-engrained 'traditional' practices of the family justice system in dealing with them.

174. We are very concerned about the effect of the pressure of case volumes going through the courts; this is felt on the parties themselves (including but not limited to delay), on the children who are the subject of the proceedings, on the judges with intolerably long lists, on Cafcass/Cymru with its unsustainable caseloads, and on court staff. It is well known that many private law cases give rise to serious issues concerning children: there are times when judges and other professionals in the family justice system (specifically Cafcass/Cymru) feels that it is operating a quasi-secondary child protection service through the private law processes.

Pilots

175. As we earlier indicated (see the text in bold below [27]) we feel that we cannot, indeed should not, make any detailed proposals about change to the family court processes until the MoJ 'Harm in Private Law' Panel has reported. That said, we feel that we should take our work forward, by formulating and developing some specific proposals for pilots, which, subject to the recommendations emerging from the MoJ 'Harm in Private Law' Panel report, we will submit to the Ministry of Justice for approval. We recognise that before any radical change is proposed to the management of cases in the family court nationally, those changes need to be tested in a sample range of courts.

176. We propose that the piloting provisions in the Family Procedure Rules[1] should be deployed to make practice directions which facilitate pilots as appropriate. The PrLWG is happy to work with the Family Procedure Rules Committee, so as to be clear what requires a rule change, amendment to practice direction or guidance (or conceivably even amendment to primary legislation).

177. The success of the pilots will depend upon a clear understanding of the current 'baseline', clear identification of the issues to be tested, and proper evidence-based evaluation. This will involve gathering data on the current situation before each pilot is implemented, careful documentation of the pilot schemes, clear articulation of their objectives, and the identification of measures to assess whether those objectives are achieved. Two aspects of the pilots will need to be examined: (a) a process evaluation to determine whether the pilot intervention is implemented consistently and as intended across each site and what factors might influence that and (b) a robust outcome evaluation to assess the outcomes of the pilot intervention

[1] *Rule 36.2 FPR 2010*: "Practice directions may modify or disapply any provision of these rules — (a) for specified periods; and (b) in relation to proceedings in specified courts, during the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings.

and, where possible, how that compares with any comparison group[28]. Pilots cost money, and we look to government to provide cross-departmental support for our initiatives. Our aim is to generate downstream savings in the justice system and benefits to society as a whole which will more than repay proper investment now.

178. It will be important for pilots to be run in England, and separately in Wales; it has to be noted that issues around funding for pre / out of Court services in Wales are different from those in England.

179. A sub-group of the PrLWG has been formed specifically to consider piloting strategy; this group will 'work up' some greater detail of potential pilots for the MoJ, following the principles set out in [177] above. At this stage, we are clear that we ought to achieve:

a. a coherent approach to designing and testing system change, rather than a serious of disconnected pilots;

b. a logical sequencing of testing options (we may need to see some measures in place before testing others); and

c. the ability to test some 'shorter-term' changes, as well as longer-term reform options.

180. The range of issues considered by the pilots must reflect the fact that the needs / challenges of the separating family are multiple and go beyond the purely legal. While legal processes are necessary, there is increasing awareness of the wider needs of those who turn to the court. Family breakdown requires all professionals (legal, therapeutic, mediator, Cafcass and others) to work alongside each other with increased understanding of what they each offer. The needs of parents and children in the aftermath of family breakdown are never going to be

[28] The PrLWG would like to recommend that Dr. Carole Kaplan and the Cumbria Northumberland Tyne & Wear NHS Foundation Trust (CNTW Trust) offer a consultancy role in the formulation and development of the pilots given their success in achieving system change in the delivery of mental health services in their region. See above ([155]), re the Nuffield scoping event.

met by one professional alone. The PrLWG would wish to encourage any initiatives for closer working practices between family professionals of all types.

181. **It is against this background that we propose that consideration should be given to piloting any or all of the following reforms**:

a. Developing ways to promote all forms of non-court dispute resolution, including revision to the MIAM processes; consideration of a 'Notice to Apply / Pre-action Protocol', with more active consideration / enforcement of pre-proceedings mediation / parenting programmes in appropriate cases, and distinguishing these cases from those that need to be fast-tracked to court.

b. The 'Mediation in Mind' project is a DWP-funded trial of a more coordinated response for families in which families are provided with a funded package of support: legal information, counselling pre and post mediation, mediation (including Child-Inclusive Mediation where relevant), plus communication meetings and group work. The project concludes at the end of March and will then be evaluated, with results expected in June. If the findings are positive, then further testing/piloting of this type of holistic approach could be indicated;

c. Enhancing the effectiveness of parenting education through the SPIP/WT4C programme (i.e. better targeting, changed content, longer duration etc), followed by full evaluation of a revised programme; this could build on the earlier research (Trinder, L., Bryson, C., Coleman, L., Houlston, C., Purdon, S., Reibstein, J. and Smith, L. (2011) *Building bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme (PIP).* London: Department for Education). Proposals for creating more bespoke SPIP/WT4C programmes (outlined above) are also worthy of further analysis.

d. To maximise the benefits of digitisation of the court application – simplifying the language and the form, and providing suitable 'nudges' into non-court dispute resolution along the way[29].

e. Enhanced early social work assessment by Cafcass/Cymru; more front-loading of Cafcass/Cymru's work, with specially trained Cafcass/Cymru officers (probably located in the court, with much closer integration with the judiciary); the *quid pro quo* for this may well be the development and application of consistent thresholds for ordering of *section 7* reports and addendums and *rule 16.4* appointments; much stronger role for Cafcass/Cymru in decision as to whether further work is needed; review/reduce circumstances in which FCAs required to attend hearings in person; consideration of a protocol for safeguarding enquiries in 'returner' cases;

f. To test out differentiated pathways ('tracks') for private law applications proceeding through the family court, according to the type, complexity (including in particular safeguarding issues) and urgency of the case. We believe that tracks would be useful, but in view of the consultation responses, we would like to re-think the specific factors which determine which case goes placed onto which track; we need to ensure that we achieve meaningful differentiation. We emphasise that the proposal for piloting 'tracking' must depend upon the views of the MoJ 'Harm in Private Law Panel' and its recommendations. Provisionally, we consider that there will be value in the following: we need to be sure that 'returners' are properly and quickly considered / 'triaged'; we need to be sure that those cases which could be conciliated or reasonably summarily determined at court are

[29] The digitisation of the C100 application process is still in 'public beta' phase. As we say further below [191], we would like to work with the MoJ development team to enhance this product – we consider that it would be helpful to alter some of the messaging, to change the online 'journey' to some extent, and (importantly) to give many more (and more regular) messages to the applicant (through nudges) about the value of local non-court dispute resolution.

propelled to an early resolution appointment, and that those with safeguarding issues (and/or greater complexity) which need active case managing proceed straight to that type of hearing; we need to consider whether cases in which there has been a breakdown in contact, and/or no current contact, should be prioritised and if so in what way; working with alienation cases which tend to linger in the system[30]. Part and parcel of this will be the piloting is likely to be a slimmed down gatekeeping activity and a more informed in-court 'triage';

g. The development with Cafcass/Cymru of the 'child impact' statement (FJYPB), so that the parents can see (perhaps at an early stage) from the child what 'impact'/effect the *proceedings* are having upon them

h. To reduce the number of returner cases; including the facilitation of more court reviews post-final order.

In each case we accept that <u>it is crucially important that</u> we do not fall into the trap of re-designing family justice interventions on the basis of our own priorities, ignorance of other research and initiative, and mistaken assumptions about the motivations and likely behaviour of parents; hence the need to proceed with care[31].

[30] Referencing Cafcass' Child Impact Assessment Framework.

[31] For earlier evaluations see: Trinder, L., Kellett, J., Connolly, J. & Notley, C. (2006) *Evaluation of the Family Resolutions Pilot Project*. London: Department for Education and Skills. Trinder, L., Bryson, C., Coleman, L., Houlston, C., Purdon, S., Reibstein, J. and Smith, L. (2011) *Building bridges? An evaluation of the costs and effectiveness of the Separated Parents Information Programme (PIP).* London: Department for Education. Liz Trinder, Caroline Bryson, Lester Coleman, Catherine Houlston, Susan Purdon, Janet Reibstein, Leanne Smith and Mariya Stoilova (2014) *Evaluation of the Separated Parent Information Programme Plus (SPIP Plus) Pilot* DfE/Cafcass/Cymru.

Initiatives

182. In the meantime, we felt that it would be helpful to identify a number of schemes, of which we have been made aware through consultation and otherwise, and which have been initiated in individual courts and elsewhere, some with apparent success.

183. **'Affordable' Legal Advice pilot**: In February 2020, members of the PrLWG attended the launch[32] of Resolution's pilot scheme designed to provide affordable legal advice to separating couples by blending online step-by-step guidance from Law for Life's Advicenow website[33] and offline legal advice from a panel of Resolution family lawyers at crucial points in the process. Resolution claims that 'Affordable Advice' delivers affordable fixed fees, price transparency and unbundled legal advice:

> "This encourages early intervention and addresses the obstacles that may have previously prevented service users seeking legal advice such as affordability, price transparency and confidence in choosing a solicitor".

We felt that the self-help guide to child arrangements is well written and comprehensive. While this service will not be available for those on the lowest incomes, it is targeted nonetheless at those on a low to medium income.

184. **Family Court Information Sheet**. We have drafted a significantly *revised version* of the 'Family Court information' sheet ("What the Family Court expects from Parents"[34]) which we consider could well be provided to all private law parties; this includes the Family Justice Young People's Board's 'Top Tips' for Separated Parents. This document is appended as **Annex 2** to this report. Significantly, in light

[32] https://resolution.org.uk/news/affordable-advice-pilot-scheme-launched/

[33] It was said that 80% of those visiting the Advicenow website are LiPs or prospective LiPs

[34] This was originally generated and adopted on the Midland Circuit; the information on this sheet could also usefully be presented as a 'nudge' on the digital system to all those who are completing an on-line application.

of the discussion with the FJYPB members, we felt that it was appropriate to include the following rubric:

> ***"Judges and magistrates hope that parties can resolve (with the assistance, if required, of a mediator or other facilitator) an issue over the precise amount of time spent with the other parent where there is no safeguarding or domestic abuse issue, and no issue over where the child should live.***
>
> If the judge/magistrate takes the view that no, or insufficient, steps had been taken to resolve such an issue out of court, this could be considered by the court when (a) deciding on the issue itself, and/or (b) reviewing and determining whether a contribution should be made to the cost of the court process and/or the costs of the participation of the other party."

185. **Review Hearings**: We consider (as we have discussed above [125] and the textbox following [130]) that there is a possible case for suspending strict adherence to *para.15.3* of the *CAP*; we contemplate a wider use of 'review' hearings in those cases where the court considers that a review would be *in the interests of the child(ren)*. This would be intended to allow longer judicial oversight of the implementation of an order when it is deemed to be in the interests of the child for this to happen. It is *possible* that, by deploying this simple strategy, the number of returning parties will reduce. We have proposed that this is formally piloted but it may be felt useful for courts to adopt this change principally in those cases which would benefit from a little more of a steer and/or judicial monitoring as the order is implemented (particularly where, for example, a 'spend time' with order is expected to develop over a period of weeks/months post 'final' order).

186. **FHDRA listings**: Subject to local resources, and the number of cases progressing to a FHDRA[35], it may be possible to arrange for Cafcass/Cymru to provide an 'extra' Caseworker on FHDRA days to work with those families who, it is identified, may be able to agree an outcome without a *section 7* report being needed. A number of our consultees observed that the large number of FHDRAs listed on any given day reduced the effectiveness of the appointment. It may well be thought that no more than 5 cases are listed on FHDRA days so that each case benefits from a meaningful amount of time.

187. We have heard of successful schemes for back-to-back listing of FHDRAs reducing waiting times for these hearings significantly. This seems to be working to good effect in Luton and Bedfordshire, in Dorset, (there is a similar but not identical scheme in Devon) and in Berkshire, where (as referred above) a form of "informed allocation" is in operation[36]; in Dorset, for example, four courts are run on a FHDRA day [DJ, 2 Magistrates, 1 legal adviser court] to increase flexibility of working and ease of re-allocation. We would wish, however, to urge caution that the quality of engagement by Cafcass and the judiciary at these important hearings is not compromised in an effort to cut through ever increasing quantities of cases.

188. **FHDRA: Young Persons Days**. We learned about a scheme in Surrey known as 'Young Person's Days' (Guildford). In this model, children of 9 years and older meet a Cafcass officer in the morning, and the parents and Cafcass attend court in the afternoon. The reports from young people and professionals are sufficiently positive to suggest that such a scheme should be subject to formal evaluation.

[35] On current resources, Cafcass/Cymru would realistically only be able to offer extra caseworkers on FHDRA days, if there were fewer cases progressing to a FHDRA.

[36] DJ consultee: "cases are allocated between the magistrates and district bench after the safeguarding letters/reports have been provided by Cafcass and therefore at a time when the allocating team can properly assess the complexity of the case and direct it to the appropriate tier of the family court rather than doing so based upon the very limited (and often partial) information contained in the C 100"

189. **Dispute Resolution Appointment ('DRA')**. At the DRA, the writer of the *section 7* report could be on the speakerphone if required. If one party has issues with the report, the author of the report will be asked to comment / elucidate / explain. This should prevent cases being listed for trial solely so that the section 7 author can be cross-examined. [Currently will only involve Cafcass/Cymru not SS]

190. **Post-Fact-Finding**: We consider that in the right case (i.e. where it is reasonably apparent that welfare enquiries are going to be necessary) *section 7* reports could/should more routinely be ordered at the point at which the fact-finding hearing is set up in order that some work can be done pre-fact-find and/or the Family Court Advisor can 'get to work' straight after the fact-find in order to reduce delay. Alternatively, and subject of course, and importantly, to the views and recommendations of the MoJ 'Harm in Private Law Cases' panel, it *may* be possible to contemplate that following a fact-finding hearing, a written copy or note of findings will be sent to Cafcass/Cymru who could respond within 21 days with a 'pathway' for the future. This would avoid ordering a *section 7* report in every fact-finding case with the consequent sequential 3-month delay. These pathways may propose arrangements for contact intervention (supervised contact) or risk assessment (where available/appropriate) or a *section 7* report. The case will be listed in 28 days for the necessary Orders/directions to be made (if required).

191. **Forms**: We will continue work closely with MoJ now in relation to the online form C100, to improve its messaging and the application journey. We propose that MoJ may wish to consider working up a proposed **Form C101** for the respondent to complete in place of the C7 Acknowledgement of Service. We propose that the revised form should require the respondent to give more detailed information than is currently expected: (a) relationship with the child, (b) outline response to the application (c) any known safeguarding issues (d) what efforts have been made (if any) to resolve the dispute out of court. The more information available to the 'triage' judge, the more effective the 'triaging' is likely to be. It may be worth

looking into adapting a form of 'Respondent's Questionnaire' (which is used with apparently good effect in relation to Online Civil Money Claims).

192. **Police disclosure:** Problems with police disclosure need to be resolved. We need to find ways of reducing unwelcome delay and difficulty in managing private law fact-finding, and this is one obvious area where we can make a difference. Subject to the direction of the President of the Family Division, and as earlier indicated, a small sub-group of the PrLWG is willing to take up the invitation of the NPCC (see [134] above) to embark on a review of the existing NPCC 2013 Protocol in order to streamline (and address the funding arrangements for) the provision of police information/disclosure in private law cases into the family justice system. This is urgent work. We are conscious that very considerable difficulties are encountered by courts up and down the country in obtaining of police disclosure in private law proceedings in a timely way.

[21] Conclusion

193. We invite the President of the Family Division, and the Secretary of State for Justice, to lend their support to the key proposal of this paper – namely, work towards fundamental and systemic change of private family law dispute resolution. We are clear that this will inevitably take time, and investment, but we believe that it will be worth it. We are as sure as we can be that downstream savings will be made, across government departments, and that society will benefit from better ways to manage family separation. It is for this reason that we recommend that the longer-term thinking starts now.

194. We would like to offer input from the PrLWG (either as a group or some of its existing members) in the designing and development of the reforms outlined here.

195. We further hope that the Family Justice Board Implementation Group will support the implementation of the recommendations set out here, and throw its weight in the near future behind the development and instigation of the 'pilots'.

196. As we earlier indicated (see [4], [26] and [30] above), the formulation of our final views, and the preparation of our third report, will now necessarily follow the publication of the MoJ Panel Report on Harm in Private Law, and will plainly take account of its content and recommendations. By the time of our third report, we also hope to be in a position to have identified further initiatives to relieve the current stresses on the courts, and to provide a progress report on the development of the piloting strategy of our proposed reforms.

Mr Justice Cobb

For and on behalf of the **Private Law Working Group**

12 March 2020.

Annex 1:

Family Solutions Working Group

Helen Adam – Mediator

Karen Barham – Mediator

Caroline Bowden – Mediator, FMC board member

Charlotte Bradley – Solicitor, Mediator

Brian Cantwell – Family Consultant

Elizabeth Coe – National Association of Child Contact Centres

Adrienne Cox – Mediator, FMSB board member

HHJ Martin Dancey – Designated Family Judge for Dorset

Jan Ewing – University of Exeter

Claire Field – Parenting Apart Programme

Martin Hau – Ministry of Justice

Dickie James – Staffordshire Women's Aid

Patrick Myers – DWP Reducing Parental Conflict Programme

Mary Mullin – National Youth Advocacy Service

Beverley Sayers – Mediator, FMC board member

Anna Sinclair – CAFCASS Cymru

Judith Timms – National Youth Advocacy Service

Teresa Williams - CAFCASS

Annex 2:

What the Family Court Expects from Parents and Carers

What the Family Courts expect from Parents and Carers

Are you a parent or a carer thinking of asking for a court order, or responding to an application for a court order?

Before going any further…. we encourage you to listen to what **children** say in circumstances where their families are separating[37]….

- Remember I have the right to see both of my parents as long as it is safe for me.
- I can have a relationship with the partner of my other parent without this changing my love for you.
- Try to have good communication with my other parent because it will help me. Speak to them nicely.
- Keep my other parent updated about my needs and what is happening for me. I might need their help too.
- Don't say bad things about my other parent, especially if I can hear. Remember I can often overhear your conversations or see your social media comments.
- Remember it is ok for me to love and have a relationship with my other parent.
- Don't make me feel guilty about spending time with my other parent.
- Don't make permanent decisions about my life based on how you feel at the moment. Think about how I feel now and how I might feel in the future. My wishes might change.
- Be open to change, be flexible and compromise when agreeing arrangements for me.
- Its ok with me if my parents don't do things exactly the same. You are both different and that's alright with me.
- Don't be possessive over me and the things that belong to me. Make it easy for me to take the things I need when I spend time with my other parent, such as

[37] FJYPB Top Tips for Parents who separate

schoolwork, PE kits, clothes, books, games, phone etc. Let me choose what I want to take with me.

- Keep me informed about any changes to my arrangements.
- Try not to feel hurt if I choose to spend time with my friends instead of seeing you. I am growing up!
- Remember that important dates (birthdays, celebrations, parents evening, sports day etc are special to you, me and my other parent. I may want to share my time on those dates with each of you.
- Work out between you and my other parent who is responsible for the extra things I need, such as new school shoes and uniform, school trips, dinner money and the cost of my hobbies or after school activities. I don't want to be involved in this.
- Remember that I don't expect you or my other parent to be perfect, so I don't want you to expect my other parent to be perfect either. Accept mistakes and move on.
- Make sure I am not left out of key family events. Please compromise with my other parent so I can join in.
- Please don't stop me having contact with extended family members who are important to me. Ask me how I feel about them. Don't assume my feelings are the same as yours.
- Don't use me as a messenger between you and my other parent.
- Don't use my relationship with my other parent against me, or them.
- Don't ask me to lie to my other parent or other family members.
- Don't ask me to lie to professionals., or to say what you want me to say.
- Remember that I might want something different to my brother or sister.
- Don't worry about how others see you or what they think. I am what matters.

Will you please follow the following guidelines?-

The court asks you to think about these things first:

● As parents, you share responsibility for your children; try to have a good communication with

Your child needs to be able to:

● Understand what is happening to their family. It is your job to explain.

● Have a loving, open relationship with both

each other because it will help your children;

● Even when you separate it is important that you try to work together provided it is safe to do;

● Try to agree the arrangements for your child. If talking to each other is difficult, ask for help. This help could be from a neutral family member or friend, a relationship counsellor like Relate, a mediator or family lawyer.

● If you cannot agree you can ask the court to decide for you. The law says that the court must always put the welfare of our child first. Don't forget though that what you want may not be what the court thinks will be the best thing for your child.

● It may well be that court-imposed orders work less well for you as a family than agreements made between you as parents.

The court therefore encourages you to:

● Support your child to have a good relationship with each parent and with other people who are important to them, where it is safe to do so;

● Arrange for your child to spend time with each of you where it is safe to do so.

● Remember, the law presumes that the involvement of each parent will be good for the child, unless your or your child's safety is at risk. How much involvement each parent should have depends on the individual child.

● Please remember that the law treats child support and contact as two different things. Please do not stop contact because of problems with child support and please do not stop child support because of problems with contact.

● Judges and magistrates hope that parties can resolve (with the assistance, if required, of a parents. It is your job to encourage this, provided it is safe to do so. You may be separating from each other, but your child needs to know that he/she is not being separated from either of you.

● Show love, affection and respect for both parents.

Your child should not be made to:

● Blame him/herself for the breakup.

● Hear you running down the other parent (or anyone else involved).

● Turn against the other parent because they think that is what you want.

● Feel unsafe or scared by a parent or experience one of their parents abusing their other parent.

You can help your child:

● Think about how he or she feels about the breakup.

● Listen to what your child has to say:

● About how he/she is feeling

● About what he/she thinks of any arrangements that have to be made.

● Try to agree arrangements for your child (including contact) with the other parent.

● Talk to the other parent openly, honestly and respectfully.

● Explain your point of view to the other parent so that you don't misunderstand each other.

● Draw up a plan as to how you will share responsibility for your child so long as it is safe to do so.

mediator or other facilitator) an issue over the precise amount of time spent with the other parent where there is no safeguarding or domestic abuse issue, and no issue over where the child should live. If the judge/magistrate takes the view that no, or insufficient, steps had been taken to resolve such an issue out of court, this could be considered by the court when (a) deciding on the issue itself, and/or (b) reviewing and determining whether a contribution should be made to the cost of the court process and/or the costs of the participation of the other party.

If a court order is made, you must do what the order says. If

- something changes to make the order unworkable
- you are worried about your child's or your own safety in following the order
- your child refuses to follow the order

you should try and agree changes with your other parent, or (if necessary) apply to the court to have the order changed.

● When you have different ideas from the other parent, do not talk about it when the children are with you.

You should talk to your children about what is happening in their family in a way that is suitable to their age

- If they are old enough, they should be asked how they feel and what they would like to happen, but you should never force them to take sides, reject the other parent or make decisions instead of you
- You should provide the support your children need to adjust to your separation

If you want to change agreed arrangements (such as where the child lives or goes to school):

● Make sure the other parent agrees.

● If you cannot agree, get some help. Again, this could be from a neutral family member or friend, a relationship counsellor like Relate, a mediator or family lawyer.

● If you still cannot agree, apply to the court.