JUDICIARY OF
ENGLAND AND WALES

The Family Justice Modernisation Programme

Sixth update from Mr Justice Ryder

July
2012

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On the 26th June I had the opportunity to give a speech in the public domain which brought together the thoughts expressed in my previous five updates with some new material which will form the basis of the proposals I shall make at the end of this month. This is likely to be the last update before those proposals are published although I hope to continue to involve everyone in the progress of the modernisation programme by continuing to publish updates about implementation.

On 10th May 2012 the Crime and Courts Bill was laid before Parliament. The Bill contains two clauses which are intended to create new statutory courts. One is a national County Court for civil proceedings to replace the existing 109 local county courts in England and Wales and the other is the culmination of an aspiration of specialist family practitioners since before the publication of the Finer Report in 1974: a unified Family Court.

This is a once in a lifetime opportunity to create and fashion a court in the image that you and I want. The launch of the court after the summer of 2013 will be the vehicle for a radical change of culture, albeit one that will be reflected elsewhere: by way of example there will be a change programme in civil justice arising out of the Jackson Reforms which will have its own commencement in or around April 2013 and there is a continuing initiative to provide strong leadership and case management in the criminal courts through the national Early Guilty Plea Scheme. The judicial Family Justice Modernisation Programme reflects a consensus for change among judges and professionals of all disciplines and will be the judiciary's response to the Family Justice Review.

May I sketch out for you a process and a timetable for the Family Justice Modernisation Programme? Over the last eight months I have been engaged in an extended conversation with more than 4,000 interested parties and individuals at conferences, seminars and meetings around the country. I will have listened to and talked with 5,000 people by the end of next month. The process recently included an examination of outline proposals with leadership judges at the President's Conference and approval in principle of outline proposals by the Judicial Executive Board.

My next task is to publish the judiciary's proposals at the end of July. The proposals will seek to provide judicial solutions to the problems identified in the narrative of the Family Justice Review and the Government's response. I intend to present an overall picture for reform which will bring together ideas from all of those with whom I have had discussions.

The key to the proposals will be the creation of a new court which will have strong judicial leadership and management i.e. judicial control of the workload of the court and the management of judicial deployment to match resources to need. My purpose is to provide access to justice for children in families: that is the real import of the complaint about delay. The Modernisation programme will be in two phases. Each phase will take approximately a year with the intention of preparing everyone for the statutory changes that are expected at the end of process in the Summer of 2014.

Phase One

Phase One of the Programme will put in place the structures, leadership and management principles to enable the primary legislation which creates the new court to be commenced some time after the Summer of 2013. By then the judiciary and Her Majesty's Courts and Tribunals Service (HMCTS) will have designed the structures and administrative support for the new court including the unified family administrations that will bring together the listing and deployment functions of each of the separate courts that presently exist. In particular, new statutory instruments, rule and practice direction changes will have been made in parallel with the primary legislation to provide for the distribution of business within the court, the destination of appeals including case management appeals, and the use of experts. There will also need to be a body of new judicial guidance relating to the deployment of judges,

magistrates and legal advisers including gatekeeping i.e. a single point of entry for applications to the court where cases are allocated, listing, judicial continuity or docketing and patterning. During phase 1, there will be a strong emphasis on leadership and management development for the judiciary and the piloting of appropriate management information to support leadership judges in their management of the court's resources.

In parallel with Phase One of the programme, we intend to draft evidence based good practice pathways and guidance which the family court will use to improve the outcomes for children involved in cases by reducing delay. We propose to train all authorised family judges, specialist legal advisers and magistrates trainers in these good practice materials before the Autumn of 2013.

In a year's time we will have a new court with a new structure where the work of the court will be directly managed by the judiciary and where all levels of judge and magistrate will be members of the same court i.e. they will all sit as judges of the family court. At a national level the court will be led by the President of the Family Division with the support of an implementation group for the modernisation programme. The Family Division Liaison Judges will be responsible for implementing the change programme in each of the regions of England and Wales i.e. the Circuits.

The new court will be organised around existing care centres which will be managed by the Designated Family Judges. Magistrates and their legal advisers will be members of the new court with leadership arrangements that reflect both their membership of existing benches, where they will remain available to continue to sit in crime and youth justice, and their new role as members of the family court.

I envisage all family court judges, including magistrates and their legal advisers, being represented both nationally and locally on judicial advisory groups and for there to be energetic family court business committees involving all practitioners.

I am very grateful to the Law Society for sponsoring the creation of a national family court business committee which is known as the Faster Family Justice Group which has enabled a wide range of professional associations and interest groups to contribute significantly to the modernisation process.

The Family Justice Review made its view about the absence of reliable management information very clear. On 1 April 2012 we introduced a new system which is capable of providing the management information necessary to enable business planning, forecasting and the allocation of cases to available resources. The new Care Monitoring System (CMS) was introduced in a trial form to a specification written by the judiciary and in particular by Designated Family Judges. It will be developed over the next year to provide information about workload, allocation, timeliness, the reasons for adjournments and the use of experts.

Phase Two

By the time the primary legislation which creates the new Family Court has received Royal Assent, we will be in a position to publish the evidence based good practice that will have been drafted between July 2012 and July 2013. Phase Two of the programme will follow. That will be a year during which the court is able to prepare for the implementation of the Government's second Bill, the Children and Families Bill. The year will begin with judicial training and end with the implementation of the second tranche of statutory reforms in approximately April 2014. It is likely that the second Bill will deal with Government's published desire to limit care cases to 26 weeks save in judicially excepted circumstances, to describe a more focussed scrutiny of the final care plan, abolish interim care order renewals and implement the Government's proposals in private law relating to shared parenting, child arrangement orders and contact enforcement.

Let me emphasise that it is not the judiciary's purpose to undertake a reform programme for Government. The proposals for change will be the judiciary's and will be independent of Government but we should not turn a blind eye to the Government's legislative programme and we acknowledge that there is a cross party consensus for the Family Justice Review reforms. We need to plan to ensure that there is a coherent process at the end of the various legislative changes.

In formulating outline proposals, where did I start on behalf of the judiciary? The overall management of the individual care case in the context of the workload of the court needs urgent reconsideration. The idea that every case is complex, unique and not susceptible to

determination without having tried every theoretical alternative option before a care order is made is neither a necessary nor proportionate way of undertaking case management. It breaches the overriding objective which is the principle arising out of legal policy that determines management of the overall workload, the prioritisation of cases within that workload and a proper use of resources to ensure a fair hearing in the individual case. The overuse of experts to confirm the evidence that is already before the court or to provide a multi-layered excuse for decision making is equally not appropriate.

Decision making is a risk-based judgment call based on principles. That is what we appoint and train our judges to do. They are not alone in performing that task and there is a deal of evidence about decision making in other risk environments that we have considered. Judges identify and solve the problems which lead to an ultimate decision and the best judges like the best advocates, learn to discard the noise of peripheral disputes and concentrate on key issues. The art of a quality decision making process is the balance between the risk that is being taken and the protection against that risk which is part of the process.

If every case needed a multiple layer of experts until at least a substantial majority view or unanimity arose we would not need judges: although you would need an unsustainable budget and you would have to be prepared to ignore the significant delay that multiple and sequential expert advice occasions. That is not to say that experts are unnecessary but rather that they are misused and over used. There is a place for independent social work and forensic experts to advise on discrete issues that are outside the skill and expertise of the court or to provide an overview of different professional elements in the most complex cases but regard must be had to why those who are already witnesses before the court have not provided the evidence that is necessary and who should pay for it when it is missing.

We propose to put in place rule and practice direction changes relating to the use of experts and importantly a timetable track which will presume that non exceptional cases can be completed in 26 weeks. These will be known as pathways and they will describe how to achieve the objective in permissory language. The pathways will be supported by at least ten good practice guides describing:

- Local authority pre proceedings work
- Social work evidence
- Official Solicitor's capacity guidance
- The timetable for the child
- Key issue identification
- The threshold
- Use of experts
- Third party disclosure and concurrent proceedings
- Placement and care plan scrutiny
- The use of research in court

In addition we hope to publish a statement of inquisitorial principle. We aim to demonstrate and assist everyone to understand that save in relation to adversarial fact finding sufficient to make the ultimate decision before the court, the judge's function is inquisitorial. The judge is in control and the judge decides what is to be determined, what is the evidence that is necessary for that decision to be made and how it is to be tested before the court.

During the course of this next year we will also seek to agree with the agencies with which we work, expectation documents setting what judges should expect from:

- Cafcass (court social work services)
- Contact services
- Safeguarding services

- Testing services
- Legal Services Commission (public funding)

We will provide new materials for the court which judges and magistrates can place reliance upon without resort to expert evidence. We shall describe peer reviewed research materials which are accepted by a reasonable body of professional opinion and which, subject to challenge before the court and/or evidence as to how the research should be interpreted on the facts, can be relied upon by judges. We will validate and publish such research and good practice guidance by using the Family Justice Council which will remain an independent advisory body chaired by the President.

In addition to the principal pathways and supporting guidance we hope over time to develop specialist materials to describe specific projects which research has already validated as successful such as the Family Drug and Alcohol Court (FDAC) and projects which assist domestic abuse victims to be successfully rehabilitated as the carers of their children. We will provide new materials by way of practice notes and explanatory guidance for self representing litigants. We will develop a consistent but firm approach to litigants, whether represented or not to ensure that issues remain in focus and that they are addressed within the timetable set by the court. That will require a new culture of compliance. Compliance will need to relate both to good practice and to sanctions but the key to compliance is an effective timetable based upon the child's welfare.

The drafting and trial of the pathways and guidance will be undertaken collaboratively with the judiciary and interested parties. The enhanced new role for the Family Justice Council will be of considerable significance. I have already received over 150 detailed drafts of suggestions that may be of assistance. The process will be designed to help judges feel confident enough to manage a heavy workload and prioritise cases within it but also to feel confident in saying that the key issues identified in individual cases are within the skill and expertise of the court and to the limited extent that they are not in a welfare or inquisitorial environment are capable of being reported upon by a single expert or a single joint expert within a reasonable time period. In every case, the judge should be able to say: is your expert necessary, i.e. to what issue does the evidence go, is it relevant to the ultimate decision, is it proportionate, is the expertise outwith the skill and expertise of the court and those witnesses already involved by reference to the materials available to the court in published and accepted research.

May I return briefly to the 26-week pathway? Such a pathway is likely to describe a case where the threshold is agreed or is plain at the end of the first contested interim care order by the reason of the decision made at that hearing. The legal environment that remains is a welfare or inquisitorial environment not an adversarial fact finding environment. The problem to be solved is essentially placement which of course includes the success of rehabilitation and the feasibility of family and other kinship options, but that is nevertheless a question of placement and consequential contact. Even in the planned and purposeful delay system employed in the FDAC, a decision in principle as to the theoretical success of rehabilitation for a child and parent can be taken within 26 weeks. It is likely that in a welfare environment of 26 weeks any expert evidence that is necessary will be a single expert or single joint expert. The issues resolution hearing (IRH) would need to be set between 16 and 20 weeks with a view to identifying at that stage each party's best case. A final hearing dealing with identified and discreet issues can then be relatively swiftly listed.

I do not forget and I know you will be concerned about the prospect of those who will fall outside of the scope of public funding for private law proceedings by 1 April 2013. No-one knows what the impact will be of the removal of public funding in terms of the volume of applications to the court nor the overall success rate of mediation. The judiciary are not responsible for answering the interesting and indeed challenging questions that now arise in respect of the pre proceedings processes that will be put in place by Government nor the mediation service itself but we must take steps to ensure that those who are entitled to family justice are provided with access to it, whether represented or not.

What is clear is that the courts will have to deal with a volume of previously represented parents. They will not have had the benefit of legal advice to identify solutions to their problems on the merits and demerits of their proposals. They will not have had identified to them the issues the court can address before arrival at the court door. They will arrive without professionally advised

applications seeking permission to file evidence. Many will have no idea what a conventional court process entails and some will have no desire or ability to take it on board.

We cannot expect our district bench colleagues who presently decide the majority of private law applications and the magistrates who are likely to have allocated to them many more of these cases to cope without assistance. It is likely that we will propose as one of a range of solutions a new process for standard cases. We will devise a private law pathway that is likely to describe information for self represented litigants setting out what the court can and cannot do and how it does it, a procedure that helps to identify safeguarding issues i.e. risk and urgent cases and an inquisitorial environment within which most decisions will be made. In a conventional case that may involve restrictions on the right of one party to cross examine another, relying instead on each party having their say, the judge identifying the issues upon which he or she needs further assistance and then the judge asking questions of each party himself or herself.

Many of the judges of the county court together with their colleagues in the High Court (both at the Principal Registry and in the Family Division) undertake a significant volume of financial remedy cases. The judiciary have agreed that these cases will become one of the major strands of work in the new family court but that the specialist services that are provided both in London and elsewhere need to be preserved so that this work remains allocated to the existing specialist judges who undertake it and those who are trained and authorised to undertake it in the future. In London we should aim to provide both a specialist family court centre for the capital and satellite family courts that provide access to justice for families.

The family court will not absorb the High Court, although High Court judges will regularly sit in the family court providing much needed leadership to interpret and apply legislation, rules, practice directions and existing case law in decisions that provide binding precedent. One of the most glaring omissions of recent years is the paucity of guidance available to family judges on case management and good practice from the High Court in children cases. That is an accident of circumstance caused by the unintended consequence of measures and workloads that have removed the High Court from regular contact with public and private law children cases: a circumstance that urgently needs review. The separate or reserved jurisdictions of the High Court will also be preserved, principally those involving international issues and the use of the inherent jurisdiction, with a power to transfer cases to the High Court out of the family court where the use of the High Court's exclusive jurisdictions is required. One important message from the process in which I have been involved is that the High Court judges (and on appeal the Judges of the Court of Appeal) are the key element of strong and consistent leadership in any programme that aims to improve the management of cases. Their decisions are more likely to influence good practice that any review or rule book and their role both in and out of the family court must be acknowledged and strengthened.

We have a great deal to do but there is a remarkable enthusiasm around England and Wales to rise to the challenge. I hope you will agree that the vision we are developing of a new style of family justice is not only right for children, it reflects the public's expectation of us. This is not just a worthwhile project, it is what we came into family law to achieve. It is what we are here for.