RESPONSE OF THE CHILDREN IN SAFEGUARDING PROCEEDINGS COMMITTEE OF THE FAMILY JUSTICE COUNCIL TO THE CONSULTATION ON THE PUBLIC LAW OUTLINE.

INTRODUCTION

The Children in Safeguarding Proceedings Committee of the FJC welcomes the PLO as a significant initiative to streamline, and simplify, the procedure for resolving these difficult and important cases. It also appreciates the intention to co-ordinate the input of the key agencies by timing the new measures for the courts to co-ordinate with the publication of revised guidance to local authorities. Clearly this is a crucial element for successful implementation and the FJC will also be responding to the consultation on draft Children Act Guidance, Volume 1. As the Thematic Review of the JRT pointed out, improvements to the court process will be dependant to a large extent on the quality of the work done by local authorities pre-proceedings, and the clarity of their communication with families. Measures to link this work with the court process will be assisted by promoting shared understanding among the different agencies.

The Committee also welcomes the opportunity to comment upon the proposals. In making these comments, the Committee would draw attention to the response of the Family Justice Council to the *Review of child care proceedings system in England and Wales,* and especially to the points made about the integration of the work carried out by local authorities and the various health trusts, which the Council considers to be key in any attempts to reduce delay in public law proceedings:
www.familyjusticecouncil.org.uk/docs/060922_Response_to_the_Child_Care_review_pdf.
Paragraphs 16-22.

It is clear that the existing Protocol for Judicial Case Management in Public Law cases has made a real difference in the effective management of care cases. However, the Committee notes that all the major "obstacles to success" listed for the original Protocol related to resources. Despite the best endeavours of the agencies concerned those obstacles remain, and in the case of the question of funding for representation have been exacerbated. It is recognised that such problems lie outside the ambit of any judicial protocol or outline but we note that the effectiveness of the proposed reforms will be seriously jeopardised by these issues. We are particularly concerned that if parties are unrepresented, or poorly represented, that will have a marked effect on the court's ability to progress cases and may impact deleteriously on the timetable for the child. We also note that the lack of LSC funding for residential assessments means that the courts are less likely to have access to key information and may find cases more difficult to determine and hence longer. It is noted that this step was taken by the LSC despite recent decisions of the Court of Appeal underlining the importance of securing independent assessments, particularly where the plan for the child is permanency outside the birth family.

GENERAL COMMENTS

The Committee has concerns about the time scale for the introduction of the outline and the way in which it is being introduced. There is a danger that, if its introduction is rushed, courts and practitioners may decide simply that it is impossible to comply with the new process and the desired improvements will, therefore, not be achieved. The draft outline is currently being tested in 10 initiative centres across England and Wales and there will be a report on progress in October. However, the Committee doubts whether this approach will assist very much in the national implementation because relatively few cases will have been considered and most will not have reached the later stages of the new system before full implementation across the country.

The Committee notes that the reforms introduced under the PLO have not been based on a thorough research based understanding of the reasons care cases take so long, involving the an analysis not only of the way courts work but also the work of local authorities and CAFCASS. The DCA and DfES commissioned such research – the *Care Profiling Study* in September 2006 with a final report due in November 2007. Empirical research of this sort would more usefully have been commissioned right at the beginning of the reform process in

2005. It is to be hoped that before further reforms are developed a thorough analysis of the operation of the system will be undertaken.

It is understood that it is hoped that the DCSF and Welsh Assembly Government revised Volume 1 Guidance on the Children Act will be issued in its final form following consultation in November this year. Given the importance of ensuring consistency between this guidance and the PLO it seems essential that both pieces of work are completed together, and in time to allow for proper training, preferably joint training, based on final versions of the two documents together. Under the current timetable this will be impossible. It is likely to be counter productive to base training on work that is incomplete.

At this stage the draft Practice Direction on the interrelationship between public law proceedings and proceedings for a placement order or an adoption order has not been circulated for comment. This is an area of practice which has already been identified as problematic and it is vital that proper consultation takes place. We are also concerned that the relevant updated guidance to local authorities is not yet available. Discussions in the Committee have made it clear that avoiding unnecessary delay is more than merely a matter of time-tabling. For example, issues such as proper resourcing for Adoption Panels, including the provision of medical advice, are also significant.

Turning to the specific steps of the Outline, the Committee makes the following comments:

PRE-PROCEEDINGS

The Committee welcomes the introduction of a pre-proceedings checklist but reiterates the Council's view in its response to the Care Proceedings Review "...it is not possible to be prescriptive about what work will be done before proceedings are issued and what work will be done afterwards. The starting point for any pre-proceedings checklist is whether there is, first, an immediate need for the child to be protected and, secondly, whether there is agreement with those with parental responsibility about the way to move forward."

The Committee welcomes the guidance that a core assessment should have been completed, **if possible**, before the issue of proceedings but recognises that this may not be possible in many cases if children are to be safeguarded.

The Committee also notes that other important material, for example, kinship assessments, while vital in many cases, are unlikely to be available at this early stage for a variety of reasons. It will remain necessary for the court to consider with care what additional information is necessary beyond that already provided by the Local Authority.

One of the items on the checklist is "previous orders and judgments". Where a different local authority has conducted these proceedings this material may not be available to the applicant local authority. Although liaison between local authorities can be expected where previous proceedings are known, no written judgment may have been produced. Even where the Local Authority knows that there have been proceedings it may not have been able to ascertain their whereabouts. There is no central register of such orders. It would also be helpful if the clearest guidance were given to local authorities about the disclosure of court documents to other local authorities. Any application for disclosure to the court is likely to delay the transfer of information to the intending applicant and add to the burden of the original court.

There is a real danger that a checklist will become the basis for challenging local authority practice, rather than supporting practice improvement. If it does it will widen the issues brought to the court rather than narrowing them. Although guidance is only *guidance* the general expectation of documents issued under LASSA 1970, s7 is that local authorities have to justify their departure from them. Although failure of parental co-operation may be accepted, resource constraints, lack of staff etc may not be. It may be useful for judicial training to address specifically the approach to the checklist.

STAGE 1 ISSUE

We understand that issue will still take place in the FPC although the plan is to amalgamate administration of the FPCs and Care Centres.

The Committee understands that initial "allocation" i.e. FPC/Care Centre will be undertaken as a paper exercise by the "gatekeeper" judge/s. Ideally, it should take place at this stage – certainly if as is suggested, "case managers" are being nominated.

There is a need for far better guidance on the issue of allocation than is available even in the Draft Allocation Order and draft allocation guidance. With clear common standards about transfer there could be agreed benchmarks for the types of case which the FPC should handle

and targeted training to ensure that all FPCs are competent to handle these cases. At present, lack of confidence in the FPC by practitioners, legal advisers and in care centres encourages transfer up despite the Allocation Order. The most common basis for transfer is complexity but it is far from clear, save in cases such as those involving fabricated illness or injuries of unclear origin, how it can be said that cases are complex on the basis of the initial paperwork. There are currently very considerable differences between courts in the cases which are transferred to the Care Centre. If more cases are to be retained in the FPC, there needs to be much greater clarity nationally about the circumstances which justify transferring cases and support for developing, and retaining, expertise in the FPC, including the provision of specialist clerks and focused training for magistrates

"Invite OS to act for incapacitated adults" –The Committee has been concerned by the delays which currently seem to be inherent in the involvement of the OS but is not clear what is proposed here. There needs to be evidence of incapacity before the OS can be invited to act. Is it suggested that it will be the Local Authority's responsibility to obtain a report from a suitably qualified psychiatrist as to parental capacity prior to the issue of proceedings? Given that the involvement of the OS to act for a parent can have profound consequences for the manner in which they are permitted to conduct their case can it be right for an opposing party in proceedings to be in control of this process? The issue is whether the parent can give instructions, and this is a matter which should be first considered by the parent's legal representative, not by another party. Will the proposed LSC funding prior to the issue of proceedings encompass the instruction of an expert witness? Surely this must be considered at a later stage? We would welcome clarification

FIRST APPOINTMENT

It is assumed that the first appointment should come before the case manager - ideally the judge/FPC who will be dealing with Case Management Conference and further hearings up to decision.

Assuming the case has already been allocated in the sense of a preliminary decision having been reached as to FPC, or Care Centre, it will be important to ensure there is an opportunity for the parties to make representations and for the court to review that decision. The Local Authority documentation will not always contain all the relevant information and parents and the Children's Guardian are entitled to make their views known. It is assumed that this is

what is meant by “For transfer.” A definition of cases which are anticipated as requiring an “early final hearing,” will be required. Judges and magistrates will be supported in making such decisions by knowing that they are following guidance and others are operating in the same way. It should be recognised that although early final hearings can benefit children they are also likely to be viewed as contrary to parents’ interest because they reduce the time available for parents to demonstrate that they have overcome their difficulties. One reason for cases currently taking so long is a wish to allow parents “more time”

ADVOCATES MEETING

The formalising of advocates’ meetings, which currently often occur immediately before a hearing, and may delay the start of the hearing, has some advantages but is not without difficulty. If the Guardian and social workers are present, such meetings can no longer be without prejudice. The absence of parties makes it difficult to obtain instructions and thus to negotiate in a way which includes the parents and supports their participation in the proceedings. The practicalities of arranging such meetings are often complex but the value of getting all the advocates together is clear. It should be noted that there is an inherent conflict between firm case management by the court and reliance on the parties to make agreements and present draft orders to the court. Requiring the parties to produce a written statement of their proposal should not lessen the importance of the case management judge having adequate time to prepare for any directions hearing.

THE CASE MANAGEMENT CONFERENCE

This appears to fulfil much the same function as the Case Management Conference in the existing protocol. The main question that arises concerns the fixing of a final hearing and how this is to be achieved. It appears from the PLO that a final hearing will not be fixed as a matter of course at the Case Management Conference but that this will come later at the Issues Resolution Hearing. Earlier fixing of hearings, albeit the listing may be provisional, do allow witnesses, parties, advocates and the court to have specific dates to work towards, rather than leaving this to a later stage when diaries are already full. The Committee recognises the problems which currently exist where cases which have been fixed a long time in advance are not effective but does have reservations about such a late stage for fixing of final hearings.

Listing for final hearing within the "timetable for the child" is obviously a positive development, but any reduction in the emphasis on completion of cases within 40 weeks, save in exceptional circumstances, would be unfortunate. In particular, we would not wish to see any reduction in the already overstretched judicial resources available to hear these cases.

Further guidance as to kinds of cases that may need shorter or longer timetables would be helpful. For example, given the importance of achieving permanent arrangements, with the parents or elsewhere, for babies there is a case for setting a shorter period than 40 weeks for all cases where infants are separated from their mothers.

THE ISSUES RESOLUTION HEARING

This is a positive opportunity to resolve and narrow issues, to identify remaining key issues and the evidence required to determine them, to eliminate fruitless argument and, thereby, to reduce the length of the final hearings. It is, however, important to dispel any possible perception that this hearing will be used to pressurise parties into reaching agreements which they may subsequently regret. The Committee is satisfied with the wording in the Outline which does not suggest that parents are to be deprived of the opportunity to present their case in its best light, if necessary by calling evidence; their "day in court". It is important that while giving full consideration to the timetable for the child and the rights of the child that the rights of the parents are also recognised

HEARING

No time scale is set for this, save that it be within the timetable of the child. We refer to our earlier comments.

CONCLUSION

The Safeguarding Committee of the FJC emphasises the importance of continuing study and consultation and engagement with key stakeholders. It reiterates the points made in the Council's response to the Child Proceedings System Review to suggest that there are other problems which also need to be addressed alongside the procedural framework for these cases, since it is these issues which will continue to hamper their effective resolution.

We think it important that the proposed guide to the PLO is published as soon as possible. Many of our concerns are likely to be resolved by more detailed explanation of the current brief document.