

Private Law Working Group 2: the case for radical change?

Emma Griffiths


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Background

- Current constitution of the PrLWG: set up by President of Family Division to review CAP 5 years
- Membership represents all relevant agencies involved in family private law
Chair: Mr Justice Cobb
- Fundamental to CAP: greater emphasis on mediation and out of court dispute resolution
- Objective underpinned by key principle that negotiated agreements between adults generally enhance long-term co-operation and are better for children

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Private Law Working Group First Report

- Published 3 July 2019
- Recommended a revised CAP
- **Objectives of reform**
 - provide a system more responsive to families needing support on relationship breakdown
 - focus: seek to divert appropriate cases of conflictual family breakdown away from court
 - those cases that do require court intervention are dealt with more swiftly and effectively

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Private Law Working Group First Report


Proposed reforms:

- Local alliances of support services: Supporting Separating Families Alliance (SSFA)
- Revitalising MIAMS
- Triaging of applications and allocation of cases to 'tracks': track 1 simplest case with no safeguarding issues; Track 2 more complex track 3: 'returner case'
- Judge-led Cafcass led in court conciliation
- Bespoke arrangements for returner cases
- Maximising digitisation

FUNDING: we have sought to redeploy and reallocate existing resources appropriately within the current system

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PrLWG2: Time Need Case for Change

- Follows consultation on proposals in PrLWG1
- Necessarily interim because awaits publication of MOJ's Panel '*Harm in Private Law Cases*': *how effective is the family court in responding to allegations of domestic abuse*'
- Not contain detailed proposals for change
- Recommends fundamental and systemic change of private family law dispute resolution

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THE CASE FOR CHANGE

We believe that we have reached a critical point in the evolution of in-court and out-of-court dispute resolution for separating families; the system (such as it is) is not functioning appropriately, and its weakness is exposed by the pressure of the demand placed upon it. Little will be gained by tinkering with the current arrangements. We feel that now is the time to instigate more radical system change for the benefit of future generations. [3]

Significant shift from redeploying and reallocating within the existing system to a complete overhaul of system

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THE NEED FOR CHANGE

- PrLWG1 identified pressures on the court system
 - Volume of cases
 - Preponderance LIP
 - Litigants unrealistic expectations of what court can/should
 - Insufficient support and signposting of support to encourage NCDR
 - High incidence of cases returning to court

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THE NEED FOR CHANGE

PrLWG2 further identified:

- CAP not successful in core and essential messaging: encourage parents to exercise decision-making for their children in fulfilment of their PR, rather than delegating decision-making to the court
- Significant harm caused within families by parental conflict
- Perceived failings of the family court to manage some cases involving domestic abuse
- Lack of public funding: families enter a court system without meaningful advice or legal/practical help
- Good quality service to support separating families out of court exist but little coherence to delivery or incentive to families to access them

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Support for Separating Families Alliance

- Key Reform: establishment of Family Solutions Service: Support for Separated Parents Alliance (SSFA)
- Involve co-ordinated support services within the community that would evolve national Family Solutions Service which incorporates the court system
- Provide a more holistic assessment of needs of children and families
- Offer range of legal, dispute resolution, relationship support and therapeutic services that would be better integrated
- Include Court services for those who cannot safely agree arrangements
- But move away from an automatically adversarial system towards tailored support for parents

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Support for Separating Families Alliance

Key features of any Service

- A National System
 - to avoid postcode lottery of services
 - not all parents live in close geographical proximity: some facility for liaison
- Needs to be adaptable and versatile: one size does not fit all
- Notion of early intervention: could help solve family problems before they escalate
- Not envisaged that the SSFA 'trying to stop' families who need access to justice BUT address need for
 - better signposting to avoid unnecessary proceeding
 - better services to support families within proceedings

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Standard Framework Guidelines

- Publication of standard framework guidelines about courts' approach to certain standard facts
- Rationale: steer parents to DIY resolution; rebuttable when proven evidence of abuse
- Superficially attractive but contentious:
 - How to establish the norm?
 - Emphasis should be quality not quantity of contact
 - Guidelines contrary to individualised decision-making ethos of s.1 Children Act 1989

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Funding SSFA

- National long-term strategy that may take some years to achieve
- Rejected suggestion co-ordinated by LFJB
 - Lack finances and human resources
- A dedicated funded national agency is required
- Evolution could and should start now
- Priority to develop properly costed models and make a bid for funding

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Domestic Abuse

- Not finalising recommendations: awaits outcome of MOJ Panel
- Clear observations:
 - Necessary to distinguish between short term heightened conflict: common but not necessarily or always harmful **AND**
 - Persistent/chronic unresolved conflict more likely to result in emotional harm to child with long-term consequences **AND**
 - Domestic abuse in all forms which is undoubtedly harmful
 - Focus on the impact on the child: not confined to domestic abuse but also alienating behaviours

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Domestic Abuse

- *Interim contact*
- Defer final proposals until MOJ Panel
- Superficial attraction to proposal that services to support contact in private law should mirror that available in Public Law
 - No obvious source of funding
 - More reliable solution: ensure urgent cases processed in a timely way

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Triage and Tracks

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Gatekeeping/Triage

- General support but concerns expressed:
 - Impossible to triage without seeing the parties: not possible to formulate clear direction of the case
 - Could inject delay
- Conclusion: careful consideration will need to be given to the format process and criteria for triaging in any pilot

Tracks

- Tracking of cases good idea but needs to be piloted
- Majority of cases would fall within Tracks 2/3 limited benefit to Track 1
- May need to rethink features which govern how cases are allocated to one track or the other

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Legal Aid Funding

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"I don't think that anybody who has anything to do with the justice system of England and Wales could fail to be concerned about the problems which the reduction in resources in several directions has caused for the system as a whole... It's unreasonable to expect a husband and wife or mother and father who are in crisis in their personal relationship to make their own arrangements without help... [In such family dispute cases] there may be an imbalance in resources because of the lack of access ...Most people require legal help at the beginning of cases. It is that lack of initial advice and help which is a serious difficulty."

Baroness Hale of Richmond 27 December 2019
[148]

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'It notes that the Government's Response to the LASPO review reflects an awareness that the LASPO reforms had been "not entirely successful" in delivering desired changes in behaviour [CP37]. The judges, lawyers and other professionals around our PrLWG table would go further: the lack of access to publicly funded or affordable legal advice in private law has materially increased the number of parents issuing court proceedings who might otherwise have been assisted to resolve their disputes out of court; this increased volume, together with the unrepresented status of the majority of parties themselves, has placed an unsustainable strain on the family justice system.'

[148]

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Next Steps

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- Not identified any clear or 'quick' fix solutions to offer reprieve or create immediate system change

"What has become increasingly clear through the consultation process and our further discussions is that it will take some time, and some up-front financial and human resourcing, to turn around the long-established patterns of behaviour of private law litigants, and the deeply-engrained 'traditional' practices of the family justice system in dealing with them."

[174]

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Next Steps

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Proposes piloting of its recommendations, to include

- Promotion of NCDR
- Enhancing parenting education through SPIP
- More frontloading of Cafcass work with specially trained officers with close links to the judiciary
- Test out tracks/differentiated pathways
- Development of child impact statement
- Reduce returners: more court reviews post-final order

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Closing thoughts ...

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- Necessary – absolutely
- Radical but realistic?
- Austerity and impact current national emergency

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Emma Griffiths, *Barrister*

 **e:** emma.griffiths@3pb.co.uk

 **t:** **01865 793 736**

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