

‘Don’t let the facts get in the way of a good headline’: the Family Justice Review

Network on Family, Regulation and Society

(The Network is an inter-disciplinary group of social-legal researchers in Family Law from the Universities of Bath, Bristol, Cardiff and Exeter)*

It was no doubt inevitable that the media coverage of the recommendations from the [Family Justice Review](#) chaired by David Norgrove would reflect the positions that the press, and particularly comment columnists, had adopted long before the government established the Review to examine, from an independent and neutral perspective, the workings of a system that affects the lives of up to 500,000 children and adults each year. In fact, the Review has done what all such reviews should strive for – it has taken evidence, considered all points of view, given every opportunity to those with an interest to have their say, and then weighed all this to come to a reasoned conclusion.

What does the Report actually say?

The diagnosis of the Review panel, with which few could disagree, is that ‘Family justice does not operate as a coherent, managed system. In fact, in many ways, it is not a system at all.’ The Review summarises the defects:

- Delay, with the average care and supervision case taking 56 weeks on average (61 weeks in the care centres and 48 weeks in family proceedings courts), and private cases taking an average of 32 weeks
- Cost, estimated at £1.6 billion in 2009/10
- Complexity, with the system opaque, completely lacking in robust management information, with a lack of accountability and a lack of co-ordination
- Low morale, with a lack of trust of the different professionals who work in the system and a lack of shared objectives and shared understanding
- Confusion, with children and families adrift in a system they do not understand and where the withdrawal of legal aid in private law proceedings and the increase in litigants in person will make the position worse in the future
- Failure to hear children’s perspectives in a system ostensibly focused on their best interests

A Family Justice Service

So the concern of the report, as its title makes clear, is with the ‘system’ and how to make it work as such. Its central proposal is the creation of a Family Justice Service to have responsibility for court social work services, the provision of mediation and out of court resolution services, setting quality standards and monitoring spend in

relation to expert witnesses, with the potential ‘to manage more directly the supply of expert witnesses, as well as solicitors for children’. Effectively, this would start out as a ‘Cafcass Plus’ organisation but taking on broader responsibilities over time. The Review recognises the need for appropriate investment to ensure that the new structure has a chance to succeed, but it may be underestimating the complexity involved in proposing that it take on responsibility for the funding of solicitors for children, and for strategy on publicly-funded mediation, whilst leaving the Legal Services Commission to sort out the payments involved. It may also be unduly sanguine about the degree to which a body arising from the ashes of Cafcass would be able to avoid perpetuating the organisational shortcomings and distrust felt for that body by many users of the existing system – and not just angry fathers. The proposed Board which would lead the Service will have its work cut out to restore confidence to and in the court welfare service which would form the heart of the new Service. What the Review does recognise is the need to ensure that the existing plethora of boards, councils, improvement groups and committees operating at local and national level needs to be rationalised, and a proposal likely to be welcomed by all except the Treasury is the firm recommendation that charges on local authorities for public law applications, and for police checks, be abolished.

Changing the culture of the system

The Review rightly recognises the central need for the judiciary to lead the cultural change required if the system is to function effectively. Creating a more managerial approach to the organisation of the judicial function requires rigorous judicial case management, real judicial continuity and the opportunity to train and specialise in family work so that a more ‘professional’ approach to conducting family cases can develop. In this regard, there are valuable proposals for joint multi-disciplinary induction and continuing education for all those working in the system, as well as specialised training for the different professionals – such as the judges in case management.

A family court at last

But more importantly, the Review proposes the creation of a single family court, with a single point of entry, to replace the current three tiers of court, with all levels of the family judiciary (including magistrates) sitting in the court and work allocated according to case complexity, albeit with the Family Division of the High Court retaining exclusive jurisdiction over international work and the inherent jurisdiction. One of the most interesting proposals within this section of the Review is for ‘flexibility for legal advisers to conduct work to support judges across the family court’ by delegating some simpler judicial tasks to legal advisers. There is potential to save much expensive judicial time by enabling advisers to take on quasi-administrative functions such as authorising agreed directions and checking documentation for obtaining a divorce. Just as the ‘special procedure’ produced as profound a change to the system of divorce as the introduction of ‘irretrievable breakdown’, so this proposal, coupled with on-line processing, moves the concept of the administrative divorce much closer to realisation than the ill-fated Family Law Act 1996 would have ever done.

Public law

Having set out their recommendations for the organisation of the new system, the Review then turns its attention to more substantive issues. In relation to public law, it identifies 'deep rooted distrust of local authorities and unbalanced criticism of public care' as the underlying reasons for the reluctance to let go of court control over the care plan. Yet, as it points out, there is no research to determine whether changes to care plans prompted by court scrutiny lead to better outcomes for children, and since care plans frequently need to change over time, the immense focus on plans during court proceedings will often be a wasteful diversion of resources from other cases needing attention. As the Review robustly puts it, 'it cannot be right to allow the legal system to function on a starting assumption that local authorities are incompetent'. It thus proposes that where it is plain that a care order is needed, the detail of the local authority's plan should not be debated, and the court should assume that the child's needs could and would be addressed by the local authority. 'A care order should be made and the case concluded.'

Distrust is not the only problem, of course. The Review recognises that delay is endemic and institutionally accepted in the public law system. A headline proposal is therefore for care proceedings to be concluded within 6 months from application – yet in fact, there are opportunities for extension, albeit subject to 'defined but fairly widely drawn grounds'. We have been here before. When the Children Act was enacted in 1989, it contained (and still contains) provisions which could be read as requiring the completion of care proceedings within twelve (not 24) weeks. They were never interpreted in this way, since they were regarded as completely unrealistic. One could envisage the 'grounds' being utilised widely to subvert the six-month time limit, or, as others have suggested, inappropriate orders being made to satisfy the form but not the substance of the legal requirement. If this is not to happen, then, as the Review puts it, 'the judiciary [will need to] give their unswerving commitment to dealing with cases within six months.'

Use of experts

A cause of delay is the need to await expert reports, which are ordered in 92% of care cases with an average of 3.9 reports per case. The Review therefore recommends that primary legislation should state that in commissioning an expert's report, regard must be had to the impact of delay on the welfare of the child and make clear that expert testimony should be commissioned only where necessary to resolve the case. It has been argued (though not necessarily accepted) that some psychologists and independent social workers simply duplicate the work that should be done by the local authority and children's guardian. Change may depend more on the extent to which judges, and especially the senior judiciary hearing appeals, take on board the Review's message that there are usually already sufficient experts in the case to enable the court to reach a robust and fair decision, than on a statutory time-limit by itself.

Private law

It is the Review's proposals on the private law side of the system that have attracted most attention, and most misunderstanding (apparently wilful, in many cases). This is probably because the panel propose reforms of both the substantive law and the family justice process. Contrary to headlines to the effect that the Review proposes that 'fathers be denied equal rights to contact with children after separation', the Report states that all its

'recommendations on the process of separation are governed by the aim to strengthen shared parental responsibility and to emphasise its importance as parents make arrangements for their child's upbringing post separation. The aim is to focus both parents on the needs of their child and, where they both have parental responsibility, that they each share equal status as parents of their child.'

There could not be a clearer example of media distortion than how this statement has been ignored and turned upside down in the initial coverage of the Review.

Process

As far as process is concerned, the aim of the Review is, of course, to continue the thrust of legal policy which has, for the past 20 years, been to seek to divert parents away from court. To this end, it proposes that separating couples should go first to an 'information hub' which, however, appears to be intended to emphasise the ideological message of 'responsible parenting' – which means working together, and keeping away from court - as much as to indicate how they can in fact go about sorting out arrangements for their children and getting help to do so. For the hub should, in the words of the Review:

- focus parents to consider the needs of their child first, emphasising that a child will benefit from a continued relationship with both parents, where this is safe;
- support parents to resolve their issues independently;
- direct them to find available support to resolve any disputes outside of court; and
- help them to understand what to do and what to expect where an application to court is necessary.

Parents would be encouraged and expected make a 'Parenting Agreement' to set out the manner in which they would meet their parental responsibilities, having discussed these with the child, and reviewing them as necessary as circumstances and life change in the future. If parents could not do this, then the Review makes use of current initiatives to seek to continue to divert them from court. First, they would, as now, attend a MIAM, but this would be followed if required by what appears to be mandatory attendance at a PIP. If they still could not agree, they would be expected (though not compelled) to use a 'dispute resolution service' with the emphasis on mediation rather than court. The details (and they are not *mere* details) of how

concerns regarding safety, the quality of mediation provision, and the proper consultation of children, are discussed in the Report, but much is left to further research and recognition of the need to keep the new system under review.

Should parents be recalcitrant and robust enough to insist on going to court, they would be confronted – as now - with a First Hearing Dispute Resolution Appointment (FHDRA) but then, if the case still is not settled, it would be allocated to a simple or complex track depending on complexity. At that point, the key features of effective case management and judicial continuity would come into play to seek to conclude cases as quickly as possible.

No presumption of ‘shared parenting time’

The Australian experience of introducing a statutory presumption of ‘shared parenting’ which, in effect, means equal, or presumptively equal, shared parenting *time* and which has been extensively and authoritatively researched, was brought to bear in telling fashion by the Review to reject calls for such a legislative innovation here. As it is at pains to point out, and contrary to the media portrayal of the law, nearly all parents already *do* share parenting under the law. What it did not point out is that it has been largely the fault of the courts which has made it so difficult to get this message across. They have effectively rendered the concept of parental responsibility redundant by their focus on making shared residence orders in order to provide symbolic recognition of parents’ (usually fathers’) ‘status’ and involvement in their children’s lives.

The panel has also rightly dropped its proposal that ‘a statement should be inserted into legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm.’ As the panel was warned, based on the Australian experience, it was clear from responses to the Interim Report that this would become transmuted into an assertion of the importance of shared parenting time.

New ‘child arrangements order’

However, the panel accepted the view that the availability of ‘residence’ and ‘contact’ orders encourages parents (and others such as grandparents) to view disputes over children’s arrangements as battles over status to be won or lost. It recommends the replacement of these orders by the creation of a new ‘child arrangements order’ ‘which would set out the arrangements for the upbringing of the child. It would focus all discussions on resolving issues related to their care, rather than on labels such as residence and contact’ although it would, if necessary, set out where a child would normally live and with whom a child would spend time. It is doubtful that this will in fact render disputes less acrimonious or more prone to settlement. It is clear from cases such as *Re F (Shared Residence Order)* [2009] EWCA Civ 313, [2010] 1 FLR 354 (where even though the court made a shared residence order, the mother still litigated over the amount of time to be spent with the children) that, the ‘label’ and psychological recognition of ‘shared residence’ do not in fact satisfy parents in dispute about spending more time with their children.

Retention of the 'leave' filter for grandparents

Another proposal which has received huge media criticism is the Review's endorsement of the requirement for grandparents (and other non-parents) to seek leave from the court before they could seek an order in relation to the child. Here, the Review again took account of research as well as the range of responses, to uphold the requirement as a safeguard against vexatious or hopeless applications. As they conclude, this is not to downplay the valuable role that grandparents can play in the lives of children whose parents separate. That role would be underscored in the 'education' and information to be given to parents as they go through the proposed process of reaching a parenting agreement. But the recommendation does recognise that what from a grandparent's perspective may look like loving concern for a grandchild can, from the parents' and grandchild's point of view, be experienced as interference and partisanship.

In conclusion

Many government reports on the family and the needs of children have had inspiring titles, such as 'Every Child Matters', 'Parental Separation: Children's Needs and Parents' Responsibilities', 'Children Come First'. The Report of the Family Justice Review has no such strap line, but it does emphasise throughout its central working principle 'that children's interests are truly central to the operation of the family justice system.' We applaud the panel's insistence on an approach focused on children, not adults, and grounded in the evidence rather than anecdote and assertion. If 'evidence-based policy making' means anything to this government, it will take no notice of the clamour of those with an axe to grind, and pay heed to the proposals of the Review, which, while we have reservations about several of these, in terms both of principle and feasibility, offers a carefully and honestly considered way forward to seeking better outcomes, and better justice, for children and their families.

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