Report to the President of the Family Division

of the

Private Law Working Group

Child Arrangements Programme

Resolution of 'Private Law' (children) disputes in and out of Court

Introduction

1. Within the context of the wider Family Justice reforms, changes to the practice and procedure of Private Family Law in relation to children are necessary. Those proposed changes, described below, and supported where relevant in the accompanying draft documents, are designed to address:

   (a) The launch of The Family Court (specifically Allocation and Gatekeeping arrangements) in April 2014;

   (b) The likely *requirement* for Applicants to attend for Mediation Information and Assessment Meetings ('MIAMs') (currently *Clause 10* of the *Children & Families Bill 2013*), and the increased emphasis of dispute resolution outside the court process;

   (c) The impact of the scope changes in public funding for litigants in private law cases, following the implementation of *Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012* in April 2013;

   (d) The likely change in terminology for private law orders (currently *Clause 12* of the *Children & Families Bill 2013*).

2. The 'Child Arrangements Programme' ('CAP'), and the associated documents, is the result of a focused piece of work undertaken by the 'Private Law Working Group' ('PLWG') over a limited two-month period following its first meeting on 2 September 2013. The composition of the group, the Terms of Reference, and the researches undertaken by the group are summarised in the Annex to this Report. Views expressed in this report on matters of wider Government policy are those of the Judicial and Practitioner members of the Working Group alone.

3. 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) Aims to ensure 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').

4. The title of the scheme ('CAP') is intended to highlight the *child* as the focus of the scheme; this is in place of 'Pre-application Protocol' (PD3A)[1] and 'Private Law Programme' (PD12B) which inherently emphasise a court process. The title is deliberately widely drawn to incorporate 'arrangements' for children made within or outwith a court setting. While this corresponds with the terminology proposed by *Clause 12 Children & Families Bill 2013* to replace 'residence' and 'contact' the programme is nonetheless designed to apply to all private law ('relevant family, non-financial' – see para.20 of the CAP) applications.

5. To support the new arrangements, the PLWG has produced (in additional to this Report) in draft:

(a) A draft Child Arrangements Programme (CAP);

(b) Draft President's Guidance on Allocation and Gatekeeping (private law) (with Allocation Schedule);

(c) Draft President's Guidance on Judicial Continuity and Docketing (private law);

(d) Draft President's Guidance on Use of Prescribed Documents (private law);

(e) Draft Flowchart for private law (a visual aid for Judges and litigants);

(f) Expectation Document – Cafcass.

Further work is currently being undertaken by the group chaired by Mostyn J. on:

(g) Proposed Standard form Orders, namely:

[1] Subject to consideration by the Family Procedure Rule Committee on rules to support Clause 10

i. CAP01 for Directions on Issue

ii. CAP02 for Directions at FHDRA.

6. We see a need for further urgent work to give effect to our recommendations. See in particular the final paragraph of this report. The sign [*] in the text below indicates further work.

Welfare-based decision making for children

7. In guiding our deliberations we have conscientiously prioritised the key principles underpinning the determination of all private law children disputes, whether in or out of court, namely that:

(a) the child's welfare is the paramount consideration;

(b) delay is likely to be prejudicial to the welfare of the child, and

(c) a court order should only be made if it positively promotes the best interests of the child.

Structure of the CAP

8. The 'Child Arrangements Programme' ('CAP') integrates the existing Pre-Proceedings Protocol (PD3A FPR 2010)[2] (insofar as it applies to private law children disputes), and the Private Law Programme (PD12B FPR 2010). The objective is to set out a supportive, clear, process for private law cases. We considered it important to give greater profile to the pre-proceedings phase; it is well-recognised that pre-proceedings work with families is crucial if the reforms to the family justice system are to succeed in achieving optimal outcomes for children in a way which respects their and their families' human rights. This is as true in private as it is in public law.

9. Specifically, the Child Arrangements Programme is designed to be more:

(a) Comprehensive – in including *all* aspects of the private law process end-to-end;

(b) Accessible – for LiPs and Judges – we regard it as an advantage if the end-to-end scheme is located in one document;

(c) Versatile – in encouraging and re-inforcing determination of disputes out of the court system before and during proceedings.

[2] Subject to consideration by the Family Procedure Rule Committee on rules to support Clause 10

10. In the opening section of the CAP dealing with the period which follows parental separation but before proceedings, we have not been able to avoid using the terminology 'Prospective Applicant' and 'Prospective Respondent' which too readily connotes court process. We have nonetheless avoided referring to this section as a 'pre-proceedings' stage, which contemplates 'proceedings'.

Timeframe for the child

11. The PLWG considered carefully whether to recommend a specific time-limit for the resolution of private law cases, as in public law.[3] We have decided not to recommend such a time-limit. Private law applications encompass a wide range of potential issues, and there is a wide spectrum of procedure available to judges. That said, we believe that many (low risk) cases should continue to be resolved swiftly at a First Hearing Dispute Resolution Appointment ('FHDRA'), and expect that others will resolve at a later Dispute Resolution Appointment ('DRA') (see §87-89 below). Only a limited number should proceed to final hearing.

12. The PLWG does nonetheless recommend the inclusion in the CAP (see CAP §8.1.2, and 14.1) of a statement to reinforce the statutory requirement[4] to conclude proceedings without delay, and as soon as reasonably can be achieved in the interests of the child.

13. In order to reduce the duration of a private law case, we felt that we should offer guidance to address the perceived tendency of litigants to become dependent on the court process to regulate/determine aspects of their children's lives long after the key decision has been made; some courts have been complicit in this practice. We therefore recommend that:

    (a) Courts should not retain involvement by ordering a Review or Reviews of a Final Order unless this is both (i) necessary and (ii) in the interests of the child (see CAP §14.2);

    (b) If a *section 7*[5] report is ordered, Cafcass should, where possible, recommend a stepped phasing-in of arrangements for the child (see §82 below, and CAP §14.3) so that there is no need to return to court at each stage;

    (c) Where professional oversight or involvement is felt to be needed after a substantive order designed to settle the dispute, the court may consider making:

        i) An order under *section 11H CA 1989* (Cafcass Monitoring);

        ii) A Family Assistance Order under *section 16 CA 1989*) (in accordance with the practice in *section 12M CA 1989*, and if all named in the order agree to the making of such an order and the child lives (or will

[3] See *Clause 14(2) Children and Families Bill 2013*
[4] *Section 1(2) Children Act 1989*
[5] *Section 7* of the *Children Act 1989*

live) in the local authority area or the local authority agrees to the making of the order).

None of this is intended to deter courts from making interim orders in the right case.

The voice of the child

14. We support the right of children to have their voices heard as participants in decisions which affect them, in light of their age and understanding. Decisions reached in and out of court should take the wishes and feelings of children into account; children should know what is happening and why. Courts should be proactive in respecting this.

15. Where disputes in court progress beyond the initial hearing (generally a FHDRA) the court should consider how (if at all) the wishes and feelings of the child are to be ascertained in light of the child's age and understanding, and whether (and if so how) the child may be involved in the decision-making process, without the child being made to feel responsible for the decisions being made.

Dispute Resolution Services

16. We wish to highlight the urgent need for more people to be guided down the appropriate route to resolve their disputes, away from the court system.

17. **Co-ordination of Services**: At present, there is little if any co-ordination of information about dispute resolution services. 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 internet, with information being available also in hard-copy format (available in courts, doctors' surgeries, community and children centres etc), and all written in language which is clear and comprehensible to LiPs.

18. The Government app 'sortingoutseparation.org.uk' (sponsored by DWP) which is intended to provide co-ordinated information does not currently effectively achieve this and is not widely used. We wish to add our weight to the need for the hub to become fully effective, given that an online information 'hub' was specifically recommended by the Family Justice Review two years ago (November 2011),[6] and widely supported at that time,[7] and is now of greater importance following the changes to Legal Aid.

[6] "*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*" (Family Justice Review: page 22 §114, and "*separating couples should go first to an information hub … to give them ready access to a wide range of information and direction to further support as appropriate.*" P.135 §4.11), and see p.180 §5.7

[7] See FJR (2011) p.152-3 §4.74-75

19. The Government hub should, in our view, be official and authoritative. It should be widely promoted and easily accessible for all separating parents and designed to interact to all questions relating to the consequences of the family break-up. Specifically, this site should be constructed so as to:

    (a) 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;

    (b) Support parents to resolve their disputes independently;

    (c) 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

    (d) Help them to understand the court process and how to navigate this, where an application to court is unavoidable.[8]

20. The need to act in this respect is urgent. We are concerned to note[9] 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 have been advised that as a consequence, some mediation services nationally are struggling, and others 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.

21. As we say, it is vital that steps are taken now to reverse these worrying trends, building on initiatives currently being developed by Government.

22. **Information**: Potential litigants would benefit *now* from better quality, more accessible, and clearer information to assist them to reach agreements for their children.[10]

23. Specifically, there is an *urgent* need for greater support for, and signposting of, MIAMs and mediation services. The HMCTS Guide for separated parents [CB7] is useful but (a) will require revision in light of the changes to the law, and (b) ought to be more easily accessible.

24. There needs to be greater access to information about the relative costs and outcomes involved in attending MIAMs and Dispute Resolution Services outside of the Court compared with negotiation leading to agreement and/or litigation supported by a solicitor.

[8] We see this as an extension of what was proposed by the FJR see (2011) p.135 §4.11

[9] We have been provided with relevant data to support the views in this paragraph, but do not consider it necessary to reproduce the data in this report.

[10] See FJR [2011] (p.20 §104)

25. To promote encouragement to access dispute resolution, we have included a specific section on 'Signposting Services for Families' within the CAP (see CAP §3).

26. **Parenting Plans**: We note that the Government is currently piloting the wider use of 'Parenting Plans' specifically at an early stage of parental separation (see CAP §1.6) – again, a tool strongly advocated by the Family Justice Review.[11] 'Parenting Plans' can be a useful resource to support parents as they make arrangements for their children. We specifically recommend use of the Parenting Plan published by Cafcass to parties, mediators and other dispute resolution services.

27. The FJR recommended the consideration of Parenting Plans at a FHDRA;[12] while this may potentially be a useful discussion document at such a hearing, we do not believe that time will permit for taking parties through a Parenting Plan at a court appointment.

28. Consideration may in due course need to be given to the weight (if any) to be attached to a Parenting Plan[13] in the event of a court dispute. It is suggested that any such Plan should be admissible in any subsequent proceedings to establish what the couple had considered a reasonable arrangement at the time.[14]

29. **Mediation and Dispute Resolution during proceedings**: Mediation should not be seen as a 'once and for all' exercise. Parties can be particularly effectively engaged at different stages of a dispute, away from the court, even once proceedings have commenced. The CAP specifically references points at which re-referral to MIAM or dispute resolution is to be actively considered.

30. In-Court Mediation schemes can be extremely helpful to parties and the court. These are currently established at a number of local courts at the request of the court and any interested mediation services. We feel that it would be helpful for it to be more widely appreciated that the Legal Aid Agency ('LAA') will provide authorisation for any participating LAA contracted mediation services to deliver publicly funded mediation from such courts (there are currently over 50 such schemes in operation across England and Wales).

31. The LAA will further fund MIAMs and mediations at court subject to eligibility rules being met. Provided that one party is eligible, the LAA will fund the MIAM for both parties. We understand that although parties attending court will not often have the necessary financial eligibility evidence with them, greater levels of flexibility for establishing this threshold for the purposes of undertaking MIAMs at court are shown. Again, we regard this as helpful.

32. In-Court Mediation services could be more widely used, for instance, when the parties return to court after attending a Separated Parents Information Programme

[11] See FJR (2011) p.135 §4.12, and p.144 §4.49-4.54
[12] See FJR (2011) p.163 §4.117
[13] "*Parents should be encouraged to develop a Parenting Agreement to set out arrangements for the care of their children post separation*" (FJR [2011] page 21 §111, and page 34)
[14] FJR (2011) p.145 §4.54

(SPIP); at that point the parties could benefit from such assistance (Cafcass will not be likely to attend this later hearing, being present only for the FHDRA or possibly for a final hearing).

33. However, in-court mediation should not become confused with 'court process'; mediators will *not* be able to perform the equivalent role of Cafcass at a FHDRA, for instance. Mediation remains at all times a voluntary and confidential process. Even if mediation takes place in a court setting, the decision-making in mediation rests with the participants to the mediation.

MIAM

34. We are aware that the Family Procedure Rule Committee is currently considering the draft rules to support *Clause 10* of the *Children & Families Bill 2013*. We do not intend to cut across that important work.

35. The CAP has been designed to reinforce the two-fold statutory obligations:[15]

    (a) upon the prospective applicant, before making a relevant family application, to attend a family MIAM (Mediation Information and Assessment Meeting) (currently *Clause 10(1) Children & Families Bill 2013*);

    (b) upon the Court (pursuant to the Rules) not to issue, or otherwise deal with, an application if, in contravention of subsection (1), the applicant has not attended a family mediation information and assessment meeting (see *Clause 10(2)(c) Children & Families Bill 2013*).

36. We would like to encourage the MoJ / HMCTS to look at feasibility of incorporating the essential compliance requirements currently contained on the Form 'FM1' (insofar as they are relevant to private law children disputes) onto the front page of the C100.

37. This change to the form C100 would have the beneficial effect of:

    (a) Emphasising the need for compliance with the MIAM as an essential part of any application to the court;

    (b) Consolidating the necessary forms (easier for LiPs).

    That said, we recognise that:

    (c) This may not be so convenient for mediators (who need to sign Part 2 of the FM1 where it applies);

    (d) Parties may still need to complete a Form FM1 in relation to a financial application;

[15] Currently in Committee [House of Lords]: *Children & Families Bill 2013*

(e) The explanatory guidance on the Form FM1 would not be conveniently included in the C100.

38. In the course of dispute resolution, there are three specific points at which the Applicant's compliance with a MIAM will be reviewed by the Court:[16]

(a) At the point of submission of the C100 application form, the court staff will check that the [front sheet / FM1] has been completed; if it has not been completed at all, then the application form should be rejected, and advice given (we understand the current practice of the courts is not consistent in this regard);

(b) At the point of Gatekeeping/Allocation, the Gatekeeping Judge will consider whether the [front sheet/FM1] has been completed appropriately; if the form has not been completed, or no proper reason has been provided for non-attendance at a MIAM, the Gatekeeping Judge will issue a 'Directions on Issue' to require the Applicant to attend a MIAM before the FHDRA;

(c) At the FHDRA, the Judge/Justices will not consider the case until satisfied that the requirements to attend the MIAM have been fulfilled; at that point, they may direct either party to attend a MIAM.

Without notice Applications/Orders

39. We have been advised that in some courts, over the last 6 months, LiPs have been attempting to bypass the pre-proceedings steps and formalities for allocation, by making without notice applications. While we recognise that any application relating to a child will be considered urgent by the party concerned, the courts should play close attention to the provisions of PD20A, para.4.3-4.5 FPR 2010 (esp §4.3(c): "*except in cases where it is essential that the respondent must not be aware of the application, the applicant should take steps to notify the respondent informally of the application*") when presented with a Without Notice Application.

40. In short, we wish to underline (and have incorporated specific provision for this in the CAP at [§9]) the importance of courts making Without Notice Orders only exceptionally, and where:

(a) If the applicant had given notice to the respondent this would have enabled the respondent to take steps to defeat the purpose of the injunction;[17] cases where the application is brought without notice in order to conceal the step from the respondent are very rare indeed;

[16] Subject to consideration by the Family Procedure Rule Committee on rules to support Clause 10
[17] *CEF Holdings Ltd & Anor v City Electrical Factors Ltd & Ors* [2012] EWHC 1524 (QB) Silber J [235]

(b) The case is one of exceptional urgency; that is to say, that there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act;[18]

(c) If the applicant had given notice to the respondent, this would be likely to expose the applicant or relevant child to risk of physical or emotional harm.

41. In relation to §40(b) above, it is almost always possible to give at least informal notice of an application by mobile phone / text / e-mail.[19] It is equally almost always possible for the Judge hearing such an application to communicate with the intended respondent, either in a three way telephone call, or by a series of calls, or exchanges of e-mail.[20]

42. The party applying for the Without Notice Order should be advised as to the high degree of candour required of the information provided. The order should reflect the information which has been provided to the court at the time of the application: every witness statement made in support of an application for an injunction made without any or any proper notice should contain a statement setting out the duty to give full and frank disclosure.

43. [*] We recommend that a short and simple Guide to making a Without Notice Application should be prepared and published for LiPs (including specific guidance as to *when* it is appropriate to make such application), and be available for distribution at every Court.

Allocation and Gatekeeping:

44. It is important that all private law applications are allocated to the appropriate level of Judge, and where appropriate to a named case management judge (or case manager in the FPC) who shall provide judicial continuity for the proceedings in accordance with the President's Guidance on Judicial Continuity and Deployment.

45. We envisage that the majority of the private law work will be allocated to Magistrates and the District Judges (DJs and DJ(MC)s).

46. Allocation shall be undertaken in accordance with the President's Guidance, and under the supervision of the Designated Family Judge (DFJ) for the area.

47. Specifically, we make the following recommendations:

(a) It is not appropriate (nor would it be particularly meaningful) to require applicants (many of whom are LiPs) to complete an Allocation Proposal Form as in public law;

[18] *National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica)* [2009] UKPC 16, [2009] 1 WLR 1405, PC Lord Hoffmann
[19] *O'Farrell v O'Farrell* [2012] EWHC 123 (QB) Tugenhadt J
[20] O'Farrell (above) Tugenhadt J.

(b) Allocation of the case shall be done by Legal Adviser &/or District Judge (i.e. acting independently or together), under the general guidance of the (DFJ) (Draft President's Guidance on Allocation & Gatekeeping [§6]);

(c) Allocation should be done on issue (so that the notices can be sent out indicating the allocation decision and the Directions on Issue if any) (see Draft President's Guidance on Allocation & Gatekeeping [§7]);

(d) The allocation decision may be subject to review in the early stages of a case ([§7] ibid.):

i) When the response to the application is received, and the safeguarding check is received;

ii) At the FHDRA.

48. We propose that FHDRAs will generally be dealt with by Magistrates (sitting with Legal Advisers) or District Judges even in cases which are allocated (in Part 2 or 3 of the Allocation schedule) to a Circuit Judge or High Court Judge. However, the Gatekeeper will be able (with the approval of the DFJ) to list the FHDRA before a Circuit Judge or High Court Judge in consultation with the DFJ (see Draft President's Guidance on Allocation and Gatekeeping [§27] & [§28]).

49. We had considered whether the allocation decision should await receipt of the safeguarding checks, but concluded that this would not be practical. We nonetheless recommend that where possible FHDRA lists before District Judges and Magistrates should be run in parallel (ideally in the same building) so that if an obvious safeguarding issue has arisen (i.e. after the original allocation decision) which justifies re-allocation from a Magistrate to a District Judge this can be done immediately prior to, or on the day of, the hearing (see Draft President's Guidance on Allocation and Gatekeeping, [§5]).

50. Further, we recommend that the allocation arrangements are monitored over the first three months; we recognise the difficulties which Gatekeeping Judges will face in allocating private law applications on minimal information. We wish to assess the incidence of re-allocation after the initial decision, and the impact of this on the timetable.

51. We do not believe that it will be appropriate to strive for a 'single point of entry' of private law applications in every DFJ area. While we recognise that there may be a benefit in some rationalisation of 'entry points' in some DFJ areas, we urge careful consideration to be given to three important potential practical consequences of reducing the number of 'entry points' for private law applications too radically;

(a) It would be counter-productive to overburden fewer court centres with an unmanageable volume of private law applications;

(b) Litigants in Person should not be required to travel long journeys (particularly in rural areas) in order to issue their application; we do see the benefit of LiPs lodging their applications in person, so that counter-staff can check the forms (and documents in support of requests for fee exemptions) with the LiP present;

(c) Redeployment of administrative staff would be unhelpful, given that many staff will continue to deal with a wide range of other (and possibly linked) family applications (FLA 1996, Financial Remedy applications) in every court centre in any event.

We envisage that local arrangements in each area will be devised in discussions between the President of the Family Division, the Family Division Liaison Judge (FDLJ), the DFJ and HMCTS.

52. We consider that oversight of the allocation of cases and distribution of work can be achieved by the DFJ without centralisation of the gatekeeping or having single entry points. The DFJ can then monitor workloads and consistency of decision-making.

Good Local Practice

53. The PLWG recommends that DFJs should be permitted to act as they consider appropriate for their local conditions in setting up arrangements to resolve private law disputes within the nationally approved CAP framework (this is specifically provided for in the CAP [§4.1]). If need be, they should consult with the FDLJ and/or the President.

54. The PLWG recommends that successful local Protocols or other local initiatives should be allowed to flourish so long as they are consistent with both the letter and the spirit of the CAP and the broader reform agenda.

55. We see no objection to local courts inserting appropriate additional provisions in prescribed form of order (e.g. in a CAP01/CAP02) so long as (i) nothing in the prescribed form is omitted and (ii) any additions comply with the 'House Rules'.

Safeguarding Checks

56. The PLWG recognises the importance of Cafcass and Cafcass Cymru providing reliable safeguarding checks promptly, and well in time for the FHDRA.

57. The current difficulties experienced by Cafcass and Cafcass Cymru in providing safeguarding checks in good time has been generated in large part (over the last 6 months) by :

(a) increased workloads (significantly higher volumes of cases being issued since March 2013);

(b) resources being applied to implementing public law reforms;

(c) poor quality of information being provided by LiPs on the applications.

58. Cafcass and Cafcass Cymru recognise the importance of providing safeguarding checks as soon as practicable. Cafcass and Cafcass Cymru agree to an 'expectation' that these checks will be provided on or before day 17; it is material to delivery on this expectation that HMCTS sends the documentation to Cafcass on day 1 electronically.

59. In order to meet the timetabling expectations above:

(a) At the point of submission of the C100, court counter-staff will need to check that the dates of birth and addresses of the parties are provided (as is required) on the Form C100;

(b) The application forms should then be electronically scanned and e-mailed / sent electronically by HMCTS to Cafcass;

(c) Local Authorities and Police should be required to respond promptly to Cafcass/Cafcass Cymru's requests.

Directions on Issue

60. We propose that the Gatekeeping Judge (DJ or Legal Adviser) should be able to give Directions on Issue at the point of Allocation (see Draft President's Guidance on Allocation and Gatekeeping [§15]).

61. Such Directions will be given on a new form CAP01 [*].

62. In particular, the Gatekeepers shall be able to issue Directions on Issue on Form CAP01 in the following circumstances

(a) where it is apparent to the Gatekeeper that the Applicant has not attended a MIAM or that the reason for not attending a MIAM is obviously not satisfactory, the Gatekeeper can direct the Applicant to attend a MIAM before the listed FHDRA;

(b) where it is apparent that an urgent issue requires determination, the Gatekeeper may give directions for an accelerated hearing;

(c) exceptionally, where it is apparent that directions need to be given for the service and filing of evidence, he/she may give directions for the filing of evidence.

See the draft President's Guidance on Allocation and Gatekeeping ([§15]).

FHDRA

63. The FHDRA is believed to be successful in resolving (or substantially resolving) many disputes. We recommend retention of the FHDRA, largely in its present form; this is a good forum for resolving the 'low risk' cases.

64. We recommend that FHDRAs should be conducted by District Judges, District Judge (MC)s, and Justices (sitting with Legal Advisers) As we envisage that substantive (and we expect in many cases 'final') orders will be made in large numbers of cases at the conclusion of the FHDRA, these hearings should not be conducted (as at present in some areas) by Legal Advisers alone, given that they cannot make substantive orders.

65. Specifically, we recommend that at the FHDRA, the Judge/Justices should deal with the following issues (in addition to those already covered by PD12B and part of the current practice):

    (a) Has the requirement for a MIAM been complied with? If not, is this a case which can/should be adjourned for *either party* or *both parties* to attend a MIAM?[21]

    (b) Is this a case suitable for mediation, SPIP, or other forms of dispute resolution? If so, this should be addressed by the Court with the parties;

    (c) Is the Allocation decision correct, in light (in particular) of the Safeguarding Check?

    (d) This is the latest point at which consideration should be given to the instruction of an expert in accordance with *Rule 25.6(b)* of the *FPR 2010*;

    (e) If this is a case in which a *section 7* welfare report has been ordered, would it be sensible to direct the listing of a Dispute Resolution Appointment ('DRA') when the court can consider with the parties?

    (f) Is an order appropriate at this stage, and if so, in what terms?

66. We received representations about the success of a number of initiatives, including

    (a) the attendance of children (over 9) at court in accordance with the existing practice at the PRFD (*District Judge's Direction (Children – Conciliation)* [2004] 1 FLR 974);

[21] This was specifically recommended by the Family Justice Review (November 2011): "*Judges should retain the power to order parties to attend a mediation information session and Separated Parents Information Programmes, and may make cost orders where it is felt that one party has behaved unreasonably*" (page 23 §120, and recommendation on page 35)

(b) In-court conciliation by a District Judge;

(c) the practice of Cafcass officers sitting in court on the Bench alongside the Judge.

We propose that local practices should be allowed to continue in accordance with the guidance given generally at [§53-55] (above).

67. At the conclusion of the FHDRA, if no agreement is reached, the court will prepare a CAP02 (PLP10 Order as revised) ([*] work in progress); this should be sealed and handed it to the litigants at court. In a case in which the court is directing the preparation of witness statements, it will provide the litigant with the draft 'CAP Statement Template' [*].

68. We recommend that the MoJ / DWP / HMCTS should investigate the feasibility of the Order generated at the FHDRA (CAP02) being completed electronically by the Judge/Legal Adviser at the hearing, automatically generating (where the relevant 'box' on the CAP02 has been 'ticked') an issue-specific (i.e. domestic abuse, allegation of child harm) CAP witness statement 'template' which can be provided to the parties with the order.

69. Judicial Continuity in private law cases should follow the President's Guidance on Judicial Continuity and Docketing. The Judge who has conducted the FHDRA should remain the allocated Judge / Justice for the case; it would be helpful if this could be replicated with the Magistracy, although we recognise the practical difficulties. Judicial continuity generally is vitally important.

Rule 16.4 appointments

70. In a limited number of private law cases, it is appropriate to join the child as a party, and to appoint a guardian to act for the child (see *§7* of *PD16A FPR 2010*). These cases, by their nature, involve an issue of "*significant difficulty*". Unsurprisingly, they tend to run for longer in the court system.

71. That said, we are concerned to learn that the average length of a case in which a *rule 16.4* Guardian is appointed is 96 weeks. Of that time, on average the case has been proceeding for about 50 weeks before the appointment is ordered. Perhaps those statistics tell their own story about the depth of some family problems, and the powerlessness of a court to change parental behaviours.

72. While we recognise that at the outset of private law court process, it is difficult to identify the need to join a child and make a *rule 16.4* appointment of a guardian (such a need often emerges as the case progresses) we are nonetheless anxious that cases which are suitable for joinder of children and appointment of Guardians are identified as early in the process as possible so that Cafcass can undertake work with the parties before attitudes become too entrenched. We consider that this is a

matter for judicial training; we would be interested to review this difficult issue further with the benefit of any published research.

Capacity of the Litigants

73. Issues of capacity arise not uncommonly in private law cases. Where a lawyer is involved and acting for the party about whom a question of capacity arises, there is a well-recognised procedure provided for in *Part 15 FPR 2010*; a responsible solicitor who has doubts about the capacity of his client will seek a medical opinion. If the opinion suggests that the client lacks the necessary capacity then the solicitor arranges for the appointment of a litigation friend.

74. It may be that the behaviour of an unrepresented litigant in or out of court raises a question for the Judge of the LiP's capacity to litigate. The Judge may well not (in fact will almost certainly not) have the benefit of a medical report on capacity, and (as referred at §80 below) will not have the facility to order such a report on public funds.

75. We recognise that it would not be appropriate for the court safely to proceed to make a determination of capacity simply on the basis of an impression formed from the Bench; a finding of incapacity is a significant step, taking away the protected party's right to conduct their litigation. Moreover, it may constitute a serious disadvantage to the other party.

76. The PLWG would therefore welcome guidance[22] on how such an issue should be determined; it may be of assistance to include such Guidance in the Child Arrangements Programme (CAP §12 has been left blank for this purpose).

Expert reports in Private Law cases

77. Courts should only consider commissioning expert reports when such reports are "*necessary*" for the purposes of resolving the proceedings, in accordance with *Rule 25* and *PD25* of the *FPR 2010*.

78. The Judicial and Practitioner representatives on the PLWG are concerned about the lack of available funding for the commissioning of expert reports (including DNA, drug/alcohol testing, and mental health reports) in many private law cases. Often such reports are indeed '*necessary*'[23] in accordance with *Rule 25.1 FPR 2010* (and see also *Clause 13* of the *Children and Families Bill 2013*[24]*).*[25]

[22] See Rimer J *Carmarthenshire County Council v Lewis* [2010] EWCA Civ 1567

[23] As defined by Munby P in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, and *Re H-J* [2013] EWCA Civ 655

[24] "*A person may not without the permission of the court instruct a person to provide expert evidence for use in children proceedings*"

79. We recognise that it would not be appropriate for the court to join a child under *Rule 16.4 FPR 2010* simply in order achieve access to public funding for a report. In any event, in many cases this would only achieve part-funding of the report (unless some exceptionality could be demonstrated): see Ryder J in *Re (JG) v The Legal Services Commission [2013] EWHC 804 (Admin)* @ [88][90[104].

80. The PLWG acknowledges that the LAA is currently not able to provide funding for an expert report unless the case is either within the general scope of civil legal aid as set out in *Schedule 1* to *LASPO Act 2012* or, on the facts of the individual case, the case meets the 'exceptional funding test' in *section 10* of *LASPO Act 2012* (which is tied to whether funding is required by ECHR or EU law). It is further noted that a person who meets the 'exceptional funding' test will also need to pass means and merits tests. The costs of expert reports are treated as a disbursement and can only be paid for by civil legal aid where the case qualifies for civil legal services more generally. The LAA has no discretion to pay for any costs outside of these cases

81. Considerable concern has been expressed to the Working Group about the effect on decision-making in the best interests of children, where a Judge deems a report to be 'necessary' but there is no funding available for such report. Judges should be enabled to have such evidence in order to discharge their statutory responsibilities.

CAFCASS / section 7 reports

82. In line with the recommendation for limited use of Court ordered Reviews in private law cases (see §13(b) above), we contemplate that the authors of welfare reports (generally prepared by Cafcass under *section 7 CA 1989*) should be encouraged to make recommendations for the stepped phasing-in of child arrangements (i.e. recommendations for the medium and longer term future for children) insofar as they are able to do so safely in the interests of the child(ren) concerned.

Judicial Continuity in private law cases

83. We recommend strict compliance with the (draft) President's Guidance on Judicial Continuity and Docketing in private law cases. The judiciary should be willing to adapt work patterns to able to offer continuity in cases.

CAP Statement Template

84. [*] We recommend the creation of a draft standard form Statement Templates, for completion by LiPs. We have been provided with one such generic 'template' in use in Liverpool, which we consider to be helpful, and should be adapted. We consider

[25] See also para.57 of the Judicial Proposals for the Modernisation of Family Justice (2012)

that the CAP Statement Template should be reasonably specific to the issues in the case; therefore a case in which domestic abuse is alleged will ask questions specific to that issue.

85. We recommend that the 'CAP Statement Template' shall be automatically generated by the completion of the information on the CAP02 Order at the FHDRA.

Fact-finding

86. If a fact-finding hearing is required, the provisions of PD12J should be followed. [*] The PLWG wish to receive views from practitioners on whether there is a need to revise PD12J.

Dispute Resolution Appointment (DRA)

87. While the PLWG is concerned not to extend the private law process by building in compulsory and unnecessary steps, we consider that there may be an advantage for some cases in directing a DRA (equivalent to an IRH in public law) to be held when either the *section 7* or other expert report is available, or for example the parties have attended a SPIP.

88. This hearing will be likely to have a short time-estimate (for instance, 30-45 minutes).

89. The DRA will be convened for the court and the parties to cover the following issues:

    (a) To identify the key issue(s) (if any) to be determined and the extent to which those issues can be resolved or narrowed at the DRA;

    (b) To consider whether the DRA can be used as a final hearing;

    (c) To resolve or narrow the issues by hearing evidence;

    (d) To identify the evidence to be heard on the issues which remain to be resolved at the final hearing;

    (e) To give final case management directions including:

        iii) Filing of further evidence;

        iv) Filing of a statement of facts/issues remaining to be determined

        v) Filing of a witness template and / or skeleton arguments

        vi) Ensuring Compliance with PD27A (the Bundles Practice Direction)

        vii) Listing the Final Hearing.

Guides for LiPs

90. As mentioned above, since April 2013 the scope of public funding for separating couples as they attempt to resolve disputes concerning their children has been significantly curtailed; legal advice and representation is preserved for only limited classes of case.

91. [*] There is an urgent need for the preparation of a specific 'plain English' guide to the processes involved in the CAP. We understand that 'Advicenow'[26] has been assisting the Family Justice Council with a guide for litigants seeking orders in relation to children. It would be helpful for that Guide could

    (a) take account of the CAP, and the views expressed in this report where relevant;

    (b) contain details of (and signposts to) the various agencies which offer assistance to those who seeking to resolve disputes for children;

    (c) specifically provide information about 'Parental Responsibility' given the widespread lack of understanding about parental responsibility.[27]

92. [*] We recommend a review of communications which are generated by or for the court so that they are fit to meet the needs of a LiP.

93. As mentioned above (§17 above) we recommend wider accessibility of information for people who seek advice about dispute resolution services concerning their children (i.e. leaflets should be available in doctors' surgeries, libraries, community and children centres etc.).

94. Particular challenges arise for the judiciary in managing private law cases (and particularly hearings) involving LiPs. The PLWG suspects that there is a wide variation in the practice (and style) of Judges and Justices in the management / handling of LiPs.

95. We recommend that the Judicial College should offer training for Judges and Justices in adapting further their practices in court to cope with the challenges of cases in which one or more parties are LiPs. Judges and Justices generally will have to become more inquisitorial in their conduct of court hearings, and will have to be prepared to assist the presentation of the evidence particularly when vulnerable witnesses need protection.

[26] 'Advicenow' is an independent, not-for-profit organisation providing accurate, helpful information on rights and legal issues for the general public.
[27] FJR [2011] p.20/21 §106/108

Court files/Bundles

96. The Practice Direction on Bundles – PD27A – will require amendment, in part to accommodate the changes brought about by the new Family Court. Revisions will be imposed to reduce the unnecessary size of many bundles in private law cases.

97. We propose that the system of compiling and holding court files is changed to that court files are structured in the same format as the conventional court bundle; this will facilitate ease of use by Judges / Justices dealing with private law disputes where there is no trial bundle. The Court file should therefore be structured so that:

    (a) Section A: contains Applications

    (b) Section B: Court Orders

    (c) Section C: Statements

    (d) Section D: Reports

    (e) Section E: Disclosed documents (police/medical)

    (f) Section F: correspondence and other material ordinarily held on file.

'McKenzie Friends' Guidance 2010

98. We recommend some limited relaxation of the *Practice Guidance: McKenzie Friends (Civil & Family Courts) [2010]*.

99. We propose that there should be no requirement for the McKenzie Friend (MF) to produce a short *written CV* or other *written statement* setting out the relevant expertise of the MF and written confirmation of understanding re: confidentiality which we believe to be unrealistic.

100. That said, in each case, the court should satisfy itself of the fact that the MF has no interest in the case and understands the MF's role and the duty of confidentiality; in that respect, para.6 can be relaxed.

Preparation and Service of orders

101. All orders should be in plain language. The order generated at the FHDRA should be in the form of the CAP02 (an amended form of the PLP10). Courts should be discouraged from using the expression 'file and serve' in cases involving LiPs and use "send/deliver to the other party / send/deliver to the Court".

102. It is a concern that LiPs have to take responsibility for service of orders, perhaps those made without notice. We invite HMCTS and MoJ to consider the feasibility of

Courts serving orders and applications in private law cases; the cost to HMCTS and MoJ may well be recouped by a saving of time and resources by the avoidance of adjournments for non-service.

103. We feel that LiPs should be reminded in Court that an order is effective and binding on them as soon as they have had notice of it.

Child contact centres

104. Supervised and supported contact centres play a key role in complex private law cases, providing a secure and child centred environment for contact. Greater awareness ought to be made of the availability of contact centres for parents and family members who are not in court proceedings.

105. We recommend that there should be more obvious and ready mechanisms available for parents and family members to self-refer to contact centres in the right cases. We have been advised that NACCC is piloting a scheme for screening parties who wish to self-refer to a contact centre; this pilot is being run in 19 areas. Provided that this pilot is successful, it would be helpful to see this, or a similar, facility rolled out nationally.

106. In a case in which a Judge / Justice wishes to engage a contact centre, directions should be given to the parties to engage in the self-referral process, providing proof to the court of their compliance with that process.

Enforcement

107. [*] We recommend the publication of clearer Guidance given in relation to enforcement.

108. Before making confident recommendations about enforcement we would ideally wish to see the full report of Professor Trinder & others containing the results of the research currently being commissioned by the Nuffield Foundation.[28] In relation to enforcement at present, we see a value (as recommended by the Family Justice Review)[29] in:

    (a) Judicial continuity for dealing with enforcement issues (particularly where the alleged breach has occurred in the first year);

[28] "*Enforcing Child Contact Orders: are the family courts getting it right*?" (Trinder & ors) July 2013
[29] Family Justice Review (2011) page 36

(b) Enforcement hearings and application for financial compensation orders being listed within a fixed number of days of the relevant application being issued, with the dispute being resolved at a single hearing;

(c) After 12 months, the parties should attempt to attempt to resolve the issue independently before issuing an enforcement application; a MIAM should be considered at that stage;

(d) The development of an specific E-Pip (Enforcement - Parenting Information Programme) (this is an MoJ policy initiative);

(e) Judicial Guidance on the use of:

1. sections 11A to 11P Children Act 1989;

2. suspended residence orders (as adapted to reflect the child arrangements order);

3. the shift of primary care under a child arrangements order.

Implementation and further work

109. The PLWG proposes that the Allocation and Gatekeeping arrangements set out in the draft President's Guidance on Allocation and Gatekeeping (Private Law) can and should be piloted from January 2014.

110. We propose that the CAP (and the recommendations in this report) should be circulated for consultation, with a view to implementing the scheme in its revised form in April 2014.

111. For further work, priority should be given to the following:

(a) Development of the information 'hub/portal' for separating parents;

(b) Preparation of a 'Guide to the CAP' for LiPs in collaboration with the FJC and 'Advicenow';

(c) Preparation of a short and simple Guide to making a Without Notice Application should be prepared and published for LiPs;

(d) Completion of work on Forms CAP01 and CAP02;

(e) The preparation of the standard form Witness Statement Template for use in private law cases (adapted from the model currently used in Liverpool);

(f) Consideration of amendments to PD12J;

(g) A review of communications which are generated by or for court so that they are fit to meet the needs of a LiP;

(h) Consideration of enforcement issues for inclusion in the CAP.

Mr. Justice Cobb

For and On behalf of the PLWG

8 November 2013

Annex

112. In July 2013 the President requested the formation of a Working Group to review private law arrangements, in the context of the Family Justice reform programme.

113. The Private Law Working Group ("PLWG") was therefore formed by the President's office, and Mr Justice Cobb was invited to chair it.

114. The membership of the PLWG is:

Mr Justice Cobb (Chair)
HHJ Alison Raeside
HHJ Rachel Karp
DJ Anne Aitken
DJ David Owen
DJ (MC) David Chinery
Steve Matthews (Magistrates' Association)
John Baker (Justices' Clerk)
Chris Woodland (National Bench Chairmen's Forum)
Christina Blacklaws (FJC Private Law Practitioner)
Christine Banim (Cafcass)
Bruce Clark (Cafcass)
Matthew Pinnell (Cafcass Cymru)
Melanie Carew (Cafcass Legal)
Stuart Moore (Ministry of Justice)
Paul Stewart (HMCTS)
Kate Lyons (Department for Education)
Eleanor Druker (Legal Aid Agency)
Jo Wilkinson (President's Office)
Nicola Massally (President's Office)

115. The terms of reference for the Group was:

> To make recommendations to the President of the Family Division in relation to the resolution of Private Family Law Disputes (concerning children) in the most optimal and efficient way, building upon the President's Revised Private Law Programme (2010) and the Operating Model of the single Family Court (2013); and preparing such documents as may facilitate those recommendations

116. In addition, Cobb J has met /spoken / corresponded separately with a number of agencies, and individuals, including, but not limited to: representatives from MoJ, Cafcass Cymru and the LAA; Professor Liz Trinder and Professor Rosemary Hunter; NACCC (Anne Dillon); HHJ Altman (DFJ London) and HHJ Iain Hamilton (DFJ Manchester); the FDLJs for all regions; Angela Lake Carroll (mediation); NYAS (Mary Mullen); FJB (David Norgrove). Additionally, the PLWG has received and welcomed

representations from a number of FDLJs, DFJs and DJs who wished to contribute their thoughts to this process.

117. The first meeting of the group took place on 2 September 2013. The PLWG has met altogether on three occasions, last meeting on 30 October 2013; significant 'home-work' between meetings has been undertaken by individuals and sub-groups. The President requested the recommendations from the PLWG in early November. Early in its creation, the PLWG identified 8 November as the target date. The material is being delivered on time. There is plainly further work to do.

[end]