

## A View from The President's Chambers: July 2021

### Carrying on, carrying on

1. I continue to be profoundly impressed by, and grateful for, the commitment of all involved in the delivery of Family Justice and in the COP to addressing the needs of the children and families that these two systems serve on a case by case basis and in circumstances which continue to be so very different from the norm. The experience of court staff, lawyers, social workers, CAFCASS officers, magistrates and judges is, I suspect, the same across the board. An unremitting burden of cases, long working hours, many emails, regular frustration when one or other aspect of the working arrangements fails, and extensive hours spent on multiple screens in a way that is more tiring than is the case with ordinary court work. Family Justice and the COP are no place for passengers and we have none. All are conscious of the responsibility to deliver what is needed for each case, and all endeavour to do so; just as you have all done for the past 15 months. These collective and individual achievements have been to the benefit of the children and families who turn to us for protection and the resolution of disputes, they are also palpably to the benefit of society as a whole.
2. In looking at what has been achieved, and the effort involved in doing so, I wish to express my particular respect to the bench of District Judges who, because of the position that they occupy in the system, undertook much of the private law caseload in the early months when the magistrates' tier was less able to function, and who have continued to support all levels of the system by absorbing additional work.
3. Looking back, it seems that we did not even blink in mid-March 2020 when we moved almost on one day from normal to remote working. Everyone in the system simply did all they could to carry on. Since then our ability to adapt to new ways of working has significantly improved and we have 'carried on carrying on' in a wholly admirable and impressive way. Hopefully, as events unfold in the coming months, things will become easier and we can confine our current experience to our collective rear-view mirror. Until then can I thank each and every person involved in the delivery of Family Justice and in the COP for all that you have done and are continuing to do.

### More than simply carrying on

4. In truth we have done much more than simply 'carrying on'. More sitting days were taken up by the Family Court in 2020/21 than in any previous year. Cases heard in the current restrictions take longer to resolve, but, because of this

additional sitting time, we have for some time been matching the pre-Covid level of volume in public children cases, albeit that our ability to keep up with the high level of private children work has fallen short. On top of this, and despite the crisis, it has been possible to focus on clear judicially led initiatives aimed at dealing with the unremitting pressure of work in the system. Both the Public Law Working Group (see paragraph 15 below) and the Private Law Working Group have delivered detailed plans for transformative change across the system, which are now being implemented.

### Recovery

5. For some months now we have cautiously been considering how courts should approach the hearing and dispatch of Family and COP work once Lockdown is entirely over and we can return to totally unrestricted working. All are agreed that the 'new normal' will not be as it was in February 2020; the question is just how, and by how much, it should change.
  
6. We are currently in the process of consulting, gathering data, discussing and taking stock. Whilst it might be tempting to feel that it is essential for the Family Court and the COP to have firm guidance circulated and in place before the 19<sup>th</sup> July date currently identified by the government, I do not take that view for the following reasons:
  - a. We are currently working relatively well with the flexible use of remote, hybrid or fully attended hearings as the circumstances of each case may require. There is no need for this to change on one particular date; indeed, such an idea would do nothing but cause extensive confusion and difficulty.
  
  - b. Whilst formal distancing requirements and other restrictions may be lifted in July, it seems unlikely that the need for caution and good sense in relation to social interaction will totally disappear on a particular date, with the consequence that not all of our court rooms and the public spaces in court buildings will, even then, be suitable for a full return to face to face use.
  
  - c. Any move towards a new norm is likely to develop organically, with the support of guidance. Because of (a) above, we have time for it to do so, and it is better to proceed via consultation and planning, in the hope of achieving the best outcome, rather than rushing on to the next stage to coincide with a, necessarily, arbitrary date.

A further, very important, element in our planning is the aim that, if guidance is to be given, it is given on one occasion and in one document that is applicable across the board in the Civil, Family and COP jurisdictions. The Master of the Rolls, as Head of Civil, and I, as Head of Family and the COP, are united in having this as our clear goal. Many of the judges hearing Family cases, particularly at district judge level, also sit in Civil and COP work. We have listened to what they have told us and will endeavour to ensure that the right balance between areas of work is maintained and that they receive a single unified message about ways of working.

7. The teams for Civil, led by Lady Justice Simler, and for Family and the COP, led by Lord Justice Baker, are therefore working closely together. On the Family side, the Financial Remedies Courts have contributed a thorough evaluation of the issues through a working group headed by HH Judge Stuart Farquhar. Extensive work is also currently being undertaken for the COP by a group led by the Official Solicitor, Sarah Castle. These projects (the reports of which will be published in due course), a wider consultation process and a further short survey by the Nuffield Family Justice Observatory, will all feed into the overall decision of what, if any, guidance is to be given for Civil, Family and COP cases. In addition, I am intending to use the occasions of the President's Conference, at the end of July, when all of the DFJ's will come together online, to discuss the issues before finally deciding how to proceed.
8. The NFJO is open to all and applies to Financial Remedies and to COP in addition to other Family proceedings. The survey closed on 27<sup>th</sup> June 2021 and received in excess of 3000 responses. It can be accessed at <https://forms.office.com/r/fTr1maCU9Q>.
9. What can be said at this stage, however, is that any guidance that is issued will not take the form of directive, mandatory instructions determining that certain cases must, or must not, be heard remotely. The approach that we have taken throughout has been to trust the judgement of the judge or magistrate in charge of each case to use their discretion appropriately when making case management decisions. Such guidance as may be issued will therefore do no more than provide a steer, or identify a default position, with regard to certain broad categories of cases, with the aim of assisting judges in making these decisions. My strong hunch is that there is already a widespread consensus as to the most appropriate format for different categories of hearing. We have, together, learned much about what works well, and what works less well, over the past 18 months. One aim of any guidance will be to foster consistency and predictability across England and Wales in this regard.

10. The aim is, therefore, to publish any guidance jointly with the Master of the Rolls, in due course. We will also work with the PQBD and SPT to ensure a coherent approach across the system. In the meantime, judges and magistrates will continue to work in, or return to work in, court buildings where it is safe for them to do so, whether or not particular hearings are remote. I hope that the NFJO may continue to help us monitor how working practices and experience of the family court evolve once the environment has become unrestricted.

#### 'The Road Ahead'

11. A combination of a higher level than normal of adjourned cases since last March, and the continued rise in private law applications, has led to a position where the capacity of CAFCASS in England to take on and allocate individual cases to specific workers has reached the upper limit of what, for various reasons, is considered to be tenable and safe. Discussions are ongoing at a national level to consider what structural, administrative and other options may be available to alleviate this situation, and I will publish a list of suggested '*Ways of Working*' in Private Law cases in early July. Separately, however, there is a need for us all to play our part in ensuring that the input of a CAFCASS officer is only sought in a particular case when it is necessary to do so. The decision to order a s 7 report, direct an addendum or require the officer to attend a court hearing should be the subject of increased scrutiny in the coming months.
12. In this regard, as in many others, we all need to use our resources more cleverly. In *The Road Ahead* (June 2020) I said:

'43. If the Family Court is to have any chance of delivering on the needs of children or adults who need protection from abuse, or of their families for a timely determination of applications, there will need to be a very radical reduction in the amount of time that the court affords to each hearing. Parties appearing before the court should expect the issues to be limited only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear.' [Emphasis added]

I make no apology for repeating this central message. There is a need for us all to redouble our efforts in order to focus the hearing of cases in a proportionate manner, whilst still meeting the needs of the children and families who turn to the Family Court for protection and the resolution of disputes.

### Transparency

13. The panel that is assisting me in developing a concluded view on issues of transparency in the Family Court has now concluded a series of oral sessions which have each proved most helpful in teasing out various topics and issues. I am very grateful to the panel members and to all those who have contributed. It is my intention to publish my conclusions at or soon after the end of July, following discussion at the President's Conference. Thereafter, if any changes are proposed, the way forward will depend upon the substance. At one extreme, any suggested change in statute law will obviously be a matter for the government and Parliament; at the other extreme, any change in practice would require reference to the Family Procedure Rules Committee and a likely period of consultation on such specifics that might be proposed.
  
14. In May 2021, Dr Julia Brophy and Dr Marisol Smith published further research '*Children Judgments: Privacy and Safeguarding – Evaluation of Practice Guidance (2018)*' [CoramBAAF]. In the context of the Transparency Review, this publication is clearly most timely. The question of what, if any, of the recommendations of this recent research might be taken up and endorsed must, however, form part of the review process.

### Public Law Working Group Implementation

15. At the launch of the Public Law Working Group report on 9<sup>th</sup> March, I challenged the system, and particularly each local authority, to achieve full implementation of its proposals by the end of July 2021. As that deadline is now approaching, we are drawing together data to evaluate how successful each area has been in implementing the recommendations which involve ensuring that the PLO is followed in all cases (save those of true emergency) with a view to, either diverting cases that might otherwise have come to court, or having those cases that do come to court fully assessed and prepared. After the end of July, I anticipate that courts will expect that every public law children case will accord with the PLWG recommendations.

### Family Public Law Rollout

16. As many will know, HMCTS has continued to develop the digital system which will provide a paperless platform on which the procedural stages of all public children applications are, in future, to be conducted. The Family Public Law system ['FPL'] has now been established at each DFJ centre in England and Wales. It is supported at a national Service Centre based at Stoke on Trent. 93 of the 173 local authority users have joined up to the FPL system, although the proportion of cases that are online is, in most authorities, still low. We are, nevertheless, getting close to the point when it is time for all involved to commit

to the FPL system and for its use to be 'mandated' (that is for all new applications to be issued online rather than on paper at the local court).

17. There are, however, some remaining significant aspects of the FPL scheme which have been flagged up in early use and need to be addressed before reliance on the system can be mandated. I am grateful to HMCTS who have understood the need to resolve these issues and are striving to do so. They know that I will not approve a 'mandation date' for all courts until I am confident that these are resolved and that use of the system is adequately supported by trained staff at local courts and in Stoke. Some courts are more comfortable with the FPL and are ready now to commit to 100% reliance on the digital platform. We have agreed that these courts (which are Coventry, Worcester and Mid/West Wales) should go ahead and do so in July. A further group of courts seems likely to be ready to follow in September. It is expected that all of the remaining courts will be ready to move to 100% use of FPL by December.
  
18. I have long been, and remain, firmly of the view that it is necessary to move to a fully digital platform for all Family work. As can be imagined, public law children is the most complicated category. It is also the first to get this far and it is not a surprise that problems are being encountered as the scheme starts to be used real time. It is a most unwelcome coincidence of timing that we have got to this stage when the Family Justice system is at total stretch dealing with the impact of Covid. When, however, FPL is up and running it should, and I am sure will, make our lives easier rather than harder. I need therefore to be clear, especially to those local authorities who have not thus far joined the system, that the mandation date for every local authority in England and Wales is now only a few months away. It is a question solely of 'when', rather than 'if', it is going to take place.

#### Domestic Abuse Training

19. In addition to the ongoing programme of training on issues relating to domestic abuse that is delivered to all judges before they start sitting on private family law cases, the Judicial College is developing new training covering the impact of the Domestic Abuse Act 2021 and the guidance given by the Court of Appeal in the combined appeals determined in March 2021 (*Re H-N* [2021] EWCA Civ 448). In addition, the College is working to refresh the current online training during the summer and new seminars are being planned for the training programme in 22-23.

#### Family Justice Council

20. The FJC has functioned very effectively throughout the pandemic, despite the obvious difficulties. In addition to its regular meetings and programme of

ongoing projects, it organised a series of four very successful seminars on consecutive evenings in March, culminating in the annual Bridget Lindley Memorial Lecture delivered by Baroness Hale. The FJC is supported by two unsung heroines, Paula Adshead and Daphna Wilson, whose efficiency, insight and good humour are responsible for much of the success of the Council. Paula is soon to take early retirement. Paula leaves us with my heartfelt thanks for all that she has done over the past 11 years for the FJC, as part of her 38 year career as a civil servant. We all wish her every good fortune for the future.

#### JAC: DDJ and Recorder competitions

21. The next round of recruitment for fee-paid judges will open in July 2021 for Deputy District Judges and in the early spring of 2022 for Recorders. The system relies upon a strong and sizeable body of fee-paid judiciary to undertake the work, and also to provide a pool of experienced judges who may be candidates for a salaried appointment.
  
22. It has been agreed that, in the upcoming DDJ competition, it will be possible for candidates to indicate that they wish to sit in Family cases and attend the family induction course first. I hope that this option will attract a number of Family practitioners who have, hitherto, held back from applying. It will hopefully increase the pool of DDJs able to sit in Family cases in the medium term, thereby reducing the pressure on joint ticketed full time DJs, allowing their workload to be better balanced.
  
23. A further observation which may assist those who might be interested in applying is that, over the past few years, each Recorder competition has been very, very heavily over-subscribed, with the result that many good candidates are not selected. In contrast the DDJ competitions have, in the main, been under-subscribed. I would simply urge those considering applying for appointment to contemplate applying for appointment as a DDJ, either in addition to, or instead of, applying to be a Recorder.

#### FDAC

24. As of April 2021, there are 14 FDAC teams servicing 35 local authorities and 20 family courts (compared to April 2019 when there were 8 teams servicing 20 LAs and 13 courts). The Birmingham and North-East FDACs are now operational. The Welsh Assembly Government has approved funding for an FDAC operating from Cardiff CJC and covering Cardiff and the Vale of Glamorgan and it is hoped that this will be operational in late September. Additionally, Wiltshire County Council has agreed to fund an FDAC which will hopefully start operating in January 2022. There was a national training day for FDAC judges on 18 June 2021 organised by the Centre for Justice Innovation

together with Mrs Justice Knowles. It is my ambition that, by the time I step down as PFD, there will be an FDAC in operation in every area of England and Wales.

#### Mediation Voucher Scheme

25. The Ministry of Justice has recently launched a mediation voucher scheme, whereby a contribution of up to £500 per case/family to the mediation costs of a child arrangements case will be offered, encouraging people to seek to resolve their disputes outside of court where appropriate to do so. I would encourage all involved in private law cases to familiarise themselves with the scheme and encourage its use in appropriate cases. The guidance for this scheme can be accessed at: <https://www.gov.uk/guidance/family-mediation-voucher-scheme>

#### FRC procedural and efficiency improvements

26. Following the evaluation of remote hearings referred to at paragraph 7 above, the HHJ Farquhar Working Group has turned to a second project which will make recommendations to me for procedural and efficiency improvements to the conduct of the business of the FRCs. Both I and the FRC lead judge, Mostyn J, are extremely grateful for the enormous amount of time and effort put in by the members of the group in the preparation of these important pieces of work.

#### Experts

27. The Family Justice Council has established a permanent sub-committee to undertake the implementation of the Working Group on Expert's recommendations. A major part of the Recommendations relates to developing links between the legal and expert communities to foster better understanding of the respective roles, to develop training and encourage knowledge of and compliance with current guidance or good practice.
28. The FJC has also set up 8 Regional Groups (Circuit based) with legal and expert co-chairs to begin the work of implementing these parts of the Recommendations. I would encourage everyone to get involved in these Groups whether by joining a discussion evening, attending a training event or becoming a part of the Group and helping with their work. The contact details of your regional group can be obtained from [fjc@justice.gov.uk](mailto:fjc@justice.gov.uk) or from the FJC website (soon I hope).
29. Williams J and the FJC are also developing proposals in relation to all the other Recommendations and I hope you will either have or be able to attend an event at which Williams J and his committee are spreading the word about the recommendations and how to implement them.



30. A key message for the legal community is compliance with Part 25, particularly in terms of the questions asked of experts and most importantly (from the experts perspective) sending them the judgment or otherwise letting them know the outcome. Feedback on their reports is invaluable to them in helping to improve.

#### Well-being

31. I continue to be concerned about the well-being of all those working in Family Justice and in the COP. I have spoken about this many times. I fear that some may feel that senior judges talk about well-being, but nothing concrete is 'done'. To a degree this may be because any change for the better needs, primarily, to come from each individual being 'well-being aware' and changing their own behaviour, rather than from some initiative from on high. That said, I am constantly on the lookout for things that can be changed to reduce the demand on judges and all others. Currently, there is a need to give further consideration to the ever increasing volume of email traffic and I am actively engaged in looking at this. In addition, there is a need to control the amount of time and number of communications taken up by lawyers after a hearing to draft the court's order. More generally, I am very open to receiving ideas in relation to well-being.

32. One well-being strategy that is so obvious that it should not need to be stated, but in the current environment I fear that it does, is: we must each take a good and complete break over the summer. You know it makes sense! I hope that you have a good one.

Sir Andrew McFarlane

President of the Family Division

12<sup>th</sup> July 2021