



**Family Justice Council  
Minutes of the meeting held on 21st January 2013  
Royal Courts of Justice, London**

**Present:**

**Mark Andrews, Justices' Clerk**  
**Annabel Burns, DfE**  
**Bruce Clark, Cafcass**  
**Martyn Cook, Family Magistrate**  
**Phil Douglas, Deputy Director, Judicial Office**  
**Nick Goodwin, MoJ**  
**District Judge Rachel Karp**  
**Bridget Lindley, Consumer Focus, Parent Representative**  
**Caroline Little, Family Solicitor, Public Law**  
**HHJ Katharine Marshall**  
**The Right Honourable Lord Justice Munby, Chair**  
**Dr. Heather Payne, Paediatrician**  
**Alison Russell QC, Family Silk**  
**Malek Wan Daud, Family Barrister**  
**Alex Clark, Secretary to the Council**  
**Tessa Fyffe, Assistant Secretary to the Council**

**1. Announcements and Apologies:**

**Professor Anne Barlow, Academic**  
**Sue Berelowitz, Office of the Children's Commissioner for England**  
**District Judge (Magistrates' Court) Nicholas Crichton CBE**  
**Dr. Elizabeth Gillett, Clinical Psychologist**  
**Fiona Green, Cafcass**  
**The Honourable Mrs. Justice Parker**  
**Beverley Sayers, Family Mediator**  
**The Right Honourable Lord Justice Thorpe**

**2. Preliminary words from the President and key FJC work priorities.**

The President outlined his priorities as follows:

- Research digest – a loose-leaf digest with approximately 1000 pages, with appropriate extracts arranged thematically or by subject. This could be for day to day use by practitioners. Members were invited to consider an overall strategy for this.

- Experts – cracking the expert issue is crucial as there is simply unacceptable delay. The length of reports is a problem which could be addressed in part by looking at the structure of reports, and the helpful use of appendices. A 70 or 80- page report is unhelpful. Another part of the Experts agenda is the applicability of the Law Commission report '*Expert Evidence in Criminal Proceedings in England and Wales*' to family proceedings. This report was published when the President was Chair of the Law Commission. It is the President's view that a good proportion of those recommendations could be applied to family law proceedings and the FJC could be the appropriate vehicle for taking this forward.
- Transparency – one part of the debate is likely to lead to a system with some greater access by journalists to expert's reports and case proceedings. The format and arrangement of expert reports will fit into this agenda. The President hopes to take this forward with the MoJ.
- Law Commission work on Ancillary Relief – The Law Commission is looking for an appropriate agency to put out guidance on their behalf and is considering the FJC. This will fit in with the current agenda and is something for the Council to discuss.

The President wished to highlight these priorities for the future, although his main focus is on experts.

Heather Payne responded by welcoming the President's focus on cracking the issue on experts. The working group's aim was to seek consensus as this is a system change and it requires some sort of professional consensus approach to drive the changes forward. She expressed how helpful it was to have a fresh view from the President and confirmed that he had the support of all members. She commented that the quality improvement models in the Health Service could be applied to the court system. The President noted that there is a large amount of criminal court work which is being moved away from lawyers and being dealt with by regulatory means.

DJ Karp noted that in civil cases, permission was given for written expert evidence, in the first instance. Parties then have to justify pre-trial, why oral evidence is required. This two-stage process might help in shortening hearings in family cases. The President agreed that the Council should look into all areas on experts that are causing delay.

HHJ Marshall noted that there have been some recent robust judgements from the Court of Appeal. The President agreed and noted that he would be handing down a judgement which will give robust messages on case management (In the Matter of TG (A Child) [2013] EWCA Civ 5).

Bridget Lindley called for a considered approach to the need and role of experts as there will be a large number of friends and family carers who will not have access to legal aid.

### **3. Minutes of the last meeting and matters arising**

The minutes were approved without amendment.

Alison Russell noted that the upcoming Symposium at the Tavistock Clinic covers the same issues as the last FJC debate, namely mothers subject to successive removal of infants in care proceedings '*Debating a prevention strategy for a national problem*'.

This may be something to consider in terms of areas of research to be commissioned or signposted for a research digest.

Annabel Burns noted that the Children and Families Bill would be published in early February.

Bridget Lindley noted that there are no mechanisms for accessing the voice of the child on the Family Justice Board (FJB). Nick Goodwin has raised this with the FJB and it was thought appropriate for the FJC to feed in such issues to the FJB. Bridget Lindley was of the view that this would not be an appropriate mechanism and asked that an alternative be considered. The President invited Bridget Lindley to address her concerns to him in writing.

#### **4. Civil Justice Council Report on Access to Justice for SRLs – update**

Following the MR's event on the 30 November 2012, Nick Goodwin has been working with the MR's team on implementation of the CJC report's recommendations. The web application is now live; there is improved public access to information with the Family Mediation Council; ongoing discussions with listing officers at court houses; and discussions with RCJ/PSU over increased funding.

Alison Russell noted that the working group are going to advise on guidance for SRLs. She will be meeting with Mr. Justice Hickinbottom at the end of the week to discuss what can be worked on together. The MR asked Mr. Justice Hickinbottom to lead the judiciary's response to the SRL problem.

The President made the distinction between SRLs through choice and those who have no choice. It is important to note that their needs differ greatly.

HHJ Marshall noted that the situation is becoming urgent. The judiciary are becoming concerned. Some of these issues are not answerable. Alison Russell has this in mind with writing the guidance.

The President agreed that this raises the concern over how much McKenzie friends can contribute. There is also a need to have those relevant cases being listed before the President. These problems require national solutions, so it should be dealt with at a senior level.

DJ Karp explained that the working group had looked at the Advice Now materials for civil cases, and the structure and pitch is very good. It would be good to decide on the legal text of the material and then make a strong pitch for funding and commission this.

Martyn Cook stressed the importance of factoring in the FPCs to the production of this material. The President noted the importance of focusing on good materials across the entire Single Family Court. There is a need to grapple with the McKenzie friend issue, and courts may need them to have an increased speaking role in assisting SRLs. The Free Representation Unit is a very helpful and useful resource. The FRU option must be explored further.

Alison Russell noted that work with students on domestic violence cases would be worth exploring. Caroline Little noted that some McKenzie friends are charging for their work, and some even charge above the legal aid rates. The President urged members not to get too involved in this given the risk of legislating for another level of lawyer. Martyn Cook asked if there was a mechanism for monitoring the impact though Mark Andrews could not see how this would be feasible before the 1<sup>st</sup> April. Bruce Clark suggested that data could be obtained by recording whether the applicant or respondent was represented at the start of proceedings as this could be done in real time from April onwards. Malek Wan Daud noted that there is likely to be an increase in direct access for the Bar. The expectations from the Bar on direct access are very different – it would be useful to find out if we are actually saving money. Nick Goodwin noted that the MoJ had commissioned research from Exeter

University on the impact post-April, though he did not have the methodology with him. The President hoped that there will be post-legislative scrutiny, and Nick Goodwin agreed that the Government will be eager to evaluate the new provisions.

The President explained that the Court of Appeal probably has the largest proportion of SRLs and the system is in chaos. The SRLs turn up with large bundles of paper in plastic bags and it doesn't work unless there is input from HMCTS staff. Otherwise in the Court of Appeal, the judges have to go through papers out of court, putting papers in some sort of order on a treasury tag before even starting the case. Members agreed that the numbers of court staff had fallen. The President was clear that he would not push his judges to work out of court past a certain point. There is a lack of understanding of the Government agencies of the amount of out of court work that judges have to do. It is interesting to note that the immigration UKBA cases are the cases where papers are presented well, in stark contrast to the family cases.

Bridget Lindley noted that mediators in Cambridge have a rota system when there is a section 8 day at court. Perhaps something similar could be considered? The President asked whether the Bar could consider a similar system offering cover. Malek Wan Daud informed members that QEB chambers were providing cover at the PRFD, but this had not been taken up much by parties. The President noted that this would be one of many challenges on which the Bar would have to work. Malek Wan Daud considered that it may well be that the Bar will need to come to terms with the fact there will be shrinkage in the Bar, and perhaps barristers will have to consider alternative working patterns such as working fewer days in the week or part-time.

The President thanked Alison Russell and Nick Goodwin for continuing to take forward the work on SRLs.

## **5. DfE Introductory overview of expectation documents**

Annabel Burns reported that some of the expectation documents had been received from the agencies in draft. These will be sent to the FJC and there will be a full consultation in February. The Official Solicitor's draft is not yet available. The full documents will be sent to the President, before full consultation, with a view to publication in April. The President understood that Resolution was supportive, but the ALC and the Bar still had concerns. Annabel Burns stressed the importance of asking the right questions. Mark Andrews commented that the documents would need to be modified in time to reflect the new private law pathway. HHJ Marshall asked about the expectation documents for the police. Annabel Burns noted that there are separate negotiations underway with the police. Sir Mark Hedley is looking into this. Heather Payne asked about expectation documents for health professions. The President hoped that a standard form of order could be used for the health professions and the police. It may take the form of President's guidance.

## **6. FJC working groups update**

### **1. Experts**

#### *a) BPS/FJC- expert's standards for psychologists*

Dr. Elizabeth Gillett is leading a joint working group with the British Psychological Society (BPS) with the aim of creating Practice Guidance for Psychological Experts in family proceedings. This will include specific guidance on standards and competence, workforce development and quality assurance, primarily for use by legal professionals. The group had the first meeting on 3<sup>rd</sup> December 2012 and having agreed terms of reference, are aiming to have a full working draft by September 2013 for the Dartington Interdisciplinary Conference. The group has three sub-working groups namely Workforce Development; Standards and Competencies and Quality Assurance.

### *b) Standards for Expert Witnesses*

Dr. Heather Payne chairs this group, which has prepared a draft consultation document, 'President's Standards for Expert Witnesses in the Family Court of England and Wales'. The standards consultation is due to be circulated by MoJ in January 2013 for a 3 month period.

### **2. Pre-proceedings**

The group, led by Beverley Sayers and Fiona Green, last met in November and are working on a number of areas including:

- Drafting a standard tool, to be used by all practitioners involved in the delivery of dispute resolution services, for initial screening of risk issues and domestic violence.
- Working with Cafcass and DfE, in producing the final version of the new Parenting Agreement
- Working with MoJ and DfE on identifying and highlighting the barriers to accessing services pre-court, and finalise a route map flow diagram through available dispute resolution services pre- Private Law proceedings.

### **3. Self-representing litigants (SRLs)**

This area of work is led by Alison Russell QC, and is divided into three strands namely:  
a) drafting guidance for the judiciary and judicial college on how best to handle SRLs in family cases

- b) working with RCJ/PSU to draft text material for a 'going to a family court' type guide, to be completed by a specialist group such as AdviceNow, for use by SRLs
- c) Providing advice to FJB/MoJ on proposals to mitigate the impact of an increase in SRLs in private law cases after April 2013.

### **4. Self-representing litigants in financial remedy cases**

This working group is led by Mrs. Justice Parker, and after an initial meeting in October, the group has agreed to conduct most business, especially where it involves drafting documents, by email. The group is drafting text material which will form the basis of the Audio-Visual material on Form E, First Appointment, the FDR, the trial, appeals and general case management.

### **5. Workforce Development**

This group, to be led by Dr. Gillett, is awaiting information from MoJ.

Discussion on Expert's guidance:

The President pointed out that he read the draft guidance document over the weekend, and stated that it could not be published as President's guidance in its present form. He would like to be certain that this fits in with the statutes, practice direction and rules. He will need to obtain a clear overview of this. An example in para 8, where a number of key points are listed, the President queried whether these were standards for expert witnesses or legal professionals; as parts of the document appear to be telling solicitors what to do, which was not appropriate. The President was not prepared to underwrite guidance that he was not happy with. He asked whether anyone had considered this document in line with all the practice directions, guidance, and rules.

Heather Payne thanked the President for his input and guidance. She asked for guidance as to whether the consultation could be presented on the principles or the questions, and whether this should be done by MoJ or the President's private office. The President highlighted paras 5, 6, and 9 as accurate summaries of material in the Practice Direction; however he queried the necessity of constant repetition of the Practice Direction.

Heather Payne explained that the guidance is intended to change the behaviour of practitioners as they are presently not keeping to the Practice Direction or the Rules. The President noted that it was his responsibility to urge compliance. Mark Andrews understood that the Council were trying to solve the practical problem about the quality

and supply of experts. Heather Payne urged the President to decide on the appropriate way forward with the planned consultation. She believed that changes could be made to the guidance document in its current form, to reflect the President's concerns. The President made it clear that it is not appropriate for Government to be consulting on the content of President's guidance. HHJ Marshall asked whether another document was needed to outline the content of the Practice Direction, like a 'how to comply with the PD' document. Heather Payne noted that the aim was to limit the document to manageable chunks. The President noted that the issue of those experts who provide DNA and hair-strand testing is not covered in the standards document. Mark Andrews noted that this is an area where the courts have been slow to recognise this group of people as 'experts'. HHJ Marshall explained that she treats these reports and laboratory tests as 'experts' when making directions, because you can get a report and ask for further information on the evidence.

The President asked Nick Goodwin to advise on the next steps for the consultation timetable in light of this discussion. Nick Goodwin agreed to take the President's views back to MoJ to have the necessary discussions. Mark Andrews reminded members that this situation arose as the MoJ offered assistance by being a vehicle for the consultation and the FJC accepted. The President stated that this was an unfortunate consequence of not having a President chairing the FJC for so long. Annabel Burns noted the President's useful comments which she and Nick Goodwin will take away and discuss and then report back. Caroline Little noted that she had always raised the argument that the practitioners should be brought into this process as they usually conduct the exercise of finding an expert for their cases. Also, non-practitioners may not appreciate that due to practitioners being in court, the person who carries out the search for the research or expert online is often the secretary or someone in a similar role. Mark Andrews stressed the importance of the need for the guidance to be aimed at people across the board. The President was concerned that if the guidance is too lengthy, the message would be lost as busy practitioners will not have time to read it. Heather Payne outlined that this was part of a developmental process – not just the document, but part of a much larger process. Mark Andrews stressed that the standards document deals with the 'who' in considering which experts you should select. HHJ Marshall questioned whether it would assist if the standards paper could be re-drafted as an expectation document. The President noted that in reference to experts, the words 'should' and 'would' appear instead of the words 'must' or 'shall'. The President stressed that drafting issues such as these will need to be addressed in the revised document.

The President asked Heather Payne to take this forward, making the appropriate changes, liaising with Nick Goodwin and Annabel Burns. The President asked Nick Goodwin to consider constitutionally how this fits into and with the consultation pace. He would also like careful consideration to be given to whom the standards document should be addressed. The President stated that he would also look at this independently.

## **7. Research**

7a) Bridget Lindley noted that it would be useful to have the outcomes of interventions which will engage families in the pre-proceedings stage. This would include Family Group Conferences. The President agreed on the importance of front-loading at the pre-proceedings stage. Martyn Cook stressed the importance of effective dissemination of information to magistrates. He used the recent Child Development Guidance as an example, as in his opinion, this has not reached the majority of magistrates. HHJ Marshall suggested that it may become necessary for magistrates to sign up to receive information electronically. The President would like Alex Clark to take this on, with Nick Goodwin and Annabel Burns at an official level to gain a better picture of what information is circulated to magistrates, and how.

Bridget Lindley noted that it is important to include the ADCS in this process as the same information will need to feed into social workers and lawyers. Annabel Burns noted that they would use their established contacts with the ADCS.

7b) Mark Andrews noted that Professor Hunter's research highlighted the issue of a lack of understanding of risk-assessments in fact-finding hearings. HHJ Marshall agreed that there is a broad misunderstanding of risk-assessments in a legal context. DJ Karp noted that what an expert understands to be a risk-assessment differs from the legal understanding of a risk-assessment. It is clear that lawyers and scientists do not think about things in the same way. Heather Payne noted that it is often difficult when professionals use the same term to mean different things. The President was of the view that this was a classic example of where the FJC can work well. He asked Alison Russell and Heather Payne to work on this and take it forward. He asked them to discuss with Tessa Fyffe and select the appropriate membership for a small working group.

7c) Members were of the view that the Fortin, Hunt and Scanlan research on contact was very interesting reading for practitioners. Martyn Cook was concerned about accessing the voice of the child in private law cases when parents appear in person. DJ Karp urged the use of a wishes and feelings report as per the private law pathway. Some members considered whether there was a similar position with colleagues in Wales. This led to a discussion about appropriate Welsh government representation on the Council. The President would like the Council to consider seeking direct representation from the Welsh Government.

#### **8. Dartington Conference: Access to Justice - update**

Alison Russell prepared the draft programme on behalf of the planning committee. The President asked for members to send all comments to Alison Russell by email. Alex Clark noted that he was awaiting a decision from MoJ on the application for funding. He understood that further investigations were being made of alternative venues that may have a reduced cost, despite this exercise having been undertaken by the agent Calders and a decision being made that it was the best value for money among their registered providers. The President noted the importance of striking a balance between cost and perception and asked Alex Clark to keep members informed.

#### **9. FPRC Consultation**

It was agreed that the Council would not support the proposals in the consultation. Some members noted that such an undertaking would mean that all such cases are referred to the Official Solicitor. The President asked Alex Clark to prepare a letter in response to the FPRC noting the Council's grave concerns about the proposal, which will not enhance the welfare of the child. Members could not conceive of any situation where this undertaking would be taken up. The President noted that the appropriate control mechanism is case management.

#### **10. Any other business**

No matters were raised.