A REVIEW OF
THE CHILD ARRANGEMENTS PROGRAMME
[PD12B FPR 2010]

REPORT TO THE PRESIDENT OF THE FAMILY DIVISION

PRIVATE LAW WORKING GROUP

[June 2019]

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Introduction

1. The Child Arrangements Programme (the 'CAP') was introduced as a Practice Direction (to complement *Part 12* of the *Family Procedure Rules 2010*: PD12B) on 22 April 2014, replacing its predecessor, the 'Private Law Programme'. This private law initiative, commissioned by the then President of the Family Division, Sir James Munby P, coincided with the creation of the single Family Court.

2. As we conduct this review of the CAP, five years on, it is instructive to be reminded of the views of the earlier-constituted Private Law Working Group, when it presented the draft CAP to the President of the Family Division in November 2013[1]:

> "In considering private law issues, and in formulating the CAP, we have tried to prioritise the most pressing demands on private law dispute resolution. In this respect, the PLWG has sought to devise a programme which:
> (a) Places a greater emphasis on mediation and out-of-court dispute resolution services for resolving low risk disputes concerning children;
> (b) Identifies key resources for litigants to access such services currently;
> (c) Re-inforces the (likely) imperative for most Applicants to attend a MIAM (*Clause 10* of the *Children & Families Bill 2013*) before issuing an application for a court order;
> (d) Preserves and builds on the aspects of the existing private law procedure which are believed to work well;
> (e) Adapts the arrangements for resolution of private law cases to fit the new model for family justice in The Family Court;
> (f) Ensures that private law cases are allocated to the right tier of judge;
> (g) Meets the needs of a system populated by a high number of Litigants in Person ('LiPs')." (emphasis by underlining added).

[1] Report to the PFD, November 2013, #3.

3. The consensus of the Private Law Working Group (2019) is that the underlying principles of the CAP remain essentially sound; there has been no meaningful challenge to the key principle (set out in para.1.3 CAP) that negotiated agreements between adults generally enhance long-term co-operation, and are better for the child concerned. However, while in many respects the CAP has been successful as a case management tool for private law cases conducted in the Family Court, it is apparent that some of the key objectives underpinning the CAP and outlined in the November 2013 report (set out at [2] above and underlined) have not been fully met. This is attributable in large part to the fact that the context in which the CAP now operates has changed significantly in the last five years. The predictions of case volumes, and the impact of unrepresented litigants on the court system, while reasonably well-understood in 2013, had nonetheless been under-estimated.

4. Anthony Douglas CBE[2] encapsulated the changes over the five years in his recent article in Family Law ([2019] Fam Law 45), under the title: 'The Child Arrangements Programme':

> "The rise and rise of litigants in person has changed the roles of family court professionals and the court process. The underlying level of demand has risen by 23% since 2014 and court has become the default option for too many unhappy separators. The exemption process is too often bypassed, so that applications which should be dealt with in mediation or early help are being passported through to court without robust gatekeeping. Finally, better and bigger data is helping us to know how the system is operating and who it is reaching. … the issues are more serious and they affect more children than we knew to be the case in 2014."

> "**Court has become the default option for too many unhappy separators**" (Anthony Douglas)

5. A further consensus view of this group is that the *Legal Aid Sentencing and Punishment of Offenders Act 2012* ('*LASPO*'), limiting the availability of publicly funded representation to only certain specially designated categories of litigant, has

[2] Anthony Douglas CBE was from 2004 until March 2019 the Chief Executive of Cafcass. He was a member of the Family Justice Board, the Adoption and Special Guardianship Leadership Board and he is a Visiting Fellow of the Universities of East Anglia and Plymouth.

probably had one of the most significant impacts in the field of private law. Most private law cases typically involve at least one litigant in person. It is the experience of the Judges[3], social work practitioners and legal practitioners in this group that hearings involving LiPs take longer.

6. In late-2018, the President of the Family Division proposed a review of the CAP and its operation. The Private Law Working Group was re-convened, representing all relevant agencies involved in private family law. Its general remit was to consider what, if any, revisions could or should appropriately be made to *PD12B Family Procedure Rules 2010* ('*FPR 2010*') / CAP, in order to enhance its effectiveness and accessibility. Some of the members of the 2019 Private Law Working Group had previously served as members of the 2013/2014 Private Law Working Group. Its terms of reference are at **Annex 1**. The composition of the group is set out in **Annex 2**. The PLWG met as a group on five occasions[4]. Sub-groups, convened by one or more members, did much of the legwork in between our main 'plenary' meetings. Discussion in our meetings has invariably been animated and engaged.

7. We have been conscious of the heavy responsibility of reviewing this important instrument, and of the implications of our recommendations. We have been much assisted by looking at a number of relevant initiatives in the field of family law, and in related fields, both historical and current[5], though we are aware that we have not surveyed the entire landscape or anything approaching it. We knew that we should not tinker with the CAP for the sake of it. We have also been alive to the fact that the 'wheel' has already been invented (probably several times over) in relation to private law dispute-resolution, and that we should be extremely careful before

[3] In this report, where we have used the term 'Judge(s)' we include Magistrate(s), unless the context indicates otherwise, or there is specific provision otherwise.

[4] 10 January, 18 February, 11 March, 8 April, 29 April 2019

[5] We were interested, for example, in the model of the Croydon Alliance which is a Health and Care Partnership for transformation. The partners are Croydon Council, Croydon Age UK, Croydon CCG, NHS Trust, GP Collaborative and Foundation Trust. They signed their Alliance agreement in April 2017 and are under the banner "One Croydon Outcomes Based Commissioning". Croydon have recognised that this is a long-term project which takes time to build and embed. After a one-year trial, they have signed up to a ten-year project. We also noted the Ministry of Justice's 'Out of Court Pathway', produced in 2016; we consider that the recommendations in that report, and the structure of non-court activity described within it, coincide very closely with our own thinking

believing, let alone announcing, that we have successfully re-invented it. We further acknowledge that it is not in anyone's interests to introduce change for change's sake, and that we should not be *overly* ambitious in our objectives. We hope that in making these recommendations in this report we have not fallen foul of these good intentions.

8. This report sets out some context for our deliberations, and our objectives. We have embedded our **recommendations** in **bold** in the body of the report; they are 'headlined' at [36] below, and collected in one place at **Annex 3**. We presented a draft of this report to the President's Conference in May 2019; we have made a very few changes to the report in light of the comments received there. We would welcome wider consultation on our proposals which are, in the circumstances, interim and provisional. We have proposed some consultation questions which we have appended as **Annex 12**.

9. Before looking at the detail of our proposals, the Private Law Working Group would like to highlight its strongly-held view that it would be far better for children and families in a significant proportion of cases if the consequences of relationship breakdown could be better supported, and disputes resolved, away from the Family Court. Research consistently shows that parental conflict, often aggravated by court process, is harmful to children[6]. By our terms of reference[7], we were encouraged to consider a radical re-structuring of the existing private law system (on a longer timescale) if this is what the Working Group considered necessary. We do believe that this radical option should be further explored. Indeed, **we recommend that consideration should be given to ensuring that the most effective range of out-of-court family resolution services are available to support those experiencing family breakdown in England and Wales, drawing on the wealth of existing research and experience in this area, both domestically and internationally. A national non-court dispute resolution ('Family Solutions') service should be actively considered. This**

[6] **NB** We have also noted the DWP 'Reducing Parental Conflict Programme' announced in February 2019 with the intention of helping local authorities and their partners to integrate services and approaches to reduce parental conflict into their local services for families. The programme is supported by a useful video.
[7] See Annex 1

is particularly pressing given the volume of cases currently passing through the courts.

10. This broader objective appears to correspond, we believe, with the Government's stance on 'Reducing Family Conflict', as evidenced by its recent reply to the consultation on 'no-fault' divorce (April 2019)[8]. We draw specifically from the Lord Chancellor's Foreword to that document, in which he advanced the view (which we share) that separating parties should be allowed:

> "… to resolve matters in a constructive way which enables everyone to rebuild their lives after. What the law should not do is entrench misery…
>
> The ability to have a positive relationship after separation is particularly crucial for parents, as children's outcomes are improved by cooperative parenting. Supporting better outcomes for children therefore requires removing those elements within the legal process for divorce which can fuel long-lasting conflict between parents.
>
> The Government firmly believes in the importance of the family. Even in the extremely trying circumstances of breakup, we want the law to offer families what stability it can".

"**Children's outcomes are improved by cooperative parenting…. The Government firmly believes in the importance of the family**".

(Lord Chancellor: April 2019)

A remodelled 'Family Solutions' regime will take time to create, financial investment[9], and Government support, and we recognise should be developed only with the benefit of evidence-based research, closely monitored piloting and careful planning. Radical reform of the way society deals with children disputes following family breakdown away from the court would only be likely to be effective if

[8] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793642/reducing-family-conflict-consult-response.pdf

[9] We believe that the long-term financial benefits of a significantly non-court based regime would soon offset initial investment. NOTE that the MoJ 'Out of Court' Pathway identifies cost savings as one of its benefits

supported by a public education campaign[10]; cultural change would be necessary in order to deliver it.

11. We consider this significant wider objective to be beyond the scope of our immediate work; we do not have a mandate for such a root and branch reform at this stage. We therefore have focused on what we believe to be realistically deliverable to achieve measurable and beneficial change for children, litigants, the judges, lawyers, social work practitioners and the courts, within the scope of family proceedings, including pre-court. Even with this more modest objective, we were all struck by the scale of the challenge.

Current Challenges in Private Law

12. We are conscious that a great deal has been written about the current state of family justice in the post-LASPO era, where (it is now widely acknowledged) the changes made by the legal aid reforms were "not entirely successful" in delivering the desired changes in behaviour[11] of those who seek the resolution of a dispute in private family law. There has been much well-informed and evidence-based research undertaken by academics, practitioners, representative bodies, advice providers, charities etc, to which we have had regard.

> "**Parental conflict, often aggravated by court process, is harmful to children**" [9]

13. It has not been our intention, indeed it would not be realistic, to marshal that extensive research evidence in formulating our views in this paper[12]. Our work has

[10] Child harm through destructive family breakdown is amenable to a campaign of public awareness…. Consider the successes of the following campaigns: 'Clunk, Click every trip', 'Stop, look, listen', 'Think before you drink and drive'.

[11] See Post-Implementation Review of Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO), published 7 February 2019. CP37. Conclusions from #1138 et seq.

[12] We have had the benefit of Professor Rosemary Hunter's engagement with this group, we are conscious of the relevant research identified in the MoJ Family Justice Research Bulletin (2018), and have also had the considerable benefit of access to the recently published 'After the Act: Access to Family Justice after LASPO' (Maclean & Eekelaar) (2019)

been largely fashioned by the experience of those around the table in the Working Group who toil daily in the family justice system (in the field of private law) and who were able readily to identify a number of key factors contributing to the current stresses in the system:

- Case volumes in private law increasing;
- Preponderance of unrepresented litigants;
- Insufficient information about the court system for litigants, leading to flawed or unrealistic expectations about what it can or should do for them;
- Insufficient support for litigants to encourage take-up of Non-Court Dispute Resolution ('NCDR');
- Incoherent connections between support services, and poor-quality signposting of services;
- A high incidence of cases returning to court, suggesting (among other possibilities): (a) reliance/dependence on the court in the absence of other affordable options, (b) continued lack of trust of NCDR, (c) that the original dispute between the parties was more far-reaching/fundamental than had been indicated by the issue previously resolved by the court, (d) vexatious litigation behaviour and systems abuse.

14. It is easy to illustrate at least the first two of these points (above) by reference to available data.

15. Since the CAP was first implemented in 2014, there has been an overall **increase of 29%** in new private law applications in England; and **an increase of 27%** in Wales[13]. This represents a total increase in volume across England and Wales of 36,514 to 47,195 between 2014/15 and 2018/19. Although the total volume of applications now is lower than in 2013/4 when there was an artificially high peak anticipating the introduction of LASPO, the trajectory continues worryingly upward.

16. The stretched resources of the court are exacerbated by the fact that there has been an increase of work for Cafcass *within* each case, on a number of measures[14], aggravated by significant pressures on Cafcass/Cymru from public law caseloads. The overall volume of *section 7* reports ordered in England and Wales has increased

[13] See Tables 1-3
[14] See Tables 4-7

from 19,490 in 2014/15 to 22,017 in 2018/19, **an increase of 12%**. The overall volume of *rule 16.4* appointments in England and Wales has increased from 1,919 to 2,806 over the same 4-year period, **an increase of 46%**.

17. In the last 2-3 years (with slightly different patterns in England and Wales – see charts 8 and 9) the increases in both *section 7* ordering and *rule 16.4* appointments have outstripped the baseline increases in new private law applications (see again charts 8 and 9).

18. Interestingly, there is significant local variation in the patterns of *section 7* ordering and *rule 16.4* appointments, which could benefit from investigation and clarification.

    a. 2018/19 saw an **8.6% increase** in *section 7* requests nationally from 2017/18 but this varied locally from a decrease of -11.3% in Derby, to a +35% increase in Blackburn/Lancaster;

    b. Similarly, during the same period the demand for *rule 16.4 FPR 2010* appointments **grew by 13.5%** nationally but this varied locally from a decrease of -38% in Brighton, to an increase of +173% in Worcester.

    Families lack an obvious, visible and authoritative place to find information and support relating to family relationship problems… [24]

    c. It would be useful to know whether there is also variation by judicial tier (this information is not available within Cafcass/Cymru).

19. Research conducted in 2017 by Cafcass showed that **30%** of private law applications involving Cafcass returned to court. This was a one-off case file review and therefore data is not able to show whether and how this has changed over time. The Cafcass data suggest one or more of the following explanations[15]:

[15] Per Cafcass' Case File review, and see also Trinder et al, *Enforcing contact orders: Problem-solving or punishment?* (2013)

a. Parents remaining in conflict; (this might suggest that there were underlying problems between the parties which remained unresolved despite a court order; i.e. the order made did not address these problems);

b. Safeguarding concerns;

c. A change in life circumstances;

d. Children's wishes and feelings.

20. As we completed work on the draft of this report in early May 2019, newly published data revealed that Cafcass had received 4,166 new private law cases during March 2019 alone. This is **18.2% (640 cases) higher** than March 2018 and the highest March on record. February 2019 saw the highest number of receipts in the month of February for six years. These figures demonstrate the steep increase in demand on Cafcass in the last two months. Prior to that, new private law applications had been **3.8% higher** than in the same period in the previous year. There is an overall increase in open private law cases held by Cafcass currently (England data only). In the last year alone, there has **been an 18% increase** in open cases (March 2019 compared to March 2018).

21. Legal Aid data confirms the experience of the Private Law Working Group court users about the drop in Mediation Information and Assessment Meeting ('MIAM') take-up, and the high numbers of Litigants in Person in the courts. The number of public funded certificates in Private Law which were closed in 2012-2013 was c.45,000; in 2017-2018 the figure was c.10,300 (i.e. **23%** of the pre-LASPO figure).

22. The number of publicly funded MIAMs dropped from 31,336 to 13,348 between 2011/12 and 2015/16 (**a fall of 54.4%**)[16]. The number of publicly funded MIAMs fell by **66%** between 2012-13 and 2017-18. This to some extent is reflected by the lower number of court applications in that period as a result of LASPO, but it also reflected the withdrawal of the significant referral route to MIAM (i.e. solicitors).

[16] Legal Aid Statistics: England and Wales December 2016: Tables 7.1 and 7.2

23. It was widely hoped (indeed expected in some quarters) as LASPO was implemented that a requirement for applicants to participate in a MIAM would lead more families into mediation, and other forms of NCDR. Alongside the decline in publicly funded MIAMs (see [22] above), mediation starts also declined after the introduction of LASPO. From 2012-13 to 2017-18 the number of publicly funded mediation starts **fell 54%**. The introduction of the statutory MIAM in April 2014 led to an initial rise but has since declined. There are no current statistics for privately funded MIAMs or mediation; **the FMC is asked to provide this data**.

24. The incoherence of support services is also well-documented; it is the experience of the group, backed by research[17] that families lack an obvious, visible and authoritative place to find information and support relating to family relationship problems, and the majority of the information available is generic. Support is difficult to navigate with few clear entry points which can provide holistic assessments of need and appropriate referrals. Research supports the creation of a more co-ordinated and effective system of support within an integrated and coordinated multi-disciplinary provision[18].

25. It is in this context that Anthony Douglas, in his published article, suggested five areas for this group to review[19]:

    a. Greater use of NCDR: Cafcass's own research and analysis reveals that "at least a quarter of applications feature no child protection or welfare concerns"; he added (and the Private Law Working Group agrees):

> "Quite simply, these families should not be in court. The court process risks escalating conflict to a point where it becomes harmful. While one role of the court is to

"Quite simply, these families should not be in court. The court process risks escalating conflict to a point where it becomes harmful". [Anthony Douglas] [25]

[17] Marjoribanks, D. (2015) Breaking up is hard to do: assisting families to navigate family relationship support before, during, and after separation

[18] Marjoribanks (2015) (above)

[19] [2019] Fam Law 45

> arbitrate where parents are not able to reach agreement, we need to guard against the court becoming the 'third parent', thereby interfering with the proper discharge of parental responsibility."

b. The need to reduce the large numbers of cases returning to court: he alludes to "the one third of applicants who return to court within a year of a final order being made. This is far too high a number";

c. More creative case management, and better use of the FHDRA including: "a menu of options about how the case can be taken forward between the FHDRA and the final hearing, rather than a *section 7* report being automatically ordered. We would like to see more Cafcass/Cymru time used for direct work with children and their families and less time spent on reporting to court";

d. Clearer interim arrangements, including more focused use of fact-finding hearings, and clearer rationale for interim contact suspensions so that the impact on the child is evaluated more conscientiously;

e. More efficient and effective use of resources: for instance: "25% of the Cafcass/Cymru operational budget goes on pre-FHDRA work, including the production of safeguarding letters. This is a lot of resource going into families, many of whom we think should not be in court in the first place." He pleads for better use of the resources so that the work of one Cafcass/Cymru officer is not repeated several times (safeguarding letter, *section 7* report, investigation when the case returns).

26. His article concludes with the suggestion that the reconvening of the Private Law Working Group provides:

> "… a golden opportunity to update and strengthen the Child Arrangements Programme for the next 5 years. The relentless rise in the numbers of children needing help makes further change a necessity rather than an optional extra".

27. During the currency of our work, the President of the Family Division delivered the keynote speech at the Resolution (Solicitors) Conference (5 April 2019) ('the Resolution Keynote Speech'), under the title: "Living in Interesting Times". The speech contained the following important message which, we feel, benefits from repetition here:

> "… The task of identifying, developing and then funding a better way to achieve good enough co-parenting between separated parents is a matter for society in general, policymakers, government and, ultimately Parliament; it is not for the judges. My purpose today is, therefore, simply to call out what is going on in society's name, and at the state's expense, and invite others to take up that call."

The voice of the child

28. Ensuring that the ascertainable wishes and feelings of children and young people are 'loud and clear' in Family Court proceedings (which, after all, are about them), and in ways which are appropriate and realistic, is and always has been a key feature of the CAP. Para.4.4 of the CAP requires that: "Children should be involved, to the extent which is appropriate given their age and level of understanding, in making arrangements which affect them."

The objective in hearing the voice of the child is to strengthen the *child*'s world in the court environment by encouraging the judge to see each case through the eyes and experiences of the child… [29]

29. The objective in hearing the voice of the child is to strengthen the existence of the *child*'s world in the court environment, by encouraging the judge to see each case through the eyes and experiences of the child, and reducing factors that worry, disturb or harm them, or fail to promote their welfare in other ways.

30. In line with the principle that 'one size' does **not '**fit all' in family court process (see what we say about 'tracking' of cases below), finding appropriate ways to involve children and young people in their proceedings and to amplify their voice, also requires a range of responses to promote children's involvement in a way that:

- Is developmentally appropriate and enabling;
- Arises at the right stage of the process (Cafcass/Cymru do not undertake direct work with children until safeguarding checks have been completed, and only where it is warranted by the level of risk identified);
- Avoids putting undue responsibility on the child for the outcome;
- Based on informed consent with a right of non-participation.

31. There is a range of methods currently in use:

- **Child-inclusive mediation**: There is now a greater awareness of child-inclusive mediation within the mediation community. Following on from the recommendations in the Voice of the Child report (2014[20]), the Family Mediation Standards Board have required all mediators to attend child-inclusive mediation refresher training, or a free-standing information training day on child-inclusive mediation
- MyCourtroom simulation: Cafcass, in collaboration with the University of Kent, has developed an interactive family courtroom simulation designed to give children and families going through the family courts a chance to experience a family court scenario. Cafcass Cymru alternatively offer an explanation about court within their online informational video.
- **How it Looks to Me App**: Cafcass has launched, internally, an app for direct work with children. Practitioners have received training to support children and young people to engage with the app to record their wishes and feelings, including writing a communication to the judge. Cafcass Cymru are also interested in pursuing this approach in future.
- Cafcass' direct work tools: A suite of tools used by Cafcass and Cafcass Cymru practitioners for engaging with children.
- **Cafcass Cymru Child and Adolescent Welfare Checklist (CAWAC) *for children over 5 years old**: a research-based direct work tool developed for Cafcass Cymru, allows children and young people to safely explore and express their

[20] Working Group led by Professor Jan Walker. MoJ.

feelings where parents are in conflict. The tool assesses psychological and emotional wellbeing which allows for a more objective, child centred report to be produced for the court.

- **Letters and drawings to the judge**: Children and young people are offered the opportunity to write a letter or complete a drawing for the judge by Cafcass and Cafcass Cymru.
- **Reports and Child Impact Analysis to court**: Cafcass and Cafcass Cymru ensure that every child's voice is heard through the report presented to the court.
- **The Family Justice Young Peoples Board Top Tips**
- **Meeting the judge:** where the child or young person chooses to do so, and this can be facilitated.
- **Child friendly judgements:** Cafcass and Cafcass Cymru would be interested to work with the judiciary and HMCTS so that a separate written judgement, expressed in language appropriate for the individual child concerned, can be routinely provided in suitable cases.

32. The common principle in making use of any (or all) of the above options is to ensure that there is sensitive and meaningful engagement and reporting of the child's voice. The complexities of achieving this should be considered, avoiding the potentially counterproductive impact of burdening them with inappropriate levels of decision-making or obtaining their views in a partial or shallow manner.

33. The view of the Private Law Working Group is that for cases which are settled at the first hearing, there is no automatic imperative to seek the child's wishes and feelings independently, as parents and carers in these cases will have been assessed as being an appropriate conduit for these at this point and it is important to strike a balance between giving children a direct voice and minimising potential harmful impact of court proceedings.

34. Best practice methods for obtaining and including the views of children and young people evolve and can be continuously improved. **We are keen to ensure that any**

future pilots agreed as an outcome to this work of the Private Law Working Group should include this as a standard component.

Reform of the CAP: Objectives and Recommendations

35. Faced with operating in this significantly challenging environment, the Private Law Working Group sought in its early deliberations, within its terms of reference, to identify its key ***objectives***; these are discussed in the balance of the report (below). In doing so, we are conscious that "there is a long and distinguished tradition within family law of designing systems and interventions that do not take account of the behaviour of potential litigants"[21] and we have sought to take this on board. There is much about the private law system which could be said to benefit from review; we tried to concentrate on the more important and pressing factors.

36. We also set out our ***recommendations*** below **in bold**. The recommendations are then collated in **Annex 3**. In summary we advocate for:

    a. The formation (possibly under the sponsorship of Local Family Justice Boards) of local alliances of support services for separating families, with the potential for a national alliance;

    b. Revitalising and strengthening of the MIAM to make it a more effective activity and thereby encourage all forms of NCDR in the right case;

    c. Allocation of private law cases onto case management 'tracks' to achieve more effective process through the court;

    d. Associated with (c), triaging of applications in the courts when more information is known about the case, and when opportunities have been given for parents to attend SPIP/WT4C or similar;

    e. Encouragement for judge-led or Cafcass/Cymru-led in-court conciliation;

[21] Professor Liz Trinder (University of Exeter): "Reforming Family Justice: is the only way Essex?" [2016] Fam Law 827.

f. Bespoke arrangements for returner/enforcement cases, to achieve swift resolution before the same judge;

g. Maximising digitisation of process for the benefit of all court users.

Non-Court Dispute Resolution (NCDR) and Support: Supporting Separating Families Alliance (SSFA)

37. The issues underlying parental conflict and family breakdown are invariably varied and complex. In very many cases the court is not the best place to resolve such conflict. As the President of the Family Division said in his Resolution Keynote speech (5.4.19):

> "Cases of straightforward relationship dysfunction, not involving abuse or a need for protection, should not need to come before a magistrate or judge for resolution. Indeed, because, for this group of cases, the issues concern matters of emotion and psychology, a court is most unlikely to be the best place to achieve any lasting resolution. The court, with its clunky legalistic approach will undoubtedly, in the end, produce a result which may then have to be imposed upon the parents, but, I would suggest, for this substantial group of cases, the court process is not one that either adds value to the welfare of the child or is in any way beneficial for the parents. In some cases, it may simply provide a pitch and a referee for them to play out further rounds in their adult contest."

"The court process is not one that either adds value to the welfare of the child or is in any way beneficial for the parents". (President of the Family Division)

38. Quite apart from the commonly "clunky legalistic approach" of the court referred to by the President in the passage above ([37]), it must be acknowledged that those experiencing family breakdown often bear "a variety of personal and circumstantial disadvantages" which create "additional challenges" for them as LIPs in attempting to represent themselves in family proceedings. Many LiPs have *multiple* vulnerabilities:

> "These vulnerabilities make it more difficult for LIPs to understand proceedings, to respond in a timely manner, to advocate for themselves, to focus on the proceedings, or to give them priority in the face of other serious problems they were experiencing"[22].

These identified factors underline the inappropriateness of court as the forum for resolving their disputes. They also underline the care which needs to be taken when offering out-of-court services for these people to ensure that the right service is made available which is sensitive to the impossibly complex needs of many families. Cases involving domestic abuse are obviously firmly in this category (see [89]-[94] above).

39. At present there is no consistent or clear route to engage parents with interventions which may be more suited to the family's needs than Court. Mediation is one option; but there is a range of other local services and support networks which may assist a family in breakdown.

40. In the 2013 Report to the President of the Family Division, the Private Law Working Group materially said this:

> "At present, there is little if any co-ordination of dispute resolution services. The available resources do not appear to harmonise, and the range of services can appear confusing to those seeking help. We consider that the public would be better served by an integrated suite of resources to offer effective dispute resolution. The co-ordination could be effectively achieved via the wwweb, with information being available also in hard-copy format (available in courts, doctor's surgeries, community centres etc), and all written in language which is clear and comprehensible to LiPs"[23]

> "We consider that it would be most helpful if an official, authoritative, Government 'hub / portal' could be created to offer this co-ordination and steer parties to dispute resolution services appropriate to their needs, away from the Courts. This should be widely promoted and easily accessible for all separating

[22] Litigants in Person in Private Family Proceedings (MoJ): (2014): Trinder, Hunter, Miles and others.

[23] #17 2013 Report.

parents; it should be designed to interact to all questions relating to the consequences of the family break-up. Specifically, this site should be constructed so as to:

- Focus parents on considering the needs of their children first; emphasising that a child will benefit from a continued relationship with both parents where this is safe;
- Support parents to resolve their disputes independently;
- Direct / signpost them to find available support to resolve all disputes outside of court (not only in relation to living arrangements, but also finance and associated issues); and
- Help them to understand the court process and how to navigate this, where an application to court is unavoidable"[24]

We are convinced that the public would surely be better served by more 'joined-up' collaboration between services providers to offer effective dispute resolution [41]

"The need to act in this respect is urgent. We are concerned to note that family mediation referrals declined steeply after April 2013, and continue to fall. Although the number of couples attending MIAMs increased prior to April 2013, the numbers attending MIAMs have fallen significantly since that date. We understand that, as a consequence, many mediation services nationally are fading away, and some mediators have ceased to operate altogether. There was a significant increase in the number of private law applications pre-April 2013; this upward trend continued after April 2013, though (so we are told) not at such a significant rate in recent weeks.

As we say, it is vital that steps are taken now to reverse these worrying trends."[25]

41. We are concerned that these clear messages from the 2013 Report have not yet converted into results. We spoke then of there being little co-ordination of dispute resolution services; there *remains* little if any co-ordination of dispute resolution

[24] #19 2013 Report.

[25] #20/21 2013 Report.

services, and we are convinced that the public would surely be better served by more 'joined-up' collaboration between services providers to offer effective dispute resolution. **We recommend that Local Family Justice Boards should now seize the initiative in creating local alliances of services (or developing existing alliances) to provide integrated support for all families experiencing separation**.

42. It is possible that these local alliances could in due course develop into a single national alliance for England and Wales, to help coordinate and foster the activity of the local alliances and potentially form part of the work of the national Family Justice Board. **We propose that these alliances should be given the working title for present purposes as the 'Supporting Separating Families Alliance' (SSFA)**.

43. The **rationale** for creating a network of alliances (or indeed a national alliance) is threefold:

    a. First, evidence suggests there is a high level of unmet need, because existing free or affordable resources and services to tackle family conflict are both embryonic and fragmented; provision of support for families is patchy;

    b. Second, the result of (a) is that an increasing number of families are turning to the courts, which are not always the best places to address the underlying problems, and which potentially further escalates conflict and its impact on children; and

    c. Third, we need to improve mechanisms for translating and integrating learning about effective approaches into variable local delivery systems.

44. The key **objectives** of such an alliance or alliances should be:

    a. To provide early information and help to families experiencing conflict so that they better understand the impact on children, strengthen their co-parenting skills, and facilitate access to therapeutic services for children who may be experiencing trauma;

    b. To provide families, where there are safeguarding concerns, with information and signposting to support services in parallel with the court;

c. To encourage more families, where it is safe and appropriate for them to do so, to use services and resources outside of the court arena to support them through family breakdown, and help them to reach agreements; early intervention is key to mitigating the worst effects of breakdown;

d. To identify the specific needs of cases involving domestic abuse at an earlier stage, with better support and safety provided, with potentially better information provided to Cafcass and the court when/if these cases come before the court; we consider that the introduction of earlier support will benefit those families at risk of serious domestic abuse;

e. To refer families to wider advice and support services – including those available digitally; and then to deliver a tailored package of dispute resolution services – including, where appropriate, co-parenting support – as part of court-directed activities (with scope for discussions down the line whether this could potentially be commissioned and funded by Cafcass);

f. To ensure a consistent and coherent framework of standards for co-parenting services and the workforce delivering them.

45. It is vital that collectively we should promote consistent **policy development and public understanding** of the unmet needs of separating families, emphasising why that matters to children, to outcomes for families, and to society. This will include clarifying the role of co-parenting and the need to strengthen co-parenting skills, as well as the context in which co-parenting occurs, and the circumstances in which it is appropriate. This may involve a number of targeted **public education campaigns** with the objective of seeking behaviour change; the views of the President from his Resolution Keynote speech (5.4.19) resonate in this regard:

> "There is a need for wider public education about how parents should separate in a child-focused way; and the damage to children of parenting disputes post-separation. For significant reform to be successful, any public

education programme would need to be effective"[26]

There have already been multiple general public education campaigns promoting mediation and co-operative post-separation parenting. None of them have worked either effectively or at all[27]. We really need to target the 20-25% who go to court but *should* be able to resolve matters without court intervention. We were advised about the 'Mapping Paths to Family Justice' research which gives a good idea of why this group do not resolve matters out of court and end up making applications (i.e. lack of emotional readiness, lack of trust, or lack of incentive to negotiate, and fundamental norm conflicts between parents: Barlow et al, [see footnote 43 below], at pp.168-171 and chapter 8), but we need better, focused research on how to help them.

46. It is hoped/expected that such an alliance or alliances will contribute to the **development of evidence** on how best to support separating families in ways which improve children's outcomes. It is further hoped/expected that the local alliances will assist in the development of a wider (England and Wales) co-parenting strategy over a longer (perhaps, ten-year) term. This would include setting any delivery measures or directing any piloting that may be necessary. The alliance could assist in the creation of a blueprint for an 'integrated local offer' which sets out the spectrum of services which are needed to support families experiencing relationship breakdown, and how a model for national co-ordinated delivery between those services could be achieved. **Family judges also need to be aware of local support services to give them a broader understanding of the NCDR available and to widen options for activity directions**.

[26] This is a view which the President of the FD had earlier expressed at the ALC Conference in October 2018 when he referred to the need for a change to "the public perception and expectation of what a court can, and more importantly what it cannot, do to resolve parental conflict"

[27] Hunter, 'Inducing Demand for Family Mediation: Before and After LASPO' (2017) 39 *Journal of Social Welfare and Family Law* 189

47. The alliances should cover England, and potentially also Wales[28]. It is intended that the alliances will meet the needs of families for a more joined-up and coordinated package of support services to minimise the harm to children, including those at risk of separation[29]. While initially these alliances might be focused on families involved in the family justice system (including their journey pre and post-court), alliances should ideally support a 'public health' approach in which *all* families are helped to prevent conflict escalating.

48. As indicated above (see [41]) we recommend that, initially, local alliances should be formed, probably under the sponsorship of the Local Family Justice Boards. We envisage that initially these local initiatives will map existing provision; develop a locally tailored blueprint which improves coordination and referral routes between existing services and identifies/addresses any gaps; and will monitor delivery and effectiveness by collecting consistent data on local need, cost and availability of local services, and on take-up and outcomes. It would be sensible, in this endeavour, for the Boards to liaise with Police & Crime Commissioners, and local Clinical Commissioning Groups.

49. **These local alliances will require a co-ordinating committee, which could or should be chaired by the chair of the Local Family Justice Board or a nominated representative**. We envisage that these alliances will be supported by the local Designated Family Judge. Lessons can be learned from related initiatives including the Family Drug and Alcohol Court, and DWP's Reducing Parental Conflict programme (both England).

[28] Potentially an alliance could cover Wales, although as 'pre-court' services are devolved in Wales, there would need to be further discussions involving the Welsh Government to consider whether and how that could be taken forward.

[29] Academic research underpins the need for such an alliance. For example. (a) The work of Prof Jan Walker has long demonstrated that family breakdown is not primarily a legal issue. There may be some legal issues to be resolved but the breakdown of a parent relationship raises a host of other issues for which the family may need support. (b) The work of Professor Gordon Harold has shown that long-term and unresolved inter-parental conflict is harmful to children, and an assessment of the social and emotional wellbeing of children in private law cases in Wales has indicated high levels of concern. (c) Wider work drawing on the Civil and Social Justice Panel Survey demonstrates the 'clustering' of justiciable problems and the need for integrated legal and other support to address them.

50. Local alliances will ideally need to operate under a common framework which would facilitate the benefits of local solutions which are responsive to local need, promote the sharing of learning to avoid the reinvention of wheels, and minimise the downsides of a resultant postcode lottery in access to services or the quality of the offer. Further work is needed to consider which aspects of that common framework are best developed at regional or national levels; existing national agencies – including those represented on the Family Justice Board, which we suggest would be the obvious place for national oversight – will need to play an active role in delivery

51. We consider that the regional co-ordinating committees would compile a comprehensive list of all the locally available support services, under separate categories. The list should include a short but clear explanation of what each resource is, who it is for, and any cost implications. **Additionally, in due course, thought may be given to appointing a single operational co-ordinator of each SSFA**.

52. Information about the services available under an SSFA will need to be publicised widely. We would welcome appropriate Government support (financial and practical) in delivering the message. Messages should be presented in a consistent and mutually reinforcing way, ideally drawing on behavioural insight and social marketing techniques. We have given some preliminary thought to this and suggest that the information may usefully be disseminated:

    a. In a leaflet or hard-copy form visible in buildings to which the public have regular (doctors' surgeries, post offices, libraries, banks, A&E departments) and third sector offices (PSU, Citizen's Advice); this is particularly important for the digitally excluded;

    b. Online through a central 'gov.uk' online hub; this was a specific recommendation of the Family Justice Review in 2011 (and for which we argued in 2013: see extract of previous report at [40] above), which could

include a section which directs parents to click on their local area, and then links them to this information[30]; alternatively, what is needed is:

> "… a single, clear and authoritative platform offering advice and solutions for the full range of post-separation issues, from getting a divorce to working out child arrangements… . At present individuals are confronted with conflicting or often inaccurate advice online or struggle to find any relevant information or accessible tools"[31].

The DWP sponsored site www.sortingoutseparation.org.uk is the closest we have to what was recommended. In due course, recommendations for how to deliver online information in a way which effectively reaches and engages parents could be informed by DWP's current research on digital engagement under its Reducing Parental Conflict Programme.

c. Through apps downloadable on phones and tablets;

d. Through Local Family Justice Board events and websites.

53. The Working Group has asked HHJ Dancey to test out some of the ideas in this paper in this regard in a small local initiative in Dorset[32]. This initiative could help to inform thinking about the value of co-ordinated services as proposed, and specifically on the formation of an alliance or alliances, which might a little time to build. We would like to arrange a similar trial in Wales.

54. We further provisionally propose (subject to the consultation exercise) that **an initial scoping event should take place before the end of 2019, for key partners who would be instrumental in shaping and delivering local alliances, to consider some of the design principles and the options for leadership, coordination and funding at**

[30] The Family Justice Review (2011) included as one of its key recommendations: "Turning to the process for separation, parents should have ready access to a wide range of information and direction to any further support they might need. **Government should establish an online information hub and helpline to give information and support for couples to help them resolve issues following divorce or separation outside court**." (#114 Executive Summary: emphasis by bold in the original).

[31] Professor Trinder [2016] Fam Law 827

[32] Although this will be initiated by HHJ Dancey initially, we recognise that the SSFA should ordinarily be led locally by someone who is neither a lawyer nor a judge.

local, regional and national levels[33]. As part of preparation for the scoping event, we will need to give further thought to the involvement of Wales, and to the boundaries of the target population for an alliance, and the pros and cons of starting with specific sub-populations, whether on the basis of geography or family circumstances. Thereafter, we suggest it would be useful to develop some local prototypes which could help shape a blueprint for an integrated local offer. We will then be likely to propose that in each local DFJ area a "Supporting Separating Families Alliance" should be formed.

55. The information provided to the public within the alliances, and from the alliance partners, must not be selective or partisan. For example, rather than include local names of mediators, the alliance could provide details of the FMC 'Find a Mediator' link, through which parents can access (with assistance if required) all registered mediators in the area. It is also important to be clear that the alliances are not intended to be networking opportunities for local services to market for clients. Instead, this should be a neutral signposting service offering mutually complementary conflict-resolving activities, and an easy cross-referral forum, for the benefit of parents and their children, and for the benefit of courts to understand better what local options are available.

56. Research has shown that many parents benefit from face-to-face support in addition to the vast and confusing array of virtual advice which is available online. There are many national agencies which are in a position to offer relevant face-to-face support to separating families. **We would expect to see the agencies / partners identified in Annex 6 involved or represented in this Alliance[34].** In each area there will be support services which form part of national networks, e.g. NACCC contact centres, Relate, Divorce Recovery Programmes, Parenting After Parting, Counselling services. In addition, there will be services which are unique to that area, e.g. in Kent there is Dads Unltd (Co-parenting support) or Fegans (Children's charity, runs parenting

[33] We would like to find a volunteer to host this scoping event, and propose to approach the Nuffield Foundation.

[34] The 'Advice Now' website provides a link to a useful directory of national support services: https://www.advicenow.org.uk/guides/help-directory.

workshops). This is why it may be useful for information to be gathered in local areas rather than nationally at least initially.

57. Once up and running, the local providers within the alliances should be asked to maintain data as to the numbers of parents and families who access support via this signposting. The local working group will need to monitor and evaluate the operation of the alliance and its effectiveness in reaching and assisting separating families.

58. The presentation and language of the information provided will need to be child-focussed and future-focussed, and wherever possible consistent between different services, offering hope and clarity to parents who are struggling at a difficult time. We believe that this proposal fits squarely with the Government's recently announced proposal to explore "better signposting and join up of support services" to "provide routes for those seeking help and guidance to resolve their problems"[35].

Revitalising the MIAM

59. We acknowledge that the MIAM has not been, and is currently not, effective in steering families away from the court. We recognise that MIAMs are not widely seen by would-be applicants, and some legal professionals, as providing the valuable opportunity (which they are) to explore out-of-court dispute resolution, but are regarded as an inconvenient obstacle to bypass to reach the court door. There was discussion in the Working Group about re-branding MIAMs to something more generic[36], by dropping the 'mediation' 'label' so that it does not dominate the 'message' and/or deter possible beneficiaries, particularly as

It is important that we should consider ways to make MIAMs work [59]

[35] Post-Implementation Review of Part 1 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (LASPO), published 7 February 2019. CP37 at para.27 of summary

[36] The MIAM requirement applies to "any application to initiate [private law] proceedings" (FPR 3.6). It is very common for extended family members to make applications and to be subject to the MIAM requirement; in the circumstances it is appropriate to be non-specific about 'target audience' too.

other forms of NCDR are discussed at a MIAM; in practice these are more than just *mediation* assessment meetings and they should be seen as valuable to parents, whether or not they choose *mediation*. There is no clear agreement about name-change; in any event, we recognise that name-change is not immediately achievable given that the name and acronym is embedded in statute. MIAMs are mandatory[37] in our private law applications process, and it is important that we should consider ways to make them work. That is not to say that we do not recognise the obvious challenges of breathing new life into the MIAM activity.

60. We would like to propose five ways to revitalise the take-up of mediation or other NCDR for couples via the current MIAM system.

61. **First, we propose that the 'invitation'/direction to applicants to attend a MIAM should contain a more encouraging, positive, and child-focused message underlining the benefits to parents and their children of NCDR; we have drafted improved wording (see Annex 7)**. The MIAM must be presented in a more positive and child-focussed way if it is to improve the chance of engaging parents in less conflictual resolution methods. Urgent and specialist advice is required on messaging to the public, in order to maximise the effect; we are pleased to note that improvements to the information about MIAMs is already being actioned with online forms, and through the work being done with HMCTS to the CB7 and CB1 guidance notes that accompany the C100 application. **We propose that the part of the C100 (or online version) which deals with MIAMs, including the page signed by mediators, is reviewed by mediators and MOJ and re-worded to reflect these recommendations**.

62. **Secondly, the quality of the delivery of MIAMs should be more rigorously monitored and consistently maintained**. All MIAMs should follow a set pattern and a suggested model is set out in **Annex 8**. It should be much more widely acknowledged that a MIAM is a pre-mediation, pre-court discussion to give parents the chance to consider their options in a child-focussed way. To be safe and

[37] *Section 10(1) Children and Families Act 2014*

effective, a MIAM needs to be a confidential face-to-face meeting with the parent on his/her own, regardless of the suggestion in the original legislation that a MIAM might be conducted as a joint meeting. It is well-understood that separate meetings are essential to enable proper screening to be carried out by the mediator, and even then, mediators report that it is often a challenge to elicit details from victims who may not be ready to disclose their situation. Rapport, privacy and safety are essential elements of a MIAM if there is to be any prospect of effective screening. This cannot take place at a joint MIAM, hence the requirement for separate MIAMs.

63. Where domestic abuse emerges as an issue, the mediator should (and in many cases will) assess and, if appropriate, review with the client whether an alternative mediation model might be an option, for example shuttle or online video conferencing. The mediator should/will also signpost to local support agencies and assess whether any formal referrals are needed. There is much ground to cover in a MIAM if it is done properly, and an hour's face-to-face meeting with each party is required. The mediator on the Working Group was of the view that funding rates of publicly funded MIAMs must properly reflect this work, and provide allowance for a full hour with the client in addition to the time taken in completing the forms; a view shared by others. Enhancing the quality of the MIAM could be buttressed by:

    a. An amendment to *FPR 2010 rule 3.9(2)*[38] to set out updated requirements for the content of a MIAM;

    b. An invitation to the Family Mediation Council to revisit its Code of Practice (Nov 2018) in the light of these recommendations. While we do not seek to be prescriptive, we see particular merit in the following paragraphs of the code being revised:

[38] Rule 3.9(2) currently provides "At the MIAM, the authorised family mediator must – (a) provide information about the principles, process and different models of mediation, and information about other methods of non-court dispute resolution; (b) assess the suitability of mediation as a means of resolving the dispute; (c) assess whether there has been, or is a risk of, domestic violence; and (d) assess whether there has been, or is a risk of, harm by a prospective party to a child that would be a subject of the application".

1. Section 7 which covers the delivery of MIAMs[39], to remove the option of a joint MIAM so that time and privacy is given at every MIAM for proper screening to take place;

2. Section 5.4.2 on domestic abuse, to require a mediator to consider whether there are alternative models of mediation which could create a safe process for mediation to take place if, and only if, the client is willing. The issue of domestic abuse should always be kept under review and, at any stage, the mediator may need to form a professional opinion as to whether it is appropriate to continue with mediation or to terminate it immediately

3. Section 6.7.1 to ensure that separate waiting spaces are available or other arrangements made as needed to ensure safety on arrival and departure from mediation

c. An invitation to the Family Mediation Standards Board to look again at steps to ensure quality delivery across the mediation profession , to include, amongst other requirements, that mediators complete regular CPD on identifying domestic abuse in assessment meetings including the use of validated tools for screening, and that only mediators specifically trained in the risks of screening via online video connection carry out online MIAMs by video conferencing

64. As a secondary point for mediators, we need to retain data on how many MIAMs take place, how many MIAMs result in NCDR, and how many court forms are signed.

[39] This currently reads: "All assessments for suitability for Mediation should be conducted by a Mediator at meetings and, where possible, on a face-to-face basis. Assessment and Mediation may include meetings via an online video connection. Statutory Mediation Information and Assessment Meetings may also be conducted via an online video connection. Assessments, including statutory Mediation Information and Assessment Meetings, should not be carried out via voice only connections except where there are specific problems about access to an online video link. The Mediator must record in writing what those specific problems are. Assessment meetings can be conducted jointly or separately, but must include an individual element with each Participant to allow the Mediator to undertake domestic abuse screening. If assessments or Mediation meetings are conducted via online video connection, the Mediator must act appropriately having regard to all the current practice guidance issued by the FMC".

Only then will we be able to evaluate truly the effectiveness of the MIAMs; current statistics do not include the non-Legally Aided MIAMS which are successfully converted to NCDR.

65. **Thirdly, Judges and court staff should be more prepared to enforce the MIAM requirement (per r.3.10(1) FPR 2010).** The forerunner to the statutory MIAM (*PD3A* and the protocol) was not strictly enforced by a large proportion of courts. Hence the Government legislated to impose a statutory requirement on applicants in relevant proceedings outwith rules of court and, crucially, biting at the point before court proceedings have begun:

> ""Before making a relevant family application, a person must attend a family mediation information and assessment meeting." *Section 10 (1) Children and Families Act 2014*

It was envisaged that court officers (not Gatekeeping teams) would enforce the MIAM requirement. Para 34 of the Government response on pre-legislative scrutiny evidence for the *Children and Families Bill 2013* states: '…the court officer should determine whether a prospective applicant has complied with the procedural requirement to attend a MIAM or is exempt from the requirement to do so, evidenced through completion of the necessary court form.' (Underlining added). In practice we know that the legislative requirements have not been uniformly followed across the country and many applications are issued without evidence of either MIAM attendance or exemption. We acknowledge that it is difficult for HMCTS court staff to enforce the MIAM requirement, and perhaps the onus on them to do so is unfair or misplaced; we also realise that Gatekeepers may not enforce the MIAM requirement because they are concerned about the potential effects of further delay on the children concerned. The move to digitisation may assist in eliminating these discrepancies but, pending

In practice we know that the legislative requirements have not been uniformly followed across the country and many applications are issued without evidence of either MIAM attendance or exemption. [65]

all applications being submitted online, the obligation remains on to court staff (supported by the judiciary) to enforce the legislative requirements for MIAMs prior to issuing an application, and we would strongly encourage them to do so.

66. **Fourthly, Judges and professional participants in the family justice system should be encouraged to re-appraise the value of the MIAM, with a view to promoting their value as a child-focused vehicle for considering NCDR across all sectors of the family justice system**. This is essentially a training issue: for family judges, HMCTS staff, Cafcass/Cymru, plus FLBA and Resolution/Law Society. We fear that there will be no change to the current narrative that 'MIAMs have failed' unless the content, value and purpose of a well-run MIAM is understood and supported by those in the family justice system.

67. **With the assistance of the Family Mediation Council, we consider that it would be valuable to conduct a trial by which parenting agreements concluded in mediation become *open* documents.** Currently, any agreement reached in mediation about children is not legally binding, unless parents go to the expense of obtaining a court order (which they may be unable to do in any event because of the no order principle in *section 1(5) CA 1989*). It is suggested by our mediator representative that the lack of an authoritative 'piece of paper' at the conclusion of a mediation about children is a factor which deters some parents from the mediation route. If an agreement reached in mediation relates purely to parenting matters and arrangements for the children, we recommend that the mediator's summary be signed by both parents and then, as in civil mediation, it can be treated as an open document and relied on in any subsequent dispute.

68. **Fifthly, we recommend that the formal statement of *expectation* that respondents would attend a MIAM (unless an exemption applies) should be reinforced to judges and professionals, underlining the benefits of this activity, whilst confirming that MIAMs can be attended separately and may not be appropriate where domestic abuse is a factor.** We have actively considered (and not entirely ruled out) whether there ought to be a *requirement* for *both* parties to attend a MIAM, though

we felt that at present there is no obvious practical lever by which MIAM attendance is to be 'required' for the respondent party and enforced by the court. Until that could be achieved there should be a clearer expectation on the respondent to attend as well with clear indications that the court will require a proper explanation for non-attendance.

69. Taking up the point at [65] above, **we recommend that courts should automatically order MIAM attendance before the first hearing where a MIAM has not taken place, no valid exemption has been claimed, and there is no safeguarding issue**. Once issued, *r.3.10 FPR 2010* is clear that the court will direct an applicant or the parties to attend a MIAM where an exemption has been invalidly claimed unless the court considers the MIAM requirement should not apply. This rule currently applies at Gatekeeping and Allocation, or at the latest at the first hearing. In the new world, should our proposals find favour, that would be triaging or possibly at a Case Management Hearing. The rule clearly envisages the possibility of both parents being directed to attend. This could be done either in reliance on *rule 3.10 FPR 2010* or as an activity direction under *section 11A CA 1989*. Both would be enforceable orders. There would be no need to adjourn the proceedings; instead they could be required to attend before the next appointment. Again, there is a divergence of practice across the country and we would like to see more uniformity.

70. Courts should be prepared to order applicants, in accordance with *rule 3.10(1) FPR 2010*[40] to bring MIAM evidence with them to court if it has not been provided with the application or the gatekeeper is doubtful for any reason about its validity. The judge who hears the case at the first hearing can then assess whether to exercise his/her powers under *rule 3.10(2) FPR 2010*.

71. For completeness, we would like to add that we have considered whether the expectations about parties engaging in NCDR should be backed by sanctions, possibly costs orders. There are well-established difficulties with such an

[40] Rule 3.10(1): If a MIAM exemption has been claimed, the court will, if appropriate when making a decision on allocation, and in any event at the first hearing, inquire into whether the exemption was validly claimed

approach[41], particularly in litigation concerning children, and where domestic abuse may be a feature of the adult relationship[42], but **we consider that *in the right case* this may still be appropriate**.

72. 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.

73. Finally, we should say that we recognise that mediation will not be the most appropriate non-court dispute resolution model for all-comers. Mediation requires a degree of reflection and ability to articulate, negotiate and compromise which not everyone in difficulty can manage. Parties in family breakdown crave information about where they stand legally and what their options are, advice on which of the potential options to follow, and support in taking the first steps; many want advice about preventive work, providing help with problems in order to avoid them turning into disputes. A process of arbitration, conducted in accordance with the IFLA principles, may well be attractive to some, and has many advantages. Early legal advice through a consultation with a family solicitor (together if possible if the parties do not have a dispute) may be more attractive to the parties or either of them, and no more expensive than mediation[43]. **The Judges,**

> The Judges, legal practitioners and mediation representative on the Group are clear in their view that early albeit limited legal advice to those with family breakdown issues would be beneficial in order to achieve early resolution … [73]

[41] *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 1 WLR 3002.

[42] We specifically considered the form of '*Ungley* Order' which requires (a) the parties to consider whether the case is capable of resolution by NCDR; and (b) that any party who considers that NCDR is unsuitable must justify his stance in a witness statement filed 'without prejudice save as to costs'; and it also specifies that the court will consider that statement after reaching its decision when considering whether to make an adverse costs order should it conclude that the case was in fact suitable for NCDR. see *Mann v Mann* [2014] EWHC 537 (Fam), [2014] 1 WLR 2807, [2014] 2 FLR 928 (a financial remedies case).

[43] The research supporting these points can be found in Barlow et al., *Mapping Paths to Family Justice* (2017); Hunter et al., 'Mapping Paths to Family Justice: Matching parties, cases and processes' (2014) Family Law 1404; Pereira et al., *The varying paths to justice* (Ministry of Justice, 2015); and Maclean and Eekelaar, *Lawyers and Mediators* (2016), and Maclean and Eekelaar, After the Act (2019).

legal practitioners and mediation representative on the Group are clear in their view that early albeit limited legal advice to those with family breakdown issues would be beneficial in order to achieve early resolution and prevent the clustering of associated problems from developing[44]. We need to be creative in what we can offer families, and perform objective cost/benefit analyses of the relevant options.

74. The Working Group heard how the mediation community recognises the changing landscapes for families and family disputes. There are increasing moves to be flexible in mediation approaches, in order to adapt to changing family needs; for example, there is greater use of shuttle mediation, hybrid mediation (with professionals in support), child-inclusive mediation, mediation alongside a court timetable, or the involvement of and referral to other support services. Mediators welcome greater collaboration with courts and court-users so that the breadth of work that is undertaken by mediators can be fully understood.

Gatekeeping

75. The Gatekeeping and Allocation process is now well-embedded in the rhythm of our current private law processes; because we wish now to consider a more sophisticated arrangement for 'triaging' cases, under reformed processes the gatekeeping stage will be quicker and simpler. On receipt of the application the court will NOT (as at present – see para.8.7/8.8 CAP) – send the parties a Notice of Hearing, but will send a '**Notice of Next Steps**', advising them of the next steps which the court and Cafcass/Cymru will be taking up to and including triage. It will advise them of the possibility that they will be required to attend a SPIP/WT4C before they come to court. **At a slimmed-down 'Gatekeeping' meeting, the District Judge / Legal Adviser will routinely be sending the new application for safeguarding enquiries and will otherwise focus on**:

    a. **Whether the case is urgent, (and if so, make appropriate arrangements to list)**;

[44] See by analogy, the Legal Help provision for pre-action advice in public law.

b. **MIAM compliance** (though this should have been done by the court office);

c. **Whether specific information from a Local Authority or other third-party agency is required for the purposes of 'triaging'**.

In a returner case, the Gatekeeping judge will be referring the case straight away to the judge or legal adviser previously having dealt with it, without ordering safeguarding checks unless this is otherwise indicated.

76. As at present, Cafcass/Cymru will review the application once received from HMCTS following gatekeeping (Cafcass/Cymru does not expect to be involved in gatekeeping as re-defined in the recommendations) to ensure it is sufficiently complete to undertake safeguarding checks, and whether it is safe to write to both parties.

77. Again, as at present, it is envisaged that Cafcass/Cymru will undertake safeguarding checks for all 'first time' C100 applications for Child Arrangement Orders, and, where Cafcass/Cymru considers it necessary or if ordered by the Court, for Specific Issue and Prohibited Steps applications by:

a. Undertaking checks with the police and local authorities. **We recommend that the revised CAP should spell out the expectations on the police and local authorities to provide information to Cafcass/Cymru in a timely way.** In Wales, Cafcass Cymru produces c.40% of safeguarding reports in *limited* form only because it lacks some safeguarding information from a third agency.

b. Undertaking safeguarding interviews by phone with both parties, which *may* include advice on signposting to local services where appropriate. In most cases, we anticipate that any signposting and consideration of next steps will follow subsequent analysis of all the safeguarding information in the report/letter available at triage

It is also envisaged that Cafcass/Cymru will write **a report/safeguarding letter** (tailored to the level of assessed risk) which – if CAP is amended to remove current barriers – (and in addition to safeguarding information) **will include additional recommendations as to (i) which track should be considered for the case initially;**

(ii) next steps / options within the track, (iii) whether the court should direct activities to move parties towards conciliation – SPIP/WT4C or other Cafcass commissioned service such as a Child Contact Intervention[45] or referral to a SSFA service if appropriate before the first hearing or during the course of proceedings, (iv) the need for a *section 7* report (and whether LA needs to be involved); (v) whether to consider fact finding.

78. It is not envisaged that Cafcass/Cymru will undertake any direct work with children prior to triage.

79. Special Guardianship Order applications (and indeed all other *Children Act 1989* Applications) are made on C1 forms which should not be sent to Cafcass/Cymru by the court. Where cases are sent to Cafcass in error, it is reasonable to assume that they will be returned to the court. Cafcass/Cymru will not undertake safeguarding on those applications unless ordered to do so at a later hearing.

80. The Working Group had discussed the value of stepping the fee payments on a private law application so as to incentivise constructive and supported resolution of proceedings, ***following*** SPIP/WT4C and/or safeguarding, and/or a referral to the Supporting Separating Families Alliance but ***before*** engaging fully in a contested process. This is controversial. It is fair to say that the proposal for a graduated fee is also not entirely straightforward and raises wider policy considerations for the Ministry of Justice.

Tracks

81. Private law applications come in many forms. Some applications involve a truly justiciable problem e.g. jurisdiction disputes, international relocation, specific issue for immunisation or medical treatment, determination of allegations of abuse to the

[45] WT4C = Working Together For Children (Wales): is designed to help parents learn more about the challenges of post–-separation parenting, including the effects on children of ongoing conflict. Equivalent to SPIP (England)

parent or child, (it is well-known that the breakdown in the parental relationship may have dangerous consequences for the children and/or adults involved), and some are principally problems over co-parenting (e.g. times and arrangements for contact to the parent with whom the child does not live), which may require a relatively simple determination or an opportunity for safe discussion through conciliation. The President of the Family Division emphasised this point in the Resolution Keynote Speech (5.4.19):

> "… the disputes that parents bring to court will only very seldom involve an issue of law. They are, instead, disputes that arise from a breakdown in the key relationships within a family and, in particular, between the child's two parents".

82. At present, under the CAP, all applications are expected to follow a broadly similar one-track road, with the same roundabouts (FHDRA, DRA) and same (largely ignored) signposts along the way (i.e. to NCDR). We see a value in the court offering different roads or 'tracks' for private law cases dependent (principally) on the complexity of the case. This approach attracted support from the Family Justice Review in 2011:

We see a value in the court offering different roads or 'tracks' for private law cases dependent (principally) on the complexity of the case [82]

> "HMCTS and the judiciary should establish a track system according to the complexity of the case. At the FHDRA, the judge should allocate the case to a simple or complex track. The simple track should determine narrow issues where tailored case management rules and principles would apply"[46].

83. We consider that it may well be helpful to consider the more detailed exposition on this issue from this Family Justice Review report which we have set out at Annex 9 below.

[46] Executive Summary #123 (p.26): and see also #4.15 on p.138, 4.119 on p.165, and the flowchart on p.151

84. **We therefore recommend that private law applications should be placed on 'tracks' with the objective of moving cases through the court system more effectively** – adopting and adapting a regime similar to the 'small claims' / 'fast-track' / 'multi-track' trial system in the civil jurisdiction as it is set out in *Part 26 CPR* (see especially *Rule 26.1(2)*, *Rule 26.7* [general rule for allocation] and *Rule 26.8* [matters to be taken into account when allocating]; each track will offer a range of options. Cases may move between tracks depending as they develop. This significant proposal plainly needs to be **piloted.**

85. Urgent cases will be identified up at gatekeeping, and will be allocated to a track once the urgent aspect of the case has been resolved.

86. As our thinking develops (and informed by consultation) so it may be possible to devise specific criteria by which the triaging of cases onto tracks will be decided (as per *rule 26.8 CPR* in the civil jurisdiction); we have taken a working assumption that the decision to assign cases to tracks 1 or 2 will be based largely by reference to complexity. We discussed names for the tracks (including 'simple' and 'complex' – per the Family Justice Review) but were unpersuaded of the appropriateness of a range of suggested names, and for working purposes simply gave them numbers. Various options will be available on each track to promote a yet more bespoke route. At present, we envisage the characteristics of the tracks as follows:

    a. *Track 1* cases will be simpler cases where there is no safeguarding issue, but the parties require a resolution/determination without *section 7* report. These would be accelerated quickly through the system, either to a conciliation appointment or to a 'Early Resolution Appointment' which if disputed will be a relatively summary hearing. The parties may be referred to NCDR (via the SSFA). This hearing would conventionally be listed for no more than 2 hours, and with limited written evidence. We would hope to have track 1 cases resolved by Conciliation or Early Resolution Appointment by no later than 8-10 weeks (possibly quicker) after the issue of the application;

b. *Track 2* cases will be the more complex cases, typically (though not necessarily) involving a fact-finding hearing in relation to domestic or other abuse for example, cases involving consideration of *PD12J*, a safeguarding issue, or a jurisdiction issue. These cases may involve an older child with apparently clearly expressed views. These cases may appear to warrant the commissioning of a *section 7* report; the Dispute Resolution Appointment (para.19 of the CAP) will remain available in these cases;

c. *Track 3* cases will be the 'returner'[47] cases (discussed more fully below) which will be treated slightly differently. These cases will be allocated at the earliest possible opportunity to the judge who heard the case the first time around; these 'track 3' cases may raise enforcement issues, though they are more likely to raise issues around variation or discharge of earlier orders. That judge may then consider allocating the case to one or other of the tracks. What may have been a 'track 2' case when first before the court, may – as it returns – in fact involve a relatively narrow dispute more fitting to a summary ('track 1') determination.

Domestic Abuse cases: PD12J FPR 2010

87. In our review of private law dispute resolution *outside* of the court system, and the operation of the Child Arrangements Programme *within* the Family Court, we have inevitably considered the many family disputes in which domestic abuse (as that term is widely understood[48]) is alleged and/or is a feature. Cafcass estimates that domestic abuse is alleged in c.60% of *section 8* private law cases before the courts[49].

[47] A 'Returner' case is the name we have given in this paper to that large number of cases which have been before the court and which are returning for variation / discharge / enforcement.

[48] Para.3 PD12J: "'domestic abuse' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific

88. We are keen to ensure (see [44(d)] above and **Annex 6** below) that the 'Supporting Separating Families Alliance' should include a range of services for victims and perpetrators of domestic abuse. We have referred elsewhere in our report to the provisions of #32 of PD12J; this paragraph contains an important obligation on the court to obtain information about the facilities available locally (to include local domestic abuse support services) to assist any party or the child in cases where domestic abuse has occurred.

89. It is of course the duty of the court to ascertain at the earliest opportunity (i.e. from the gatekeeping stage) whether domestic abuse is raised as an issue which is likely to be relevant to any decision of the court relating to the welfare of the child, and specifically whether *the child and/or parent* would be at risk of harm in the making of any child arrangements order. If so, then we contemplate that such cases will be assigned to track 2 (see [82] and [86b]). There will be flexibility to move cases from one track to another if the complexion of the case changes, or domestic abuse issues arise once the case starts to unfold; thus, a case allocated to track 1 which does not appear to raise domestic abuse issues will be switched onto track 2 if domestic abuse allegations emerge later in the process which are likely to impact on the decision making for the child.

90. The case management of cases involving domestic abuse and harm are currently governed by *PD12J*. Review of the operation of *PD12J* is outwith the specific remit of the Private Law Working Group's terms of reference; however we consider it timely to emphasise that the integrated provisions of *PD12J* "forcibly remind the court of the seriousness with which it needs to consider domestic abuse in its widest sense wherever it is alleged"[50]. It is also opportune for us to highlight the fact that the Family Court is not *obliged* to conduct fact-finding hearings in relation to all allegations of domestic abuse; for instance, in some cases domestic abuse is established by admission(s), or conviction(s). Fact-finding hearings nonetheless will

forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;"

[49] See: https://www.cafcass.gov.uk/download/2124/

[50] *L v F* [2017] EWCA Civ 2121 at #17

be required to resolve disputed allegations which would be "relevant in deciding whether to make a child arrangements order and, if so, in what terms" (#5, #14, #16, #17 *PD12J*).

91. We note the recent announcement (21 May 2019) by the MoJ of a 'review' of how family courts protect children and parents in cases of domestic abuse and other serious offences. Any changes in practice recommended by the review will be incorporated into the Private Law Working Group's further work in this area following consultation.

92. Finally in this regard, the Private Law Working Group is pleased to note that statutory reform is now intended to protect alleged victims of domestic abuse from cross-examination by an unrepresented perpetrator[51]. However, there is concern among the practitioners, judges and academics on the Private Law Working Group that the class of cases in which the automatic prohibition will apply has been too narrowly drawn, excluding some of those who we believe ought to receive assistance automatically. Under the existing proposals, there will be a significant number of cases where judges will be required to exercise discretion. If the legislation is implemented in this way, there is a prospect of time-consuming case management hearings where judges are required to investigate the issues, and there is a risk of inconsistency in the way in which discretion is exercised. In this regard we have had regard to the recent MoJ study[52] which found that judicial confidence in facilitating the direct cross-examination of a vulnerable witness varied based on their seniority and experience: "Judges called for clearer guidance on appropriate case management practices in these cases."

[51] *Clause 50/51* of the *Domestic Abuse Bill*, introducing the changes by amendments to *section 31* of the *Matrimonial and Family Proceedings Act 1984*

[52] Natalie Corbett and Amy Summerfield, *Alleged perpetrators of abuse as litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses* (Ministry of Justice Analytical Services, 2017). And see the submission of the Family Justice Council to the Joint Committee on the Domestic Abuse Bill (April 2019).

Information gathering and early ordering of SPIPs/WT4C

93. Within a proposed reformed regime for gatekeeping and triaging of cases (see below) Cafcass/Cymru offer to undertake a more targeted role when preparing its report/safeguarding letter. As indicated above, in addition to the safeguarding checks, it will provide recommendations as to the 'track' which the case should follow initially, and more generally on next steps. It will specifically advise on whether the court should direct activities to move parties towards conciliation and access to the Supporting Separating Families Alliance; it will advise on the need for a *section 7* report (and whether it considers that the Local Authority needs to be involved); it will advise on whether the court should be considering fact finding and/or other next steps.

94. **We envisage that 'triaging' Judges will actively consider the use of *section 11A Children Act 1989* to order SPIPs / WT4Cs at this stage, where it is safe so to order, before the parents come to court**. The experience of the members of the Working Group is that SPIPs/WT4C are extremely effective in helping parents to understand how to put their children first while they are separating, even while in dispute with the child's other parent. The courses are widely available, and if ordered by the court they are of course funded by Cafcass (and by Cafcass Cymru in Wales if the party is in financial hardship); pre-hearing attendance at a SPIP/WT4C provides a good context for conciliation or dispute resolution at court.

95. The experience of the Working Group (referred to in the previous paragraph) is to some extent borne out by wider research. Professor Liz Trinder's 2014 evaluation of the Separated Parent Information Programme Plus (SPIP Plus) Pilot, found that the *2013 SPIP* (as it was designed at that time), delivered a "modest but broadly positive impact on family outcomes". This included an increased likelihood of reaching agreement within proceedings; feedback from parents was that they valued the focus on children's needs, sharing experiences with others, and the focus on communication skills. This study did *not* focus on behaviour change, but earlier work in 2011 showed only a limited impact. The content of SPIP has been further improved since 2013. Our Working Group was advised that Cafcass continuously

collects positive feedback from SPIP attendees, which consistently indicates that parents wish they attended SPIP earlier in their separation journey.

96. Indeed, a feedback survey undertaken by Cafcass from nearly 18,000 parent respondents includes the following responses:

    - *Learnt*: I have learnt things on the SPIP group that I will be able to use to make things better for my child/ren: **89% agree or strongly agree.**
    - *Arrangements*: The SPIP programme will be helpful in sorting out child arrangements with the other parent/carer: **45% agree or strongly agree.**
    - *Impact*: The programme helped me understand the impact of separation on my child/ren: **89% agree or strongly agree.**
    - *Understanding*: I have an improved understanding of the effect of parental conflict on my child/ren: **90% agree or strongly agree.**
    - *Helpful*: Overall how helpful did you find the service you used? **95% said extremely or somewhat helpful**.

97. It has been helpful for us to learn from Cafcass' 2018 Manchester 'Support with Making Child Arrangements' pilot, which found that in those cases where the parents had attended a SPIP, and particularly those where the parents had received a combination of SPIP and mediation, the parents were more likely than other cases to reach a full agreement within the pilot, and to make a consent order or withdraw their application from court.

'Triaging'

98. **We recommend that the 'triaging' of cases (when the 'triage' judge determines the 'track' for the case and any further case management options) should be undertaken at about 4 – 6 weeks after issue**, when safeguarding and other information is available; if information is not available at the target date, Cafcass/Cymru should provide an explanation to the court as to reason/s why, and

the expected date of provision of information. Robust mechanisms within the court office should be in place to ensure that safeguarding letters are placed on file by the target date and the file promptly referred to the triage team.

99. Two important questions will doubtless arise:

    a. Is 'triaging' different from 'allocation'?

    b. Will this 'triaging' step build in unwelcome delay, given that the FHDRA is currently listed in week 5-6?

100. Is 'triaging' different from 'allocation'? Yes. Allocation refers to the identification of the right tier of judge in the Family Court for the case. The 'triage' judge will be doing rather more: working with more information (the safeguarding information, plus additional information from Cafcass) to make a more bespoke decision about 'track', allocation, and options within the track. The judge will actively be considering a *section 11A Children Act 1989* contact activity direction for a SPIP before the parties even enter the court. The Judge will also be considering referral to a SSFA service.

101. Will this 'triaging' step build in unwelcome delay given that the FHDRA is listed in week 5-6? Overall, we think not. Any apparent delay is likely to be purposeful and, in any event, offset by downstream time-saving and efficiencies:

    a. The slightly longer time taken to 'triage' an application will be offset by the comparatively accelerated pace of the application thereafter, and the clearer direction of travel;

    b. A SPIP/WT4C or a referral to a SSFA service may have been ordered at triage, and this is likely to have benefits to the parties generally, and to the development of the case down the line;

    c. Where *section 7* reports are required, they will be directed earlier in the process, and will bypass what would have been a largely procedural FHDRA stage in their case;

d. Many cases are not of course suitable for dispute resolution; in any event c.60% of cases across England and Wales progress for further hearing beyond FHDRA;

e. There is currently often insufficient court time to deal with any realistic conciliation / dispute resolution at a FHDRA and the cases simply proceed as case management hearings; **we see the value of in-court conciliation / dispute resolution** (see [108] below) and the listing of fewer Conciliation appointments (because other cases will have proceeded along other tracks) will free up more court time for those which will really benefit from judge-led dispute resolution;

f. Track 1 cases will reach final hearing (at Early Resolution Appointment) within 8-10 weeks (or earlier), significantly quicker than under the current regime.

102. As we said earlier ([94] above) – and this is an important point, hence its repetition - 'triaging' Judges should (indeed 'will') actively consider the use of *section 11A Children Act 1989* to order SPIPs / WT4Cs at this stage, where it is safe so to order, before the parents make their first attendance at court.

103. *Who will triage the cases*? We propose that the DFJ will nominate a team in his or her area as with allocation/gatekeeping at the moment. That could be District Judge or Legal Adviser or both.

104. It is not envisaged that the parties would be present for triaging. The triage will not appear on a court list as a hearing. We envisage that parties will have the opportunity to make representations about the 'track' and/or other options selected for the case on the first occasion the case is before the court.

105. *What information will be available at triaging*? (a) The application form, the Form C1A, and the acknowledgment form, (b) Safeguarding information, (c) Cafcass/Cymru recommendations, particularly in relation to attendance at a SPIP/WT4C, referral to a service provided under the SSFA, and/or the allocation to a track (with reasons). It is not envisaged that Cafcass/Cymru will be directly involved in the triaging decision-making, though Cafcass/Cymru should be available to the

'triage' judge (by telephone or skype) for clarification of issues raised in the safeguarding letter particularly if the triaging judge is minded to adopt a course other than recommended.

106. *What are the options at triaging*? The triaging judges will *first* consider onto which track a case will be launched, and then will consider which of a number of different case management options (depending on the particular nature of the case) it should pursue. The benefits of deciding FIRST on the track and THEN on the options within the track are that it achieves greater consistency of treatment, and avoids any tendency for triaging teams to choose options which are inappropriate for the particular type of case. For example, the Working Group does not regard it as appropriate for a particular triage team to decide that *any* case could be sent for NCDR / MIAM / Early Resolution Appointment / Conciliation – this would be likely to be appropriate only for a track 1 case. Tracking allows a clear demarcation to be maintained between 1) cases which are amenable to [further] NCDR or early resolution; 2) cases which require some form of court intervention to ensure children's safety and welfare; 3) returners.

107. The non-exhaustive range of options on each track are therefore likely to be:

Track 1[53]

Refer to NCDR through the local SSFA – adjourn, stay or timetable proceedings	Direct attendance at MIAM (activity direction) and timetable proceedings	Direct that the parties attend a SPIP / WT4C / commissioned service such as CCI (activity direction) and timetable proceedings.	List for Early Resolution Appointment (ERA) when court can exercise summary powers This listing should be within weeks rather than months (suggest a maximum of 4 weeks post-triage).
Refer parties to the FJYPB 'Top Tips' for parents who are separated	Consider judicial conciliation, and direct the same	List for interim hearing if there is urgency and/or there are	

[53] We have set these out in tabular form, as the choices are in no particular order of merit or priority, and there is no linear process by which a selection is made.

		difficulties over Early Resolution Appointment dates.	Direct witness statements[54] - *for LiPs ideally on the prescribed form*

Track 2

List for interim hearing (or possibly urgent hearing if something has arisen since gatekeeping)	List for fact finding hearing if one is obviously needed, particularly with reference to *PD12J*	Direct police and/or other third-party disclosure	Consider whether conciliation is appropriate (though much less likely to be so than on track 1)
Direct witness statements (see above) - *for LiPs ideally on the prescribed form*	Direct schedules of findings (both parties represented) Consider how best to identify the areas of agreement and disagreement where the parties (or either of them) are *un*represented. A direction for a 'Scott Schedule' may not be appropriate where the parties are unrepresented. We need to make this function suitable	Consider need for Ground Rules Hearing and participation directions, particularly in a LiP case, or at least a PTR rather than going straight into the FFH.	In all other cases of any complexity list for Conciliation and Case Management Hearing (CCMH); suggest this is weeks 6-8
In an obviously complex case falling within the guidance in PD16A #7.2, appoint a rule 16.4 guardian (+ (in England) consider Positive Co-Parenting Programme) or other		Direct *section 7* report and list for DRA in a case where a report will obviously be needed.	Direct parties to attend CCMH (one hour before)

[54]Judges/courts should be reminded of the template which is Form C120 available online at https://www.gov.uk/government/publications/form-c120-witness-statement-template-child-arrangements-parental-dispute

commissioned services such as the Domestic Abuse Perpetrator Programme	for LiPs[55].		

Track 3

This case should be listed before the judge / magistrates / legal adviser who dealt with the case previously (where possible) for immediate triaging and to consider need for (further) safeguarding.	Judge to consider (i) What has gone wrong (why are the parties back?) (ii) What the parents have done about the problem – MIAM/NCDR (iii) If they haven't attempted NCDR, why not?	If more complex issues arise the full range of resources set out above is available, including further Cafcass/Cymru involvement/report/short update *if necessary*.	Consider conciliation Consideration of enforcement orders, and potentially order Cafcass to report
Consider NCDR and referral for services under the SSFA.	Referral to SPIP / WT4C if not already attended	Refer parties to the FJYPB 'Top Tips' for parents who are separated.	In straight-forward cases list for ERA (before same judge).
Consider whether there is a genuine practical issue requiring resolution to make child arrangements work, and if so whether to vary the original order		Refer parties to other activities (such as the Cafcass Positive Parenting Programme, which to date is being tested in England, and only in relation to *rule 16.4* cases)	

[55] The work being done for the online court in civil justice offers a useful model in this regard. This would necessarily have to be part of the longer-term project.

Judge-led Conciliation / Cafcass-led Conciliation

108. **We propose that those cases which stand a real prospect of resolving through conciliation should be listed for conciliation, and those which need a judicial determination should advance straight through a case management process; in short, the automatic FHDRA for all cases in the current CAP will be removed**. We hope by triaging cases in this way, more space will be created for in-court conciliation which **could be Judge-led[56] and/or Cafcass/Cymru–led**, in the cases which would benefit from this. The emphasis here is on tailoring the approach of the court to the specific circumstances of each case in order to resolve it as fairly and expeditiously as possible.

109. We believe that the intense pressures on court lists have adversely impacted on the ability of many judges and Legal Advisers to conduct FHDRAs in the manner in which they were intended. This is a particular challenge for the judges and legal advisers if the lists are over-crowded (which they invariably are); the scope for compromise is often lost by the rushed and sometimes stressed context in which the activity is taking place. Many such hearings are effective in achieving agreements; many are not. It is our understanding that some FHDRAs start and finish as simple case management activities without much time for a dispute resolution component.

110. Paragraph 14 of CAP refers to the 'dispute resolution' activity of a FHDRA as 'conciliation'. We consider that 'conciliation' is likely to be better understood than 'FHDRA'; the current acronym is unwieldy. **We recommend that hereafter these hearings be known as 'Conciliation Appointments' or where there is scope for conciliation and case management, the case will be listed for 'Conciliation and Case Management Appointments (CCMA)'.**

[56] We acknowledge that many Legal Advisers have developed skills in conducting FHDRAs which are likely to translate well into conciliation, and they could/should be encouraged to continue to undertake this form of dispute resolution.

111. In light of what we have said at [109] above, **we recommend that proper time be given in court lists for Judge-led or Cafcass/Cymru-led conciliation in the right case at the right time (conciliation may not be a one-off activity).** While local practice may dictate or favour one arrangement over another, we would like to suggest that a *minimum* time of 45/60 minutes should be allowed for a conciliation appointment before a Circuit Judge or District Judge and perhaps 60 minutes before magistrates. Generally, conciliation will be suitable for track 1 cases, but conciliation may also arise appropriately in track 2 cases. Judges are not specifically trained in conciliation at present and we believe that the judicial college will have a role in preparing them to conciliate where appropriate; Cafcass/Cymru may also have valuable training to offer to judges / magistrates / legal advisers locally and/or nationally on conciliation techniques, and on the listing of conciliations[57].

112. Para.14.9 of the CAP provides that the FHDRA is not privileged. We discussed in the Working Group whether we should resurrect the 'privileged' nature of conciliation (a feature of the CAP's predecessors); we were to some extent influenced by the effectiveness of the privileged discussions which take place at Financial Dispute Resolution Appointments in Financial Remedy Cases. We also looked across at the 'Settlement Conference' pilots (settlement conferences are privileged events), and specifically at the evaluation by Dr. Brophy[58] of these events but gained no real steer in this respect. On 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.

113. **We would support the wider roll-out of 'at court' mediation delivered by trained mediators, particularly for track 1 cases**; **we consider this is realistic particularly at the larger court centres**, although there are cost implications. We hope funding issues around this option can be resolved. Professor Trinder has

[57] Historically, 'Judicial Conciliation' schemes have been said to be successful in achieving successful outcomes; we were advised of such schemes in Burnley, Blackburn and Bournemouth.
[58] Judicial Approaches in Settlement Conferences (ALC)(2019)

reviewed the research evidence on various models of conciliation and case management, and recommends that a modified form of the 'Essex model' of in-court conciliation be explored[59]. Positive experiences in some other courts of these schemes would need to be drawn together and evaluation criteria established.

Returner cases

114. We know from Cafcass data that approximately 30% of the private law cases before the courts are 'returner' cases; nearly two-thirds of that number (63%) return within two years after the previous case has been closed to Cafcass We also believe (albeit that we have no firm data in relation to this) that only relatively few *section 11 Children Act 1989* enforcement orders are ever made. Therefore, it appears that when cases return, generally essentially *welfare* decisions are being made, rather than *enforcement* decisions.

Approximately 30% of the private law cases before the courts are 'returner' cases; nearly two-thirds of that number (63%) return within two years [114]

115. Cases return to court for many reasons. It is in fact relatively rare for cases to return because the parent with care is implacably hostile, and has refused to comply with an order; such cases do exist, but they are a small minority of enforcement cases (under 10% of the sample of the research undertaken by Professor Liz Trinder & others[60]). The most common type of case involved parents whose conflicts with each other prevented them from making a contact order work reliably in practice. The second largest group involved cases with significant safety concerns, followed by cases where older children themselves wanted to reduce or stop contact. Part of the problem has been that the available sanctions – fines, imprisonment or change

[59] 'The only way is Essex' pp.830-831 of the article

[60] Enforcing Contact Orders: Problem Solving or Punishment: (2013) Nuffield.

of the child's residence – may be impractical or harm the child. The sanctions to be found in *section 11A-O* of the *Children Act 1989 are* rarely used[61].

116. Returner cases currently come to the court in one of two ways:

a. On form C79 (application for an order related to the enforcement of a child arrangements order or to set aside or change an existing enforcement order) or

b. C100 (application for a 'child arrangements', 'prohibited steps' or 'specific issue' order under the *Children Act 1989*).

117. Given that many returner cases are not truly about enforcement, but often raise new child welfare issues, **we recommend that the C79 is taken out of circulation, and that all applications (including applications for 'enforcement') are made on a C100**. This may have the additional benefit of neutralising the potential for an 'enforcement' application to be used as a form of 'control' of the respondent. Moreover, a C79 may set up false expectations that the court will reprimand or discipline the other parent when, as is well known, the court's primary focus is on making contact work and not 'punishing' often quite technical, and even trivial, breaches of a previously made order.

118. **The revised C100 should contain specific enforcement questions**; **further questions around enforcement of a previously made order should also be included in the form**. In this way, all the information about the previous proceedings is in one place (which also fits with the rationale for the decision to move the separate paper C1A content into the digital C100). We would like to propose that the C100 form needs to be adapted to request more specific information about the previous proceedings (section 7 of the form). HMCTS will be able to help to deliver this in the digitisation of the forms.

119. **For completeness' sake, we recommend that at gatekeeping, the judge (or legal adviser, where appropriate) decides the timing of the hearing of a returner**

[61] Professor Liz Trinder's research: Enforcing Contact Orders: Problem Solving or Punishment (2013)

case, with the primary objective of placing the parties back in front of the same judge/magistrate/legal adviser who heard the previous case (where possible) as soon as possible, and ideally within 10-15 days. The timing will be dependent on the need for fresh safeguarding checks. **Fresh or new safeguarding checks will not generally be ordered at gatekeeping in a returner case** unless there are indications on the face of the application which suggests that such checks are necessary: those indications may be:

a. Specific allegations of harm/risk of harm to the child;

b. Local authority involvement with the family

c. Risks arising from the broader context, including disputed issues which have given rise to the fresh application;

d. The length of time that has lapsed since the last application may also be relevant, but should not on its own determine the need for fresh checks.

120. At the initial case management hearing, in a returner case the judge/magistrate will seek to understand from both parties what has led to the fresh application, and decide whether:

a. There is a genuine practical issue requiring resolution to make child arrangements work, and if so whether to vary the original order;
b. A finding of fact hearing is needed before deciding on a course of action;
c. To ask Cafcass/Cymru to undertake fresh safeguarding checks or a *section 7* report on the basis of any new issues identified since gatekeeping. If a *section 7* report is being ordered in a returner case, the court will not need an order for a safeguarding letter also, as the safeguarding will be covered in the *section 7*;
d. To direct the parties to undertake NCDR or other activities (such as the Cafcass Positive Parenting Programme, which to date is being tested in England, and only in relation to *rule 16.4* cases, but could potentially be adapted to a subset of returning cases) before varying an order/making a new order

e. Enforcement or other sanctions are appropriate and proportionate to ensure implementation of child arrangements which would then require a *section 11* report from Cafcass/Cafcass Cymru.

After care

121. We have given some thought to 'after care' for those leaving the family justice system with an order. We consider that there is wide range of 'after care' provision which judges should more actively contemplate, including:

a. In the right case, some immediate judicial monitoring of the effectiveness of orders, by a direction that the judge will hear the case on the second working morning following the proposed contact (a course advocated – in the right case – by Sir James Munby P in *Re D (Intractable Contact Dispute: Publicity)* [2004] EWHC 727 (Fam) at [56][62]);

b. Family Assistance Order (*section 16 Children Act 1989*);

c. A *Section 11* order or orders;

d. Child monitoring order: *section 11H Children Act 1989* (though acknowledged to be of very limited benefit);

e. A standard form direction in suitable cases for the parties to access services within the 'Supporting Separating Families Alliance' network in their area, or to a national digital support service, in the event of further disputes;

f. A letter to the child(ren) concerned, and/or an order framed in terms suitable for the child(ren) concerned.

[62] [56] "Other things being equal, swift, efficient, enforcement of existing court orders is surely called for at the first sign of trouble. … Thus, it may in some cases be appropriate for a judge who has concerns as to whether the contact ordered for Saturday will take place to include in the order a direction requiring the father's solicitor to inform the judge on Monday morning by fax or e-mail if there have been any problems, on the basis (also spelt out in the order so that the mother can be under no illusions as to what will happen if she defaults) that the mother will thereupon be ordered to attend court personally on Tuesday morning and immediately arrested if she fails to attend. The problem can then perhaps be nipped in the bud."

122. Note that it is not envisaged that Cafcass/Cymru will nurse the parties into post-litigation life; there is currently no power for Cafcass/Cymru to offer any parenting co-ordination service post-order. Nor is there any intention to reverse the effect of para.15.3 of the CAP ("cases should not be adjourned for a review … unless such a hearing is necessary and for a clear purpose that is consistent with the timetable for the child and in the child's best interests").

26-weeks rule

123. We have considered the benefits, or otherwise, of imposing a 26-week (or similar) timeframe on the determination of private law applications, as there is for public law[63]. The discussions have led us to the same conclusions which we reached in 2013/2014; in short, we have rejected this idea. We do not consider it appropriate to impose any formal (and may we suggest, potentially artificial) time-limit on private law litigation. We have every hope that a track 1 case will be completed in significantly less than 26 weeks (a realistic objective could be 8-10 weeks).

124. In our view, paragraph 15 of the CAP [The Timetable for the child] has withstood the test of time: the objective is and should remain that "court proceedings should be timetabled so that the dispute can be resolved as soon as safe and possible in the interests of the child" [#15.1].

Digitisation of Private Law Processes

125. The digitisation of private law processes under the Reform Programme provides a valuable opportunity to reinforce some of the messages above. The C100 application will soon be accessible on an interactive site, which will be designed to ask the user relevant questions, and will provide pertinent information, as the

[63] *Section 32(1)(a)(ii) Children Act 1989*

application is completed and populated with information, designed to tease out key material. We are assured that the site will be clear and comprehensible to those who are unrepresented by a lawyer. In this way, potential applicants will be able to make more informed decisions about their application. If they decide to make an application, they will be prompted to furnish the court and Cafcass/Cymru with more practical information regarding the case.

126. Importantly, questions asked of the applicant will be devised in such a way as to nudge potential applicants to consider alternative options for resolving their disputes, and will provide them with a better understanding of what the court process can and cannot do for them. The requirement for a MIAM (and the benefits of the same) for example can be much more simply and attractively presented *online* than at present; as Sir James Munby P persuasively observed, in October 2018:

> "One has only to glance at Chapter 3 of Part 3 of the Family Procedure Rules 2010, and in particular Rule 3.8, or at paragraphs 12, 13 and 20 of PD 3A, or at the many relevant pages of Form C100, to appreciate the almost unbelievable complexity of the MIAMS requirement – how is a litigant in person supposed to be able to understand and navigate all this?"[64]

127. The digitised application system can be easily adapted to changing legislation and/or requirements, as HMCTS will be supporting the system in-house; this will provide the facility for easier testing of alternative approaches to questions and process, as limited pilots can be run alongside the mainstream content.

128. Many opportunities arise from digital improvements in wider back-office functions which will encourage more efficient sharing of information between relevant agencies (for example Local Authority checks for Cafcass/Cymru). Overall, digitisation will reduce unnecessary delay for all parties; postal times will be removed, and administrative functions will be streamlined. In all of these ways,

[64] Talk to NACCC: Dealing with Parents' Conflict and Unreasonable Behaviour, reproduced at [2019] Fam Law 153

digitisation will support an important objective of diverting appropriate cases away from the court, and modernising the processes within it.

129. In due course, we hope that the digitised system will enable the production of clear, uncomplicated, uncluttered, easy-to-read orders – swiftly and efficiently. As the President has recently said[65]:

> "The ultimate goal remains, as stated in the June 2018 Guidance, for court orders eventually to be drawn with ease from an electronically supported system once such systems are widely available".

This, we know, will be a particularly welcome outcome for the judges as for the parties.

130. We recommend that the HMCTS Reform team remain closely involved in this Private Law Working Group's work so that digitisation of private law processes (including the process of making an application and the form on which it is made) can be crafted to enhance the messages (including the desirability of NCDR) of the reforms proposed.

CAP for LiPs

131. The CAP is already a very long document. We would ideally like it to be shorter. We could look at re-structuring it so that it is more compartmentalised – separating out for example (a) key principles, (b) NCDR and support services, and (c) court process (case management).

132. Further or alternatively we would be interested in producing a revised and considerably abbreviated CAP specifically drafted for LiPs, crystal-marked by the Plain English Campaign[66] if and to the extent that the reforms outlined are more widely considered, piloted and approved.

[65] President's Guidance on short form orders: June 2017

[66] http://www.plainenglish.co.uk/services/crystal-mark.html

Implementation

133. It is acknowledged that some of the proposed processes and joint-agency working would benefit from more detailed discussion and mapping between relevant agencies to encourage, as far as possible, full stakeholder 'buy-in' and mitigation of risk. The discussions would benefit from the input of others who have experience in implementing a strategic response to significant service challenges.

134. As we have mentioned earlier in this report, while the principles of the current CAP are sound and still largely stand, implementation of the CAP has not been consistent. Thorough implementation strategies will need to be designed and applied across the system so that opportunities from this review are not missed. This will need to include *significant training requirements* to ensure the judiciary and legal professionals are able consistently to give effect to these proposals.

It will be important to trial initiatives on a small scale before rolling them out more widely; we plainly want to avoid unintended adverse consequences of our proposals. [#124]

135. We have had a look at the implications of our proposals for *Part 3* and *Part 12* of the *FPR 2010* and *PD12B* itself. A summary of the impacts is tabulated at Annex 10.

Pilots

136. **Subject to the outcome of any consultation on these proposals, we would like to recommend that the initiatives set out above should be piloted, and the result thoroughly evaluated, before commitments are made as to wider roll-out and rule-change.** It will be important to trial initiatives on a small scale before rolling them out more widely; we plainly want to avoid unintended adverse consequences of our proposals. It is vital that we at this stage develop a model which we think is 'testable' (which would involve people beyond the working group).

We need to be able to demonstrate the costs and benefits (evaluated and assessed by MoJ and HMCTS analysts). While pilots would need to be conducted at local level initially, ideally they should be set up with a 'whole system' approach, and with a national sponsorship/overview (possibly by the Family Justice Board) to ensure lessons are learned and captured.

Consultation

137. The Private Law Working Group 2019 welcomes wider consultation on these proposals. We would further welcome the opportunity to discuss the initiatives proposed here, or others, with relevant Ministers.

Conclusion

138. We do not profess to have found absolute answers here to the very significant problems which we identified in the early part of this paper. Far from it. We have wondered whether we will be back in five years' time looking at this situation again, and if so, whether we will be ruing missed opportunities, regretting decisions made (or not made), or reflecting with satisfaction upon some successful transformation of a system currently under considerable stress. We have conscientiously sought here to work upon a revised CAP scheme which is more responsive to the needs of the families who seek support on relationship breakdown.

139. We have focused on seeking to divert appropriate cases of conflictual family breakdown away from court – not merely because the court system is stretched to breaking point (and beyond) by current case volumes, but because we genuinely believe that out-of-court services will offer better solutions for many families whose differences are more amenable to negotiated or conciliated agreement.

140. We have also sought to devise arrangements for ensuring that those cases which require court intervention are dealt with more swiftly and/or effectively, and in accordance with their specific requirements.

141. We have sought to re-deploy and re-allocate existing resources appropriately within the current system.

142. Most importantly, we have sought to measure our proposals by the test of whether they contribute to delivering enhanced benefits and outcomes for children; we believe that they do.

143. We are of the strong view that positive change for families experiencing family breakdown, and improved processes of private law in the courts, could/would be achieved if those working in this field conscientiously and faithfully respected the spirit and letter of the CAP, particularly in any revised form (as outlined above), and observed its underlying objectives.

144. We commend this report to you.

Mr. Justice Cobb

For and on behalf of the Private Law Working Group (2019)

June 2019.

Annex 1: Terms of Reference (2019)

Private Law Working Group – Terms of Reference (2019)

The primary purpose of the Working Group is to review, and assess, the effectiveness of the Children Arrangements Programme, as established in 2014, for children and to consider whether amendments are necessary. In making its assessment, the Working Group will consider the perspectives of: children subject to proceedings, parents especially when acting as Litigants in Person (LiPs), judges, Cafcass/Cymru, the legal professions and HMCTS.

In its review, the Working Group will have regard to the following:

1) LiPs – how can the private law system be made more responsive to their needs?
2) Managing expectations of parents, especially LiPs – how can this be done when parties are unrepresented and have not had the benefit of legal advice?
3) Case volumes – are there cases reaching court which would be better dealt with elsewhere?
4) Pre-proceedings – is there scope to divert cases from court with more effective triage?
5) Mediation and MIAMs – is this process working? If not, how could it be improved?
6) Other forms of Non-Court Dispute resolution (NCDR) – what can be done to promote them?
7) Is the right information being provided to the Court? If not, how could this be improved?
8) Allocation and gatekeeping – is there merit in adopting a multi-track approach?
9) The voice of the child – when and how can engagement with children be made in the most effective way?
10) Time – how long should cases take? Could some cases be dealt with more quickly? If so, how could this be done?
11) FHDRAs – are these operating as intended? If not, what can be done to ensure that they provide a genuine opportunity to settle the case?
12) Safeguarding and risk assessment – is the right balance being struck in those cases where allegations of domestic abuse are made?
13) Delays in Finding of Fact Hearings – is this a widespread problem? If so, what can be done to address it?
14) Repeat applications – is the proportion of these a concern? If so, how can the proportion of cases which come back to court be reduced?
15) Enforcement – what can be done to improve compliance with court orders?
16) Benefit to children – all proposals should be measured against whether they contribute to delivering enhanced benefits and outcomes for children.

The Working Group will be encouraged to make recommendations which can be implemented relatively quickly in terms of making the current system more effective. It will also be encouraged to make recommendations, including a radical re-structuring of the existing system if this is what the Working Group considers necessary, which may take longer to implement – perhaps because they require primary legislation or public expenditure which only ministers can approve.

Annex 2: Membership of the Private Law Working Group (2019)

Composition of the PLWG:

Mr Justice Cobb	Family Division Judge. Chair of the PLWG
Helen Adam	Mediator [Kent]
Beth Altman	Cafcass Cymru
Neal Barcoe	MoJ, Deputy Director, Family Justice
Mel Carew	Cafcass High Court; Head of Legal
HHJ Dancey	Designated Family Judge for Dorset
Eleanor Druker	Legal Aid Agency
Michael Edwards	Barrister [London]
Martin Hau	MoJ
Sandie Hayes	Cafcass
Rosemary Hunter	Academic [University of Kent]
Rebecca John	Cafcass
Helen Jones JP	Magistrate [London]
HHJ Jordan	Circuit Judge [Manchester]
Santosh Kumar	Solicitor
Adam Lennon	HMCTS (Reform)
DJ (MC) Vanessa Lloyd	DJ(MC)
Steve Matthews JP [§]	Magistrate
Stuart Moore	Ministry of Justice
DJ Mulkis	District Judge [CFC]
Sarah Parsons	Cafcass: Assistant Director
Hannah Penfold	Legal Adviser [West Country / Barnstaple]
Olivia Piercy	Solicitor
Matthew Pinnell	Cafcass Cymru: Deputy Chief Executive
DJ Suh	District Judge [Dartford]
Maja Vojnovic	MoJ Family Justice
Teresa Williams	Cafcass: Director of Strategy
Alex Clark / Hannah Phoenix	Secretariat assistance

[§]Steve Matthews JP died suddenly and unexpectedly on 12 April 2019. Steve had been a member of the original Private Law Working Group in 2013/2014, and was re-appointed to this group when it was formed in early 2019. He was an experienced and greatly respected family magistrate, and made valuable and insightful contributions to our discussions and wider work. We were all very shocked and deeply saddened by his death.

Annex 3: Executive Summary of Recommendations

#	Recommendation	Para.
General		
1	Consideration should be given to ensuring that the most effective range of out-of-court family resolution services are available to support those experiencing family breakdown in England and Wales, drawing on the wealth of existing research and experience in this area, both domestically and internationally. A national non-court dispute resolution ('Family Solutions') service should be actively considered. This is particularly pressing given the volume of cases currently passing through the courts.	9
Voice of the child		
2	Any future pilots agreed as an outcome to this work of the Private Law Working Group should include best practice methods for obtaining and including the views of children as a key standard component.	34
Non-Court Dispute Resolution (NCDR) and the creation of the Supporting Separating Families Alliance		
3	Local Family Justice Boards should take responsibility for forming local alliances of services (or developing existing alliances) to provide integrated support for all families experiencing separation.	41
4	The alliances of services should be given the working title for present purposes of the 'Supporting Separating Families Alliance' (SSFA).	42
5	The local SSFA alliances will be managed by a co-ordinating committee which could or should be chaired by the chair of the Local Family Justice Board or a nominated representative. Additionally, in due course, thought may be given to appointing a single operational co-ordinator of each SSFA.	49 / 51
6	The outline frameworks and principles for local alliance(s) or an alliance covering England and Wales should be discussed at an initial scoping event before the end of 2019 - for key partners who would be instrumental in shaping and delivering local alliances, to consider some of the design principles and the options for leadership, coordination and funding at local, regional and national levels.	54
7	The agencies / partners identified in Annex 6 should be involved or represented in the alliance(s).	56
Revitalising the MIAM		
8	The 'invitation' / direction to applicants to attend a MIAM should contain a more encouraging, positive and child-focused message underlining the benefits of NCDR to parents and their children;	61
9	The quality of the delivery of MIAMs should be more rigorously monitored and consistently maintained.	62
10	Judges and court staff should be more prepared to enforce the MIAM requirement	65

#	Recommendation	Para.
11	Judges and professional participants in the family justice system should be encouraged to re-appraise the value of the MIAM, with a view to promoting their value as a vehicle for considering NCDR across all sectors of the family justice system.	66
12	With the assistance of the Family Mediation Council, we consider that it would be valuable to conduct a trial by which parenting agreements concluded in mediation become *open* documents	67
13	The formal statement of *expectation* that Respondents would attend a MIAM (unless an exemption applies) should be reinforced to judges and professionals, underlining the benefits of this activity, whilst confirming that MIAMs can be attended separately and may not be appropriate where domestic abuse is a factor	68
14	Courts should automatically order MIAM attendance before the first hearing where this has not happened and no valid exemption has been claimed, and there is no safeguarding issue.	69
Gatekeeping		
15	'Gatekeeping' will be a slimmed-down activity; the District Judge / Legal Adviser will routinely send the new C100 application for safeguarding enquiries and will otherwise focus on: a. Whether the case is urgent, (and if so, make appropriate arrangements to list); b. MIAM compliance (though this should have been done by the court office); c. Whether specific information from a Local Authority or other third-party agency is required for the purposes of 'triaging'. In a returner case, the Gatekeeping judge will be referring the case straight away to the judge or legal adviser previously having dealt with it, without ordering safeguarding checks unless this is otherwise indicated	75
16	The revised CAP should spell out the expectations on the police and local authorities and other third parties to provide information to Cafcass/Cymru for their safeguarding enquiry in a timely way.	77a
17	The safeguarding letter will be expanded, and (in addition to safeguarding information) Cafcass/Cymru will include additional recommendations as to (i) which track should be considered for the case initially; (ii) next steps / options within the track, (iii) whether the court should direct activities to move parties towards conciliation – SPIP or referral to a SSFA service, (iv) the need for a *section 7* report (and whether LA needs to be involved); (v) whether to consider fact finding.	77

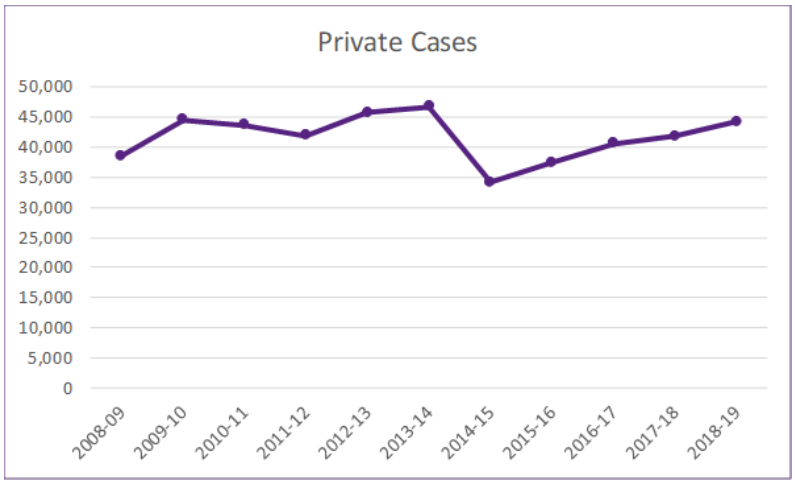
#	Recommendation	Para.
Tracks		
18	Private law applications should be placed on 'tracks', with the objective of moving cases through the court system more effectively. We propose that a regime similar to the 'fast-track' / 'multi-track' trial system in the civil jurisdiction should be adopted and adapted; each track will offer a range of options. Track 1 will be for the simpler cases without safeguarding issues; Track 2 will be for the more complex cases (often with safeguarding issues); Track 3 will be for 'returner' cases. Cases may move between tracks depending as they develop.	84 / 86
SPIPs/WT4C (early section 11A direction)		
19	'Triaging' Judges will actively consider the use of *section 11A Children Act 1989* to order SPIPs / WT4Cs at this stage, where it is safe so to order, before the parents come to court.	94
Triage		
20	The 'triaging' of cases (when the 'triage' judge determines the 'track' for the case and any further case management options) should be undertaken at about 4 – 6 weeks after issue	98
Judge-led conciliation		
21	Those cases which stand a real prospect of resolving through conciliation should be listed for conciliation, and those which need a judicial determination should advance straight through a case management process; the automatic FHDRA for all cases in the current CAP will be removed	108
22	We recommend that these hearings be known as 'Conciliation Appointments' or where there is scope for conciliation and case management, the case will be listed for 'Conciliation and Case Management Appointments (CCMA)'.	110
23	We recommend that proper time be given in court lists for Judge-led or Cafcass/Cymru-led conciliation in the right case at the right time (conciliation may not be a one-off activity).	111
24	We would support the wider roll-out of 'at court' mediation; we consider this is realistic particularly at the larger court centres.	113
Returner cases / enforcement		
25	We recommend that the C79 is taken out of circulation, and that all applications which would otherwise have been made on a C79 (applications for 'enforcement') are made on a C100.	117
26	The revised C100 should contain specific enforcement questions; further questions around enforcement of a previously made order should also be included in the form.	118
27	At gatekeeping, the judge (or legal adviser, where appropriate) decides the timing of a hearing, with the primary objective of placing the parties back in front of the same judge/magistrate/legal adviser (where possible) who heard the previous case as soon as possible and	119

#	Recommendation	Para.
	ideally within 10-15 days	
28	Fresh or new safeguarding checks will not generally be ordered at gatekeeping in a returner case	119
Digitisation		
29	We recommend that the HMCTS Reform team remain closely involved in this Private Law Working Group's work so that (i) digitisation of private law processes (the process of making an application and the form on which it is made) can be crafted to enhance the messages (including the desirability of non-court dispute resolution) of the reforms proposed (ii) orders can be more flexibly and easily created in a form which will be easier for all litigants to understand, and (iii) back-office work is more efficient rendering the processes quicker.	130
Pilots		
30	Subject to the outcome of any consultation on these proposals, we would like to recommend that some or all of the initiatives set out above should be piloted, and the result thoroughly evaluated, before commitments are made as to wider roll-out and rule-change.	136

Annex 4: Cafcass data

Annex 1: Data Tables

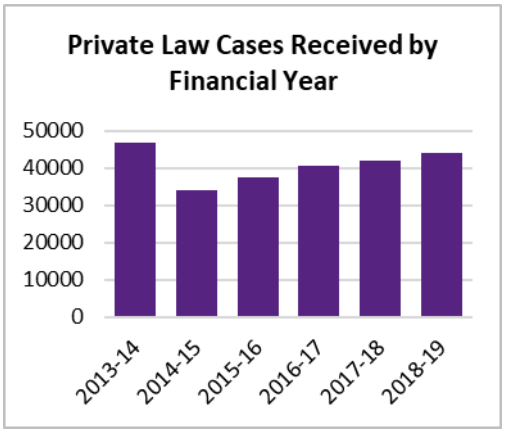
1. Cafcass historic data on private law demand



2. Cafcass Private Law Cases Received by Financial Years 2013-2019

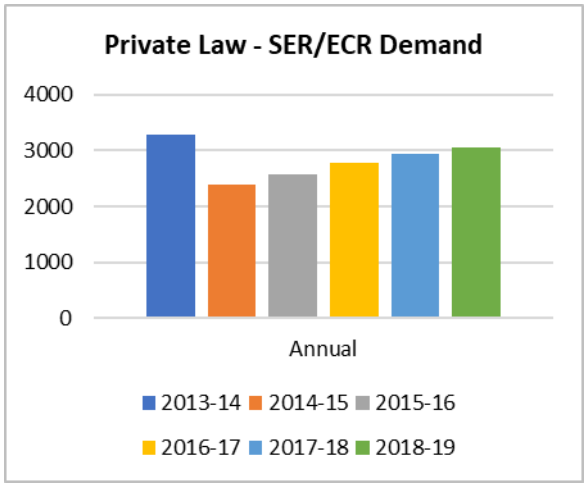
Source: Cafcass Official Private Law Demand data.
Accessed 18/04/19.

	Private Law Cases Received by Financial Year					
Month	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
April	4318	3190	2859	3463	3130	3464
May	5017	2141	2792	3170	3628	3641
June	4212	2596	3372	3486	3812	3392
July	4569	2892	3466	3376	3616	3687
August	3998	2502	2868	3449	3637	3956
September	3799	2819	3011	3493	3548	3434
October	3945	3367	3226	3381	3815	4000
November	3497	3095	3357	3492	3741	4029
December	2861	2663	2917	2842	2737	3078
January	3342	2753	2876	3240	3505	3598
February	3462	2929	3300	3333	3087	3696
March	3616	3172	3371	3811	3526	4166
Year Total	**46636**	**34119**	**37415**	**40536**	**41782**	**44141**
% Change on previous		-26.8%	9.7%	8.3%	3.1%	5.6%



3. Cafcass Cymru Private Law Cases Received by Financial Years 2013/14

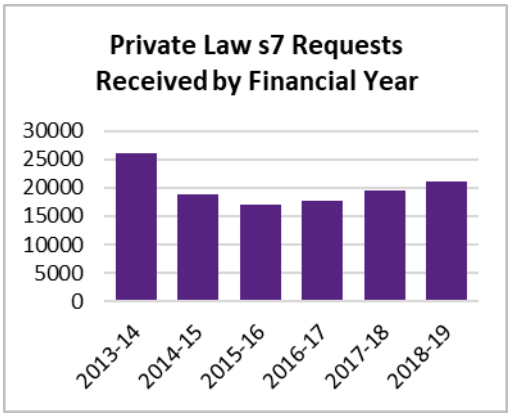
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
April	346	215	198	234	208	265
May	370	148	174	223	234	261
June	303	167	204	245	276	270
July	324	213	217	211	274	274
August	301	190	232	256	276	263
September	279	212	217	210	232	216
October	301	227	254	251	294	329
November	226	208	206	278	237	257
December	192	204	160	190	203	173
January	216	186	194	216	244	251
February	191	181	266	211	223	248
March	226	244	261	257	238	247
Annual	3275	2395	2583	2782	2939	3054
% Increase		-36.7%	7.3%	7.2%	5.3%	3.8%



4. Cafcass Private Law s7 Requests Received by Financial Years 2013-2019

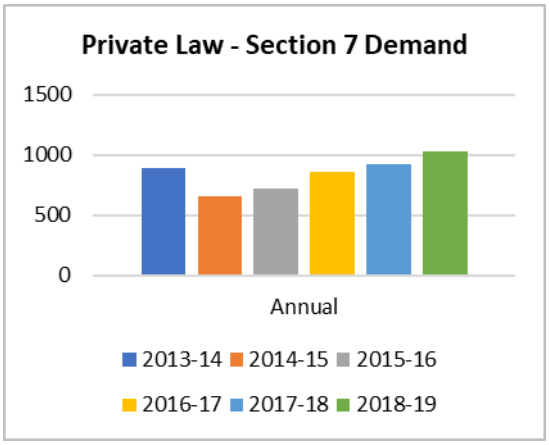
Source: CMS and ECMS 17/04/2019. Please note that ECMS is a live database and as such, may be subject to change.

	Private Law s7 Requests Received by Financial Year					
Month	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**	**2018-19**
April	2183	1901	1434	1433	1486	1669
May	2171	1633	1342	1418	1663	1725
June	2238	1464	1449	1400	1661	1488
July	2524	1502	1492	1373	1564	1742
August	2146	1414	1315	1415	1575	1715
September	2225	1657	1531	1595	1616	1687
October	2411	1744	1408	1427	1660	1908
November	2165	1473	1444	1578	1722	1898
December	1849	1422	1296	1283	1293	1458
January	2262	1633	1446	1744	1898	1999
February	1906	1426	1368	1385	1580	1798
March	1974	1569	1418	1618	1690	1959
Year Total	**26054**	**18838**	**16943**	**17669**	**19408**	**21046**
% Change on previous		-27.7%	-10.1%	4.3%	9.8%	8.4%



5. Cafcass Cymru Section 7 (Inc. Child Impact Analysis)

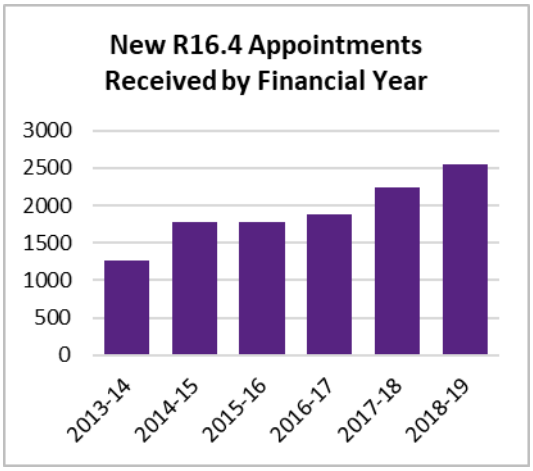
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
April	92	71	55	66	61	76
May	83	54	56	73	73	82
June	74	47	57	74	94	75
July	91	47	48	74	64	87
August	77	39	68	71	74	90
September	72	50	72	87	69	86
October	88	49	72	68	81	81
November	73	64	55	71	69	86
December	64	60	57	71	84	82
January	59	55	64	75	99	99
February	48	50	56	66	89	87
March	68	66	59	63	66	94
Annual	889	652	719	859	923	1025
% Increase		-26.7%	10.3%	19.5%	7.5%	11.1%



6. Cafcass Number of New R16.4 Appointments Received by Financial Years 2013-2019

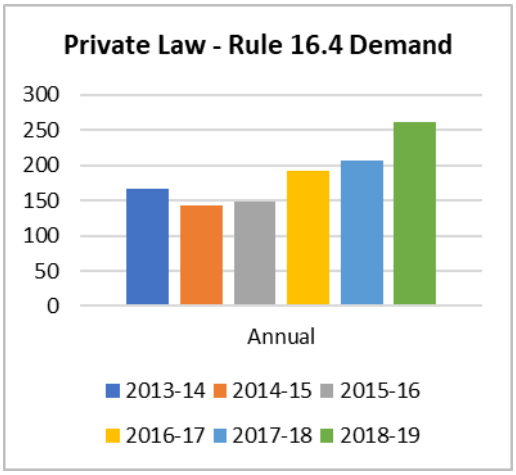
Source: CMS and ECMS 17/04/2019. Please note that ECMS is a live database and as such, may be subject to change.

	New R16.4 Appointments Received by Financial Year					
Month	**2013-14**	**2014-15**	**2015-16**	**2016-17**	**2017-18**	**2018-19**
April	80	153	136	165	135	200
May	54	148	128	169	146	221
June	69	171	162	144	167	201
July	97	155	147	160	169	211
August	82	124	153	113	191	223
September	90	177	165	169	171	201
October	125	145	162	163	209	233
November	125	150	155	159	215	242
December	116	146	151	164	201	184
January	132	123	126	134	215	211
February	142	135	144	162	206	212
March	144	149	148	172	207	205
Year Total	**1256**	**1776**	**1777**	**1874**	**2232**	**2544**
% Change on previous		41.4%	0.1%	5.5%	19.1%	14.0%

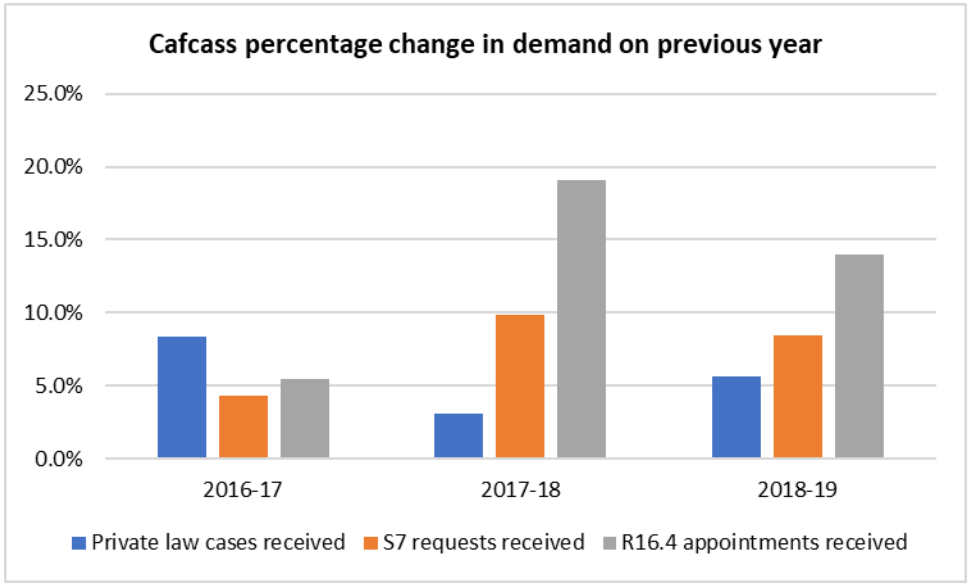


7. Cafcass Cymru Rule 16.4

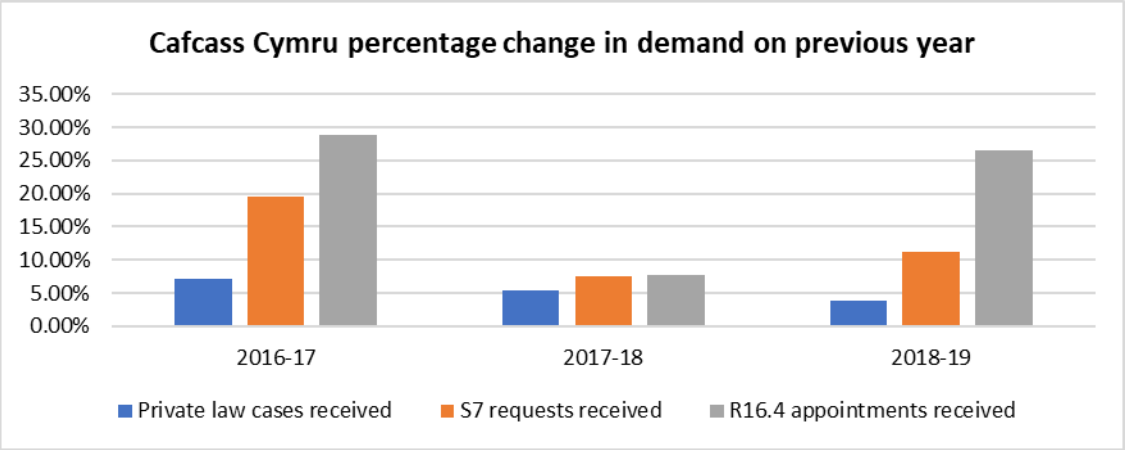
	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
April	10	14	15	12	18	19
May	14	7	12	19	19	29
June	19	14	15	16	13	18
July	23	20	15	14	10	23
August	10	10	8	11	27	23
September	9	9	11	14	16	21
October	28	15	12	18	21	31
November	9	12	8	22	15	21
December	13	8	16	15	19	16
January	12	7	12	17	20	22
February	10	15	15	18	17	23
March	10	12	10	16	12	16
Annual	167	143	149	192	207	262
% Increase		-14.4%	4.2%	28.9%	7.8%	26.6%



8. Cafcass percentage change in overall private law demand, S7 demand and r16.4 demand.



9. Cafcass percentage change in overall private law demand, S7 demand and r16.4 demand.



10. Cafcass Private Law Case Duration by Financial Years 2013-2019

Source: CMS and ECMS quarterly snapshots. Data is based on case closure (final hearing of case)

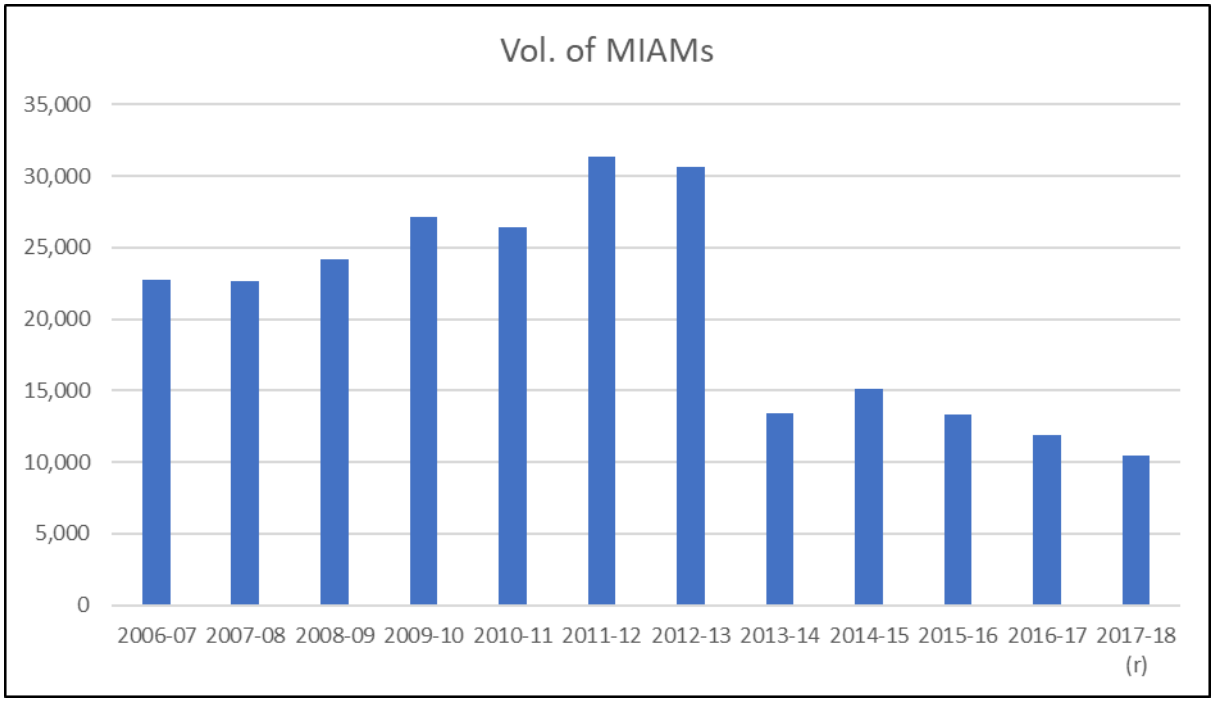
Mean Case Duration of Private Law Cases in Calendar Weeks					
2013-14	2014-15	2015-16	2016-17	2017-18	2018-19*
25	24	20	17	18	19

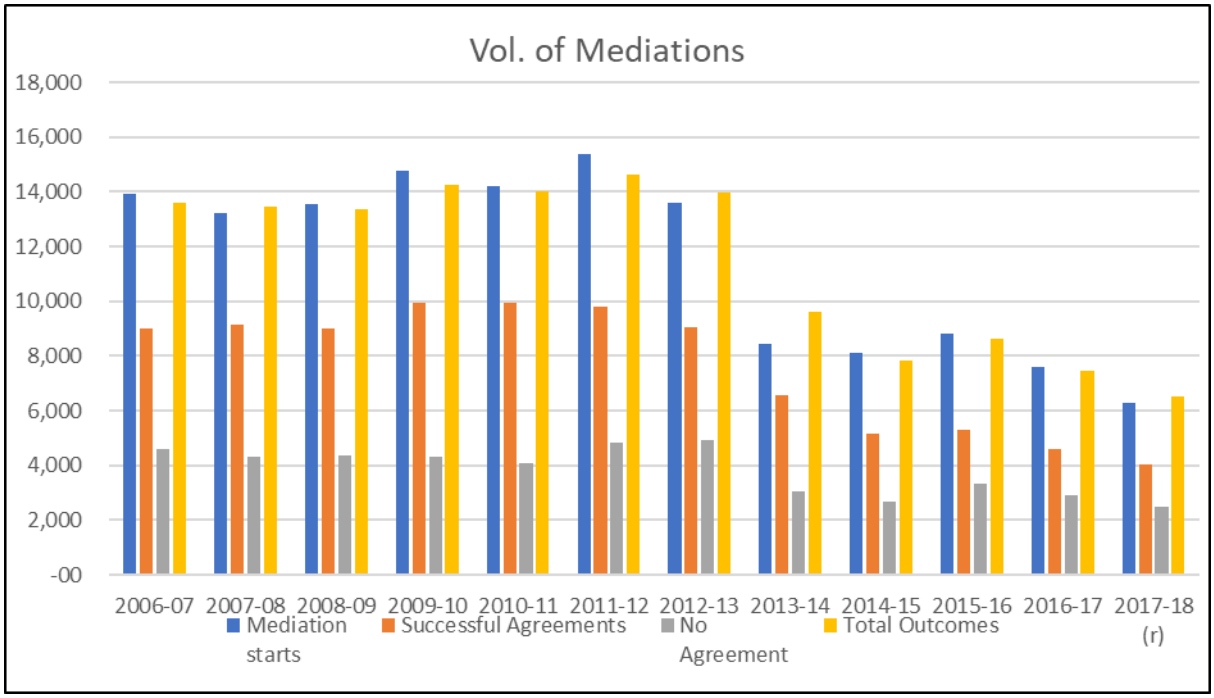
*N.B. 2018-19 data only includes Private Law cases closed up to Q3 2018-19

Annex 5: Legal Aid Agency data

LEGAL AID DATA

Mediation volumes

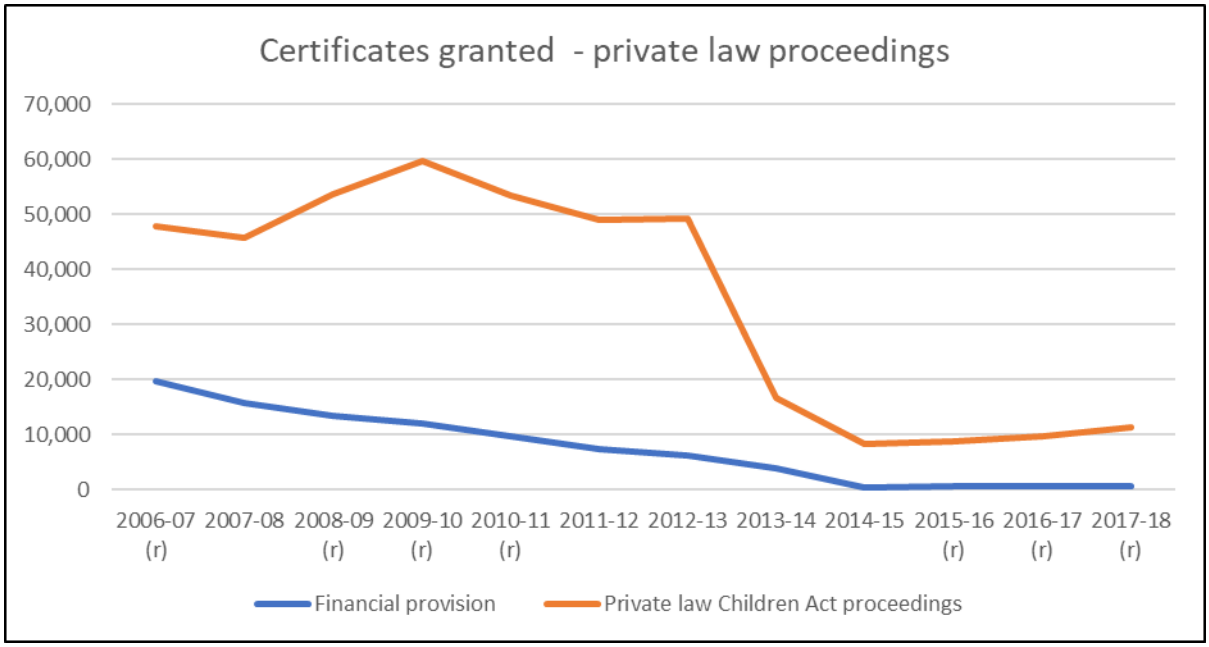




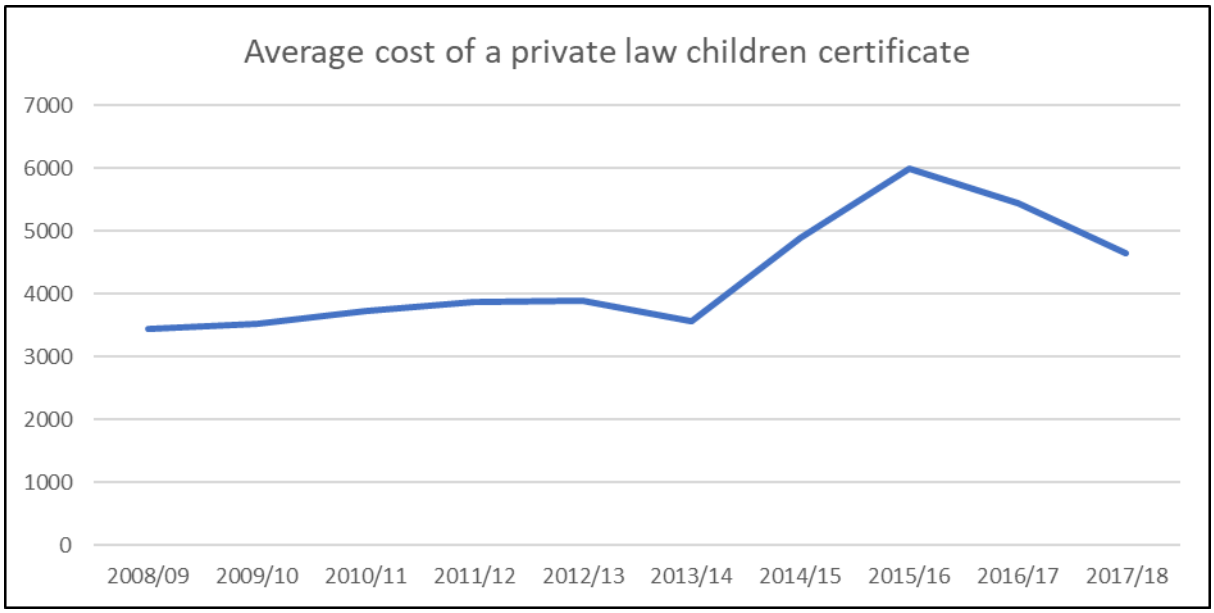
Breakdown of mediation starts by mediation type

Yea	All Issues	Children Only	Property & Finance	Grand Total
2006-07	6788	4339	2791	13918
2007-08	6253	4323	2663	13239
2008-09	5949	5156	2432	13537
2009-10	5902	6447	2396	14745
2010-11	5330	6563	2293	14186
2011-12	5022	7538	2797	15357
2012-13	3685	7299	2625	13609
2013-14	2143	4881	1414	8438
2014-15	1919	5001	1172	8092
2015-16	1889	5574	1369	8832
2016-17	1468	5027	1116	7611
2017-18	1141	4270	891	6302
2018-19	867	3300	639	4806
Grand Total	48356	69718	24598	142672

Private family law certificates granted



Average cost of a private law children certificate



Annex 6: Supporting Separating Families Alliance – Relevant National Agencies

Domestic Abuse and Safeguarding Issues[67]

- Women's Aid - https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-services/
- Refuge - https://www.refuge.org.uk/
- Mankind - https://www.mankind.org.uk/
- Domestic Abuse Recovering Together (DART) programme for children - https://learning.nspcc.org.uk/services-children-families/dart/
- NSPCC service centres - https://www.nspcc.org.uk/preventing-abuse/our-services/nspcc-service-centres/
- Rights of Women https://rightsofwomen.org.uk/
- Respect (for perpetrators and male victims of domestic violence) http://respect.uk.net/

Contact centres

- Contact centres - https://naccc.org.uk/find-a-centre

Co-Parenting

- Separated Parents Information Programmes - https://www.family-action.org.uk/what-we-do/children-families/spips
- Working Together 4 Children - https://gov.wales/cafcass-cymru/family-separation/information-for-parents
- Parenting After Parting - http://www.resolution.org.uk/divorceandparenting/
- Other Cafcass/Cymru commissioned services;
- Local Divorce and separation Clinics;
- Local relationship counsellors;
- Gingerbread - https://www.gingerbread.org.uk/
- Family Rights Group: https://www.frg.org.uk/
- Advice Now representatives;

Resolving Issues between Parents

- Family Mediation Council https://www.familymediationcouncil.org.uk/find-local-mediator/
- Local mediators

[67] The alliance should specifically include resources to support those who are or may be victims of domestic abuse. This corresponds with para.32 of Practice Direction 12J: "The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally (to include local domestic abuse support services) to assist any party or the child in cases where domestic abuse has occurred."

- Resolution
- The Law Society http://solicitors.lawsociety.org.uk/?Pro=True
- Divorce Surgery; One Couple One Lawyer: :www.thedivorcesurgery.co.uk,

Relationship issues, Mental health, Addictions

- British Association of Counselling and Psychotherapy https://www.bacp.co.uk/
- Relate - https://www.relate.org.uk/
- Divorce Recovery Workshops - DRW.org.uk
- Recovery from Divorce and Separation - https://www.restoredlives.org/
- British Association of Anger Management - https://www.angermanage.co.uk
- MIND - https://www.mind.org.uk/information-support/local-minds/
- AA - https://www.alcoholics-anonymous.org.uk/
- Alanon - support for families with alcoholics - https://www.al-anonuk.org.uk/
- Gamblers Anonymous - https://www.gamblersanonymous.org.uk/

Debt, Benefits

- Citizens Advice Bureau – https://www.citizensadvice.org.uk
- Debt Advice – https://nationaldebtline.org

PLUS Early Years Support for Families available through Local Authority

PLUS a multitude of local services which may not form part of national networks.

PLUS Cafcass / Cafcass Cymru;

PLUS local Solicitors - http://www.resolution.org.uk/

PLUS Personal Support Unit - https://www.thepsu.org/

PLUS Citizen's Advice - https://www.citizensadvice.org.uk/

Annex 7: MIAM (revised information for Parents and other parties)

Mediation and Information Assessment Meetings (MIAMs) – Information for Parents

Why is this information being provided?

There are some cases about children, particularly where there are risks to children's safety or welfare, which may need to be dealt with by the court. This includes cases where contact with a parent would put the child at risk of suffering harm and/or cases which are really urgent because delay would cause harm to a child.

However, court is generally not the best place for parents to sort out disputes about arrangements for their children where they simply cannot agree on what arrangements to make. The court process tends to increase parental conflict rather than reduce it and that in itself is harmful for children and makes resolving disagreement between parents more difficult.

So, if there is no risk of harm, it is better for children (and parents) to try and sort out arrangements without going to court if at all possible.

What is a MIAM?

A MIAM is an opportunity for parents considering court proceedings to get information about how they can try to resolve any disagreement without using the court. That may be mediation or other ways in which disputes can be resolved without going to court.

A MIAM is an individual meeting with a mediator. It will last for about an hour. Parents attend separately and do not have to meet each other.

Why should I attend a MIAM?

Getting information about how to resolve disagreements out of court can help to reduce conflict and support co-operation between parents for the benefit of their children. It may also help to save you time and money.

Somebody who intends to apply to the court for an order (called "the applicant") must attend a MIAM unless an exemption applies (there is a list of MIAM exemptions at the end of this leaflet).

If somebody applies to the court without going to a MIAM and without a valid exemption, the court is likely to order them to attend a MIAM anyway.

The other parent (the one who is not applying to the court – called "the respondent") should also attend a MIAM unless an exemption applies (see the list of MIAM exemptions at the end of this leaflet). If they do not attend and do not have a valid exemption they should expect the court to want to know why they have not taken the opportunity to get information about resolving matters for the child or children without going to court. The court may require the other parent to go to a MIAM in any event.

How much will it cost me?

If you, or the other parent, are eligible for legal aid, the MIAM is free. Information about eligibility for legal aid can be found at https://www.gov.uk/legal-aid. At the MIAM, the mediator will assess whether you qualify for legal aid.

If neither of you is eligible for legal aid, ask the mediation services you contact how much they will charge for a MIAM.

How do I organise a MIAM?

Contact a mediation service or services in your area to ask about costs (if you are not eligible for legal aid) and to arrange a time for a MIAM. You can find local mediation services via the Family Mediation Council's website: https://www.familymediationcouncil.org.uk/find-local-mediator/.

What if I'm not interested in mediation?

Going to a MIAM doesn't mean you have to mediate. The MIAM will include an assessment of whether mediation is suitable for you and your ex-partner. Information given to you at the MIAM will also include general information about resolving disagreements without going to court. It might provide details about mediation that you didn't know, and it will give you the opportunity to raise any concerns you may have about mediation.

What are the exemptions to attending a MIAM?

You are not required to attend a MIAM if any of the following conditions apply to you. But you can still choose to attend a MIAM if you wish to.

1. There is evidence of domestic violence. A list of the kinds of evidence accepted for this exemption can be found here: https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_03a#para20
2. The local authority is investigating the child's circumstances or there is a child protection plan in place
3. The application is urgent because delay would cause a risk of harm to the applicant or a child (including unlawful removal from the UK), or unreasonable hardship to the applicant (including loss of evidence or threatened court proceedings in another country)
4. There has already been a MIAM or attempted NCDR within the last 4 months, or a MIAM exemption relating to the same dispute was granted within the last 4 months
5. The application is part of existing proceedings in court and the applicant already attended a MIAM or obtained a MIAM exemption before those proceedings
6. The applicant doesn't have sufficient contact details for the other parent to enable the mediation service to contact them to invite them to attend a MIAM
7. The application is being made without notice
8. One of the parents can't attend a MIAM because of disability and none of three mediation services contacted within 15 miles provide facilities to enable that parent to attend

9. One of the parents can't attend a MIAM because they are in prison or detained in another institution, or are subject to bail or licence conditions that prohibit them having contact with the other parent
10. One of the parents doesn't live in England or Wales
11. None of three mediation services contact by the applicant within 15 miles of his or her home is able to offer a MIAM appointment within 15 business days
12. There are no mediation services authorised to conduct MIAMs with offices within 15 miles of the applicant's home.

Full details of all the exemptions can also be found here: https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_03#para3.8

Unless there is a good reason for not doing so, every parent should go to a MIAM before court proceedings start. The MIAM is an opportunity to get help to sort things out without going to court. Parental conflict is harmful for children.

Annex 8: Proposed outline requirements of a MIAM (for Mediators)

MIAM requirements

A MIAM needs to be an individual face to face meeting, ideally in person or otherwise by online video conference, conducted by a mediator trained in online video work.

The essential elements are as follows:

1. Building rapport– hence the need for face-to-face meeting, for an hour in a confidential setting, so the client feels safe and is not rushed. The purpose of the meeting will be explained so the client understands that this is not just about signing a form.

2. Information exchange – first part. The client is given time to explain his/her story.

3. Screening. This is a vital element of a MIAM, as the mediator screens for domestic abuse, child protection, mental health issues, disabilities or other vulnerabilities. In these situations, the mediator will take time to explore these, to consider what options are available and provide suitable signposting to local support services for both parent and child.

4. Information exchange – second part. Subject to the appropriateness from the screening, the mediator gives information on a range of issues:
    - Emphasis on co-parenting responsibilities and long-term welfare of the child. (NB mediators are expected to communicate 'co-parenting' in ways that can be understood, with examples/diagrams/resources – the word itself is easily misunderstood.)
    - Empowering messaging about finding child-centred solutions, rather than justice/control-type thinking
    - Risk to the child of long-term conflict
    - Nature of a court application (dispelling any incorrect presumptions). This will cover the stages and timing of a court application and the court's expectation that parents resolve issues themselves.
    - What are the DR options available?
    - If mediation suitable, what it is, how it works and what model would be appropriate
    - The benefits of hearing the voice of the child via child-inclusive mediation
    - What other local support services might be helpful?

5. Assessment. The mediator assesses throughout the meeting what options are appropriate for this client and this family. Included in the assessment process is an assessment for legal aid and the cost implications of suitable options. If mediation is a possibility, the mediator assesses which model would be appropriate to ensure a balanced and fair process. Following a full discussion about his/her situation and the information provided by the mediator, the client assesses his/her options.

6. Choice – the client decides on the way forward. This may result in the mediator referring the client to other support, writing to the ex to invite him/her to attend a similar meeting, signing a court form, or any or all of these.

Annex 9: Extracts from the Family Justice Review Report (2011)

Online hub:

Information and support for dispute resolution

4.74. We made the following recommendation:

- *an online information hub and helpline should be established to give information and support for couples to resolve issues following divorce or separation outside court. This should cover issues relating both to children and to finance.*

4.75. The proposal to join up information services was given overwhelming support, with many noting its importance in enabling parents to seek advice on the full range of issues they might encounter following separation.

> *Cafcass supports the introduction of information hubs and steps to inform parents of options to resolve disputes and provide for effective parenting without recourse to courts.*
>
> Cafcass, consultation response

4.76. Some respondents noted the limitations of the information hub and argued that it must provide information to support families where there may be issues of child protection or domestic abuse, supported by suitably qualified staff.

> *The Law Society supports the concept of developing an online information hub and telephone helpline, however this hub will not be suitable for all members of the public. It is likely that some vulnerable people may find accessing services by telephone or online difficult or even impossible.*
>
> The Law Society, consultation response

4.77. The online information hub should offer support and advice in a single easy-to-access point of reference at the beginning of the process of separation or divorce to enable people to make informed decisions about how best to resolve any issues they may have. In particular, the website should provide clear guidance about parents' responsibilities towards their children, the benefits to children of a relationship with both parents, what further support is available, and advice about options and processes for supported dispute resolution, including court resolution. Those who deliver the helpline services should be trained to identify where there may be child protection or domestic violence concerns.

4.78. The information hub should provide families with the information they need to get further support including local dispute resolution services. It should also allow

parties to access necessary application forms where they wish to make an application to court. Forms should be intelligent, allowing later forms to be pre-populated and also adapting to the information already entered. This last would be particularly useful in relation to ancillary relief application forms.

4.79. Government established an expert Steering Group, including academics and people from the voluntary and community sectors, in August 2011, to advise on the development of the proposals set out both in our interim report and in the Department for Work and Pensions Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance*. The first phase is expected to conclude by November 2011. Subject to government's approval, the Group will take forward its recommendations through a series of subgroups.

The simple track

4.124. The simple track would be established to determine narrow issues, where the court would undertake a tightly managed hearing (limited say to two hours), held at short notice and during which each party could be heard.

4.125. The simple track should allow the court flexibility in its approach to resolving disputes. The court should be able to proceed in whichever manner it considers practical and fair in order to support the parties to reach agreement. Where a case was assigned to the simple track clear instructions would be given to both parties to enable them to understand the process and to minimise the scope for delay. The parties would be required to submit all documents relating to the case within deadlines before each hearing.

4.126. Tailored case management rules and principles would apply. These could include:

- informal hearings;
- limited cross examinations;
- removal of strict rules for evidence; and
- limitations on numbers of hearings and indeed the expectation of only one in the majority of cases.

4.127. Cases allocated to the simple track are likely to be those cases with a single issue for determination, cases without allegations of domestic abuse, and those where no findings of fact are required. The judge would be able if necessary to transfer the case from the simple to the complex track.

The complex track

4.128. The panel invited the President of the Family Division to consider how best to develop further the case management and trial skills of the family judiciary in relation to complex cases. The President has issued helpful guidance about case management.

4.129. As in the interim report the panel suggest that the following proposals might guide complex cases:

- limiting the parties to litigating any issues relating to past behaviour to those that may impact upon the future arrangements;
- early evaluation of those factual issues that do need to be determined and those that do not;
- an early hearing to determine the factual issues that do call for resolution;
- early declaration as to the weight that the matters that do not call for resolution may attract;
- not listing a final hearing unless and until it is necessary to do so but, instead, adopting the use of the Issues Resolution Hearing from the Public Law Outline; and
- in the event that issues are to be contested at a full hearing, the hearing should be tightly controlled by the judge who, in accordance with the overriding objective in the Family Procedure Rules 2010, will determine the time taken by each party and each witness in a proportionate manner.

4.130. The Family Law Bar Association (FLBA), who originally made these proposals to the panel, made further suggestions, including:

- there should be a requirement to set out the issues on the face of the application to assist court staff in allocating cases;
- a space on the form for parents to set out when they last saw their child; if they are seeking to suspend contact and why;
- that those who assert serious concerns should be required to produce evidence at an early stage; and
- those who seek suspension of contact should be made to stipulate in clear terms their reasons why and what harm they say will come to the child if their stipulations are not adhered to.

4.131. We agree, and recommend these additional suggestions.

Annex 10: Amendments to the Rules and to PD12B FPR 2010

What follows is not an exhaustive list of the Rules and Practice Directions which would require amendment in the event that the recommendations in the report are pursued, but some of the likely **key** changes to **Part 3**, **Part 12** and **PD12B** which the Working Group has discussed:

#	Current Rule / Para.PD12B	Proposal
Part 3		
	Rule 3.9: conduct of MIAMs	Will be strengthened by inclusion of additional issues to discuss at the MIAM
	Rule 3.10: MIAM exemption not validly claimed	Will be strengthened. Courts should automatically order MIAM attendance before the first hearing where this has not happened and no valid exemption has been claimed, and there is no safeguarding issue. [#64]
Part 12		
	Rule 12.5: What the court will do when the application is issued	Will need to be amended. Remove reference to 'setting a date for a directions appointment or FHDRA'
	Rule 12.7: what a court officer will do	The Court officer will not be sending 'notice of hearing date'
	Rule 12.31: FHDRA	To be removed, and replaced
PD12B		
	Para.2.2: List of recommended services	To be expanded or replaced by reference to the Supporting Separating Families Alliance (SSFA)
	Para.5.1: Availability of dispute resolution services.	To be expanded or replaced by reference to the SSFA
	Para.5.3: Expectation on Respondent to attend a MIAM:	This should be re-written to reinforce the benefits of the MIAM activity (#63)
	Para.5.10: Content of the MIAM	This should be re-written to take account of the matters contained in Annex 8 above, and to highlight that the quality of the delivery of MIAMs should be rigorously monitored and consistently maintained (#62b).
	Para.6.1: Obligation to consider NCDR	Amend to refer to the SSFA
	Para.8.7/8: Application	Delete reference to the provision of a Notice

#	Current Rule / Para.PD12B	Proposal
		of Hearing, and substitute with 'Notice of Next Steps' which will explain to the parents what the court and Cafcass/Cymru will do over the next 4-6 weeks up to and including triage.
	Para.9.1: Allocation and Gatekeeping	References to 'Allocation' will be removed here
	Para.9.3: Allocation	Removed
	Para.9.4: Gatekeeping	Remove references to the FHDRA
	Para.10.1: Allocation upon issue	Will be replaced with Allocation at Triage
	Para.10.2: Judicial Continuity from FHDRA	Will be replaced with Judicial Continuity from the first hearing (which will be undefined, given the range of options)
	Para.12.5: Urgent and without notice applications: Gatekeeping decisions	To be amended, to reduce the scope of identified 'Gatekeeping decisions'
	Para.13.2: Safeguarding	Amended to reflect the content of the safeguarding letter, which itself will include recommendations as to (i) which track should be considered for the case initially; (ii) next steps / options within the track, (iii) whether the court should direct activities to move parties towards conciliation – SPIP/WT4C or other Cafcass commissioned service such as a Child Contact Intervention or referral to a SSFA service if appropriate before the first hearing or during the course of proceedings, (iv) the need for a *section 7* report (and whether LA needs to be involved); (v) whether to consider fact finding. See #72
	Para.13.3: Safeguarding enquiries	The CAP will include [#72a above] the expectations on the police and local authorities to provide information to Cafcass/Cymru in a timely way
	Para.13.7: Safeguarding letter	Will be amended in line with the recommendation for #13.2 above
	Para.14: FHDRA	This will be replaced in its entirety. Parts of the text will be adapted for the four new sections (below)
		There will be a new section on 'Triage'
		There will be a new section on 'Tracks'
		There will be a new section on 'Conciliation'
		There will be a new section on 'Early Resolution Appointments'

#	Current Rule / Para.PD12B	Proposal
	Para.21: Enforcement of Child Arrangements	This will be amended to reflect the changed procedure (application brought on C100 not on C79), and follow the principles of the 'track 3' case management set out above, see [#81c] and [#96]
	Para.22: Court timetable	Will be amended to exclude reference to the FHDRA and will include reference to tracks 1-3, triage, conciliation, and Early Resolution Appointments.
	Annex: Explanation of terms	Will be amended to include the new terms
PD12J		
	Para.5, 9, 11, 12	Will require amendment to reflect the new terms and procedures

Annex 11: Private Law Flowchart

See Separate Sheet

Annex 12: Consultation Questions

It would be helpful if you could please respond to the consultation by addressing the following questions.

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

b. **MIAM**: What more could be done to refresh or revitalise the MIAM to encourage separating parents to non-court dispute resolution?

c. **GATEKEEPING AND TRIAGE**: Do you support the changed arrangements for gatekeeping? And for triaging cases?

d. **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?

e. **SPIPs**: Could/should we encourage more parents to attend SPIPs? If so, when and how?

f. **RETURNERS**: What are your views on the arrangements for 'returner' cases, specifically, their early re-allocation to the original tribunal for triage?

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

h. **GENERAL**: Do you have views on any other aspect of the report?

[end]