HOUSE OF COMMONS

Justice Committee

Oral evidence: Work of the President of the Family Division, HC 700

Tuesday 23 April 2024

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Watch the meeting

Members present: Sir Robert Neill (Chair); Tahir Ali; Dr Kieran Mullan.

Women and Equalities Committee member present: Caroline Nokes.

Questions 1-92

Witness

I: Sir Andrew McFarlane, President of the Family Division.

Examination of witness

Witness: Sir Andrew McFarlane.

Q1 **Chair:** Welcome to this session of the Justice Committee, and a particular welcome to our witness, the president of the Family Division of the High Court, Sir Andrew McFarlane. We are very grateful to you for coming to assist us.

We just have to deal with any declarations of interest, although I think there is only myself: I am a non-practising barrister and a former consultant to a law firm. I do not think anybody else has any relevant interests.

Sir Andrew, as I said, thank you for coming to join us. You have been a specialist in family law for a deal of time at the Bar.

Sir Andrew McFarlane: I have. It was not an area of law that I wanted to practise in when I started, and I have been a barrister since '77. I thought, "Why would anyone want to do family law?" However, I then started to do some adoption cases five or six years in, and I thought, "Wow, this is pretty striking stuff," and I became interested in the law and the human interest side of it.

Q2 **Chair:** And you have been the president of the Family Division since 2018.

Sir Andrew McFarlane: It is nearly six years.

Q3 **Chair:** Looking at that level of experience and the current work that you do as the head of the division, how would you assess the state of health of the family justice system as of today? How has it changed?

Sir Andrew McFarlane: It has changed; it always changes. That is obviously a complicated question. Can I address it in one or two parts?

Chair: Yes, of course.

Sir Andrew McFarlane: First, I will say something that may not come up elsewhere in the evidence. If you were asking judges, I think they would say first of all that there is a deal of apprehension about security following the striking incident at Milton Keynes court in November. Obviously, I will not say anything about that incident, but the fact that it happened and the security arrangements were breached to a significant degree has had an impact right across the system, and for civil judges as well. I think that judges think, "Well, it could have been me."

The issue has been taken extremely seriously by the Lady Chief Justice, the senior presiding judge and me, and we are working through what the ramifications will be and what changes need to be made. The differences are quite striking between the security arrangements in a criminal court and those in a family court, where domestic abuse is often an issue and—not frequently, but it is not out of the ordinary—some people become very excited by what is going on and lose control of their behaviour. That could happen in any court.

I think judges would have high in their view of the current state an apprehension about whether we should carry on sitting in the way that we do, so the jury is out, as it were.

Q4 **Chair:** Indeed. Do you get a sense that there has been an increase in such incidents?

Sir Andrew McFarlane: Over time, if we are measuring it over decades. I do not think that any judges were surprised that something had happened in a court, because, sadly, that is something that does happen. People were surprised by the degree to which this was a known known. This was an individual who had not behaved safely before, and some arrangements had been made, yet it did not protect the judge. Of course, the court staff and the lawyers in the room are vulnerable. There was not another party in the room on this occasion, but if there was, they would be vulnerable. It is something that is rightly being taken really seriously. I did not know if that would crop up in other questions, so I thought that I would mention it.

Q5 **Chair:** Since we are discussing this, are you satisfied with the level of support that judges are getting from His Majesty's Courts and Tribunals Service, for example, in these arrangements? Are they fully engaged?

Sir Andrew McFarlane: Yes. They, too, are taking it very seriously. They are working with the senior presiding judge and the deputy senior presiding judge to work through—inevitably—protocols and templates, and then there will be training. I think the world will not be the same, but the volume of cases we have is such that it is very hard to understand what we would do. It involves a wholesale change for every single case.

Q6 **Chair:** As you know, I was a criminal practitioner at the Bar, but I get the sense that part of the whole idea was, for good reason, a quite deliberate attempt to make family proceedings more informal and less potentially oppressive to parties, shall we say, and to make parties more at their ease? However, this was a consequence perhaps—

Sir Andrew McFarlane: We are used to having special measures in place for domestic abuse victims. Now, post-covid, it is common for people to join remotely rather than physically. That is clearly a good thing from a safety point of view.

Q7 **Chair:** The only thing that I was going to pick up on with that point is that I noticed you have announced a pilot where Family Division judges in some sets of circumstances will be sitting in and wearing robes again.

Sir Andrew McFarlane: Yes, it is a very limited pilot. It grew from the judges at the central family court, where the degree to which incidents happen is relatively high and there is a high level of confiscation of knives at the door, not because people are trying deliberately to bring in knives, but because in the population at any one time people have knives with them. The judges felt that they wanted to do something to see if it would change the perception of those attending court as to the seriousness of the court process and the anonymity of the judges' role by bringing back robes. It is limited just to that court, just to three months—

Chair: And then we will see how it goes.

Sir Andrew McFarlane: We will see how it goes. It doesn't require the solicitors and barristers to robe; it is purely about bringing a degree of solemnity to the process.

Chair: That is very interesting; we will look forward to that.

Sir Andrew McFarlane: The second thing, which is the only other thing I would mention under the heading of what judges would be particularly concerned about, is the level of staffing in the court. You will know that the digitisation reform programme—bringing in computer software to undertake all the administrative tasks in the court—is rolling on. I think what the judges want is to have some clarity, looking long term, as to what the court of the future will look like and what staff will be in the building to undertake administrative roles, rather than the judges having to take their time on that, which, to a degree, they are doing at the moment, while the computer programmes settle in. Paying a judge's salary to people—judges—to undertake administrative roles is clearly a very expensive thing to do. The judges need support, and there is a worry that the level of staff may be reduced below that which is necessary to run a proper system. That is a constant matter, and it would be disingenuous for me to answer your question about the health of the system and not report that.

Q8 **Chair:** What steps are being taken to address that concern?

Sir Andrew McFarlane: We are in constant discussion with HMCTS, which have reassured the Lady Chief Justice that the staff will not be reduced to achieve benefits from the reform programme until those programmes produce a situation where you do not need staff to do what they were doing before, and also, similarly, leave sufficient staff to run a proper system. I am comfortable that we are in conversation with HMCTS. However, equally, I understand entirely the judges' apprehension, because it is a proper question—what will the court look like once this is all finished?

Chair: Indeed. Workload does seem to be a particular issue for the family judiciary.

Sir Andrew McFarlane: It is. To more broadly answer your question on the state of health of the system, I think the word I would choose is "convalescing"—it has been in intensive care. After covid, we inevitably lost pace and the backlogs went up. The bulk of our work is to do with children: public law child protection cases or private law disputes between parents, both of which rose. We have had initiatives on each side to try to get them down. We may come on to the data in due course, but that is moving in the right direction.

I do not know if this is helpful, and I am no good on numbers or working out what a number looks like, but last year, we sat—that's the word—99,000 judge days in the family court, not including the magistrates days. I was in the Principality stadium in Cardiff last week, and I looked out on

the pitch—it's enormous. The capacity of that stadium is 72,000. Wembley, I think, is 90,000, so that is equivalent to 99,000. The O2 is only 20,000. The London marathon was 50,000 people. So 99,000 judge days is an enormous amount of resource. First, I wonder if there is something wrong with society that the family court is sitting that much more than the civil court. Secondly, I hear frequently of people who have had unfortunate experiences in the family court, and there are complaints about the way the court runs. Those are legitimate complaints, and I take them very seriously, but it has to be seen against the overall scope of the number of court doors opening and judges sitting every day. That is helpful.

So there are green shoots. Before I go out at the end of the afternoon and close the door, the one thing I want you hear me on, if possible—we will come to this again in more detail—is the pathfinder court.

Chair: Yes, we will come on to that.

Sir Andrew McFarlane: Although we have achieved some change—some green shoots—with the initiatives that I have taken on, and others have as well, they have been tweaking, as it were, the current system. The pathfinder, which we can come on to in more detail, is a total game changer. It is a different way of supporting couples to achieve separation and agreement about the arrangements for their children, in a way that entirely acknowledges any domestic abuse and provides a safe way forward, if that is there. I think that is significantly different. It reduces the resources enormously. The cases are completed very quickly, and the court is able to get on with the few cases which do carry on being contested or to turn its mind to public law.

Chair: That is interesting. That is helpful.

Sir Andrew McFarlane: There are two other little things, and then I will subside, but perhaps I can just set the scene.

Talking about the health of the system, so far the transparency pilot—and I do not take anything for granted—has achieved positive results. There is not a lot of reporting and there are not a lot of journalists, but those who have been have reported accurately. I think the public who have heard and read those reports will have learned something about what we do, which is good. The pilot is now live in, effectively, half the family courts in the country, and the ambition is for that to be completed for all the courts by the end of the year.

I suspect that this Committee will have understood that the amendment that Harriet Harman MP introduced last week to Jade's law arose because of a report by Sanchia Berg, who had observed the court in Cardiff. I am really pleased that that sort of thing is happening. It is the sort of sequence of events that you would want.

The final thing is FDAC—the family drug and alcohol court. This Committee will know what that is, but I have learned, as I have gone around, that it

is a mistake to think that the D and the A only stand for drugs and alcohol. The FDAC tell me that every case that they deal with includes domestic abuse—there is a domestic abuse component in someone who has become a parent in a relationship which is also characterised by drugs or alcohol.

The FDAC has found a way of supporting that victim to deal with the fact that they may have a series of abusive relationships that they have gone through and to break the cycle. I am not trying to be an advertising executive, but I am keen that we somehow use the DA in FDAC for domestic abuse as well, even if there are no drugs or alcohol issues. I think we have learned enough to see that, if we can get a parent—often a mother—at an impressionable stage, namely the start of care proceedings, it is an opportunity to break a cycle which might not otherwise be broken.

Chair: That is a very helpful overview.

Sir Andrew McFarlane: I will subside now.

Q9 **Chair:** No, that is very useful—thank you.

You mentioned the backlog, and my apologies for pressing a little on that. What is your assessment of the size of the backlog? There is a difference between public and private family law cases, isn't there?

Sir Andrew McFarlane: There is. I have got some figures—I do not want to bombard the Committee, and I am very happy to supply what I have. I will give just a four-year snapshot of the backlog. We have got monthly figures. For August 2020, the backlog for private law was over 51,000. In August '21, not surprisingly with covid, it went up to 52,800. In August '22, it went down to 50,000. Then, in August '23, it was 46,000. Now, in February, it is 45,000. So it is not an enormous change, but it is certainly going in the right direction. This is a lot of cases. Each case has two or three children.

Q10 **Chair:** There seems to be a discrepancy between public law and private law cases?

Sir Andrew McFarlane: Yes, there is.

Q11 **Chair:** Why is that?

Sir Andrew McFarlane: Well, they are different. Public law cases often involve some expert intervention because the stakes are high—the local authority is often looking to remove the child permanently from the family.

There are two questions in these cases: what on earth has happened and what on earth are we going to do about it? There is often potential for expert evidence, and that takes time. Often, the end of the case is stalled because there is a need to look at the placement options for the child if they cannot go home, and no matter how often you say to parents when they come into the court at the beginning, "Now is the time to tell us about uncle, auntie or granny so-and-so, who might step forward," inevitably, human beings being what they are, the family don't do that,

and then someone comes forward. The more that local authorities can look at that before they start, or at the beginning, the better.

There are different dynamics in play in public law—the backlog in public law is more static. Effectively, it has gone from 12,400 at the beginning of last year to 12,900 now. That is depressing because we have had the relaunch of the public law outline, which was a template for case management. I have some figures on that, which actually show that the ones that have finished are in fact in a better shape than the average.

Chair: Perhaps you would be able to provide us with that data afterwards?

Sir Andrew McFarlane: Yes, because I don't want to bombard you.

Chair: That is fine. I know you have got your office to very efficiently provide us with that. That is very helpful.

Sir Andrew McFarlane: The trouble with the backlog is that the bigger it is, the more turgid the whole thing is to get through, and my hope is that once courts start getting into the backlog and clearing it off, they will become faster at doing it. We are just starting the pathfinder in Birmingham and Cardiff, and each of those two courts had substantial backlogs. In order for them to be able to start the pathfinder with a relatively clear runway, they were given some extra sitting days to address it, and they found that by having a deliberate programme of getting the old cases in, surprisingly, the cases had, in fact, either sorted themselves out or were able to be sorted out relatively quickly. We have learned from that, and there is no reason now why every court should not be doing what they have just done, whether they are going to get the pathfinder or not.

Q12 **Chair:** Are there regional variations in terms of the backlogs and delays?

Sir Andrew McFarlane: Yes, but that is partly because, as the Committee will know, we have a shortage of salaried judges in the south-east and in London, so the backlogs in London particularly are higher. In the smaller courts, the difference of one judge more or less makes a real difference, so there are variations.

Q13 **Chair:** Do you think you have access to enough data to be able to track that sufficiently?

Sir Andrew McFarlane: Well, no, you can never have enough data, and I think that anybody in our system would say that the computer system that the service has at the moment, which is called FamilyMan—family management system; that is not meant to be a pun—is now very antiquated and it counts things in pretty lumpy amounts. We look to the time when the new reform products are in and we can count things in a more agile way. CAFCASS has good data, so we tend to use that.

Q14 **Chair:** When do you think that your new systems should be in place, with the reform programme?

Sir Andrew McFarlane: I think we will have to wait and see. The private law programme has not started yet, so I am not going to put my—

Q15 **Chair:** So it is difficult to predict at the moment? Okay.

You talked very positively about the pathfinder programme. I know there have been some other initiatives that you have launched as well—the "Make Every Hearing Count" guidance and, as you said, relaunching the public law outline to try to speed things up. What success has there been with those initiatives, as well as with pathfinder?

Sir Andrew McFarlane: For the benefit of Committee members, the public law outline was introduced when Parliament passed the statutory requirement for public law cases to be undertaken within 26 weeks. That was a new focused way, and effectively the message was that the court decides only whether the threshold criteria for intervention is met and what the care plan is for the child—in the bald terms of going home or not, and if not, then to the family, and if not, then to adoption—and then makes the final order as to affording the child's welfare, which is the paramount consideration. That is rather than, as had been the case before that, the court hanging on to wait for the care plan to be finessed in every detail—"Which school is the child going to go to? Which doctor will be instructed for this work? What is the placement going to be?"

That was very successful. It came in in 2014-15, and by 2016 the national average was 27 weeks, which had come down from around 60, as the family justice review reported. I do not want to give you the whole minute's spiel on this but then, out of the blue, the volume of incoming work went up by 25%. My predecessor, Sir James Munby, memorably said, "We don't know why this has happened and we don't know what we can do about it."

We then started looking at that. By then I was president and set up the public law working group. We came up with proposals for local authorities to tighten up their decision making before they decided to come to court. That did produce a drop of about 13% in the volume coming in, which has been sustained.

On the PLO, however, with covid people got out of the habit of sticking to it, because it was very difficult to have effective hearings when covid was around—to get everybody to file their statements, the experts to do their reports, a social worker to be present and well, the parents to be present and well. Hearings were adjourned and adjourned. The courts got used to delay and it became normalised, so they stopped connecting with the 26 weeks, because the experience was that you never achieved it. What I did was to kick-start the PLO and say, "Look everybody, if we carry on like this, it is only going to carry on spiralling." That message really got home, I think.

Chair: You have had the buy-in from practitioners for that.

Sir Andrew McFarlane: Yes. Of course, I would say this, but I think it is true. I think they got it and are doing their utmost to adhere to it, because

that is the way to go. It is unconscionable for young children to be waiting in interim foster care for even six weeks, let alone for longer, while the grown-ups—us, their parents and the local authority—work out what to do. As I say, it is moving in that direction.

I have another set of statistics on care proceedings that have closed within 26 weeks. If the measurement were taken in quarter 3—for us, the autumn—of 2021-22 in post-covid times, only 22.8% of cases finished within 26 weeks. The following quarter, it went down to 18%. Whereas, skipping forward, in the year 2023-24 which has just finished, quarter 1 was 25%, quarter 2 was 27% and quarter 3 was 31%. I anticipate that the next quarter will be higher still, so that is the direction of travel.

Q16 **Chair:** How long do you think before we get to about nigh on 100%, or as near as we can?

Sir Andrew McFarlane: The time to ask that question is probably July or August, when we have a whole bulk that is waiting to come through. That is where we want to get. We all want to get there but it is not a perfect system.

Chair: It is helpful to have that timeframe.

Q17 **Dr Mullan:** Sir Andrew, you mentioned the pathfinder pilots, but I want to go to the step before that and the suite of measures that the Government introduced to try to reduce the likelihood of family custody disputes ending up in court. I would like your observations on why we describe these things as getting worse, and say that more and more people end up in legal disputes. Do you think that is true? If it is, why do you think there is this trend towards more custody disputes ending up in court?

Sir Andrew McFarlane: It is complicated. I think there are more people, which is an easy answer. Without making a political point, I think the statistics show that when legal aid was taken away from this private law work, the volume initially dropped quite substantially but since then it has gone up. An awful lot of the cases are litigants in person. You mentioned the Government proposals and I will come on to those.

You can picture the scene if you separate. Without coming to court, you can't access parenting programmes or professional input of any sort, and you can't access much independent authoritative advice. If a man googles or a woman googles, they might get hived off into different interest groups. So people come to court, or maybe they go to the police or a social worker—"It's a domestic. You need to go to court." I think we have seen a rise for all sorts of reasons of that sort.

I and others were pushing for the Government to take some action. It is not for judges to tell the Government, but our frustration was that we cannot connect with those individuals until they have issued a court application, because we do not know that they exist. It is not for the court to be putting out messages generally to the public. I think that a fair proportion of the people who come would be better off not coming to

court, and we should get that message across. Some people really need to come to court—they need protection—and I am absolutely keen for them to come.

You mentioned the Government proposals. I mentioned when I was here before that they were encapsulated in a report called "What about me?", which pulled together all the resources that might be thought of to support separating parents. It was Dominic Raab MP, when he was Lord Chancellor, who picked this up and consulted on a range of proposals that eventually came out into the policy announcement in January. So I certainly welcome this, because I think it is going to be of real benefit to parents. It will help them not to come to court but to sort out their problems in a sensible and sustainable way.

Q18 **Dr Mullan:** Which of the measures—things like early information, early legal advice, and mediation—do you think has the greatest potential to divert people away from a courtroom?

Sir Andrew McFarlane: This is a big ambition, but what is needed is for there to be a change of mindset in the community that looks at these options as a range of options. What suits one couple will not necessarily suit another, so I do not think that any one of them is my top pick. I think they are all good.

For example, the parenting course is something that a group of parents go on. If you and your ex are both going on one, one of you would go to a course on a Tuesday and the other would go to a different one the following week—different ones for different parents. It is a bit like a speed awareness course for parents: "This is what is happening. You're separating. These are the options. This is the impact on children, generally. Have you thought about this?" That is really sensible input and it allows parents from other families in a similar spot to talk to each other. I would have thought that is innovative. At the moment we do that—we can order it in court—but it is not available until you come to court. None of this is, of itself, a silver bullet, but it is all very much in the right direction.

Q19 **Dr Mullan:** In some of the discourse around mediation there has been a question of whether people should be compelled to have attempted mediation. Some people argue that if you are compelled to do it, it does not really meet the approach you might need for it to be successful. Having read what you have said previously, am I right to think that you probably think in that vein?

Sir Andrew McFarlane: Yes. As you know, it was part of the Government consultation but did not travel through to the policy document. It depends what you mean by compulsion. The rules are changing at the end of April and, for example, instead of forcing someone to go to a MIAM—a mediation, information and assessment meeting—the court can say, "We're not going to have any more court hearings until you have been." That is compulsion, but in fact it seems to me to be perfectly sensible that people try alternative means. That happens in civil litigation as well. So

compulsion is perhaps the wrong word, because it may send a rather clunky signal that it is compulsion, whereas in fact you can require something or expect something firmly.

Q20 **Dr Mullan:** Outside of compulsion, what do you think are the other ways that we might encourage separating parents to make use of the services that are available?

Sir Andrew McFarlane: With signposting. Within the digital process, where people have to fill in a form online—we are all used to this and get bombarded by it in other contexts, such as when you are trying to book a holiday—it is possible to signpost people. Looking more at the long term, the online procedure rule committee, which the Master of the Rolls chairs and which I am on, does not allow people to even get to making the application to come to court for family or anything else without going through an online experience, where—

Dr Mullan: Is that currently?

Sir Andrew McFarlane: It doesn't happen at the moment; this is something that will come in in two or three years' time.

Q21 **Dr Mullan:** Why in two or three years' time? It seems very obvious.

Sir Andrew McFarlane: What I am describing—the online procedure rule committee—is a wholly new concept. It is being worked up quite quickly, but it needs to be worked up in detail, taking in the whole of civil and family law.

But we can be doing stuff, I think, in our digital space for someone applying online. Only this week, with the new scheme coming in next week, together with the Ministry I have written a short letter that will go out to anyone who applies to the family court saying, "Hang on. Have you thought about this? There are other ways of sorting this out." I didn't actually say, "Hang on," but that is the gist.

Dr Mullan: And that is definitely going to happen.

Sir Andrew McFarlane: Now, that will happen. If you apply after 26 April—or whatever date it is—both you as the applicant and the other party will get this letter.

Q22 **Dr Mullan:** Going back to the online side of things, without directing criticism towards you, it seems to me that that is not necessarily a hugely complicated idea. You are doing it in letter form and you could just put a few links on a webpage. Again, I am curious as to why that is such a long process.

Sir Andrew McFarlane: I am the wrong person to be asking about that. It is not a hugely complicated idea, but my experience with all our online processes is that it takes a long time to achieve something that actually happens.

Q23 **Dr Mullan:** You touched on the pathfinder courts earlier, speaking about

them in positive terms. Do you have results relating to the impact they are having?

Sir Andrew McFarlane: The honest answer is that I do, but I can't tell you what they are. The data is HMCTS data and it has not been published yet. There is an appraisal of the pathfinder courts—they are in north Wales and in Dorset—that the MoJ has commissioned, which we hoped would be published around now, but it has been delayed a short time. That will have the statistics.

I can say that the pathfinder experience is that most proceedings sort themselves out at the first hearing, or if they have to have a second hearing, because they have virtually no backlog, that takes place two or three weeks later and it is short. So it is a much tighter process.

Q24 **Dr Mullan:** Have you found it successful for managing conflict? Setting aside scenarios where you need some kind of protection for any of the parties—setting aside those high-conflict situations—have they been successful?

Sir Andrew McFarlane: Yes, and in the two pilot courts every case goes in. They do not triage and take the high-conflict ones out. My primary concern, when I heard about the pathfinder, was that if it was dealing with the cases and looking to achieve a consensus at an early stage, it might avoid considering the domestic abuse side of cases—60% or more of the cases involve domestic abuse. I have asked and asked about that, and I am now reassured that it does.

I will step back, if I may, and tell you what it does. Under the current model, I apply to the family court for an order about my child. I say, "This is what I am upset about. This is what I want." My wife puts in her side and it comes before a judge and immediately we have a conflicted structure. The judge does not know much about the case at that stage, because there is very little information and no independent information coming in. They act more as a referee, so the case is litigant-led. They say, "This is what I want," and the court reacts. It really only stops when one or other of them accepts—or they both accept—that it has stopped. If they want to carry on going back to court—in abusive cases often the perpetrator of abuse will use the proceedings—the whole thing is potentially harmful. If it is litigant-led, that is wholly different.

For example, when one person applies, before any court hearing takes place, CAFCASS or CAFCASS Cymru in Wales—the social work agency that advises the court—goes to see the children and parents, and produces a report of 12 to 15 pages. That is the sort of information we only get seven or eight months down the track, when a welfare report is produced in a conflicted case. The court and the parents get it up front. It is called a child impact report.

The conversation—it is much more of a conversation at the first hearing—is the judge saying, "Is this description of your dispute about right?" "Yes." "Well, look at the impact on your child of this. What are we going to do?" It is a problem-solving court. We are not concerned with who said what or

did what six months ago; it is what we are going to do about it, but within that, getting to the domestic abuse side: "Whatever you say are the rights and wrongs, do you accept that she"—it is often "she"—"is extremely vulnerable and does not want to have anything to do with you communicating about the arrangements? If you are going to have time with your child"—if it is safe for that—"how are we going to arrange things to protect her from you?" Immediately, we are cutting to, "What's the solution?", rather than spending a long time mithering over the problem.

My concern was whether domestic abuse was in some way being fudged and sidelined, but another aspect of pathfinder is that the court in these regions actively forms a working alliance with the local domestic abuse professionals, so that they regularly attend court with the families they are already engaged with, and the court—if it spots that there is a need for them—will refer cases to them, which I do not think ever used to happen in the old days. I have now met domestic abuse workers in north Wales, Dorset and last week in Cardiff. They are very positive about this, as is Nicole Jacobs, the national Domestic Abuse Commissioner. I am reassured by their focus, which is entirely on making sure that this is safe.

Q25 **Dr Mullan:** On the planned expansion, I assume you view it positively, but even if you do, what do you think the risks are to rolling it out more widely, if there are any?

Sir Andrew McFarlane: I am very pro expansion. To finish my metaphor about litigant-led or the current model, the pathfinder is child-led. I think that is the key thing that makes it work.

We are no longer piloting it. It was always thought to be a good idea, but it has worked so impressively that we are clear that it is the right idea. I am sure that that is the Ministry's view as well, because they say it in their policy document. We are trialling pathfinder in the two bigger centres of Birmingham and Cardiff to see what we need to do to make it work in a more complicated setting.

I think there was a bit of extra money in the budget to look at going to other places. Although currently we only have four places, so what I am about to say is odd in that respect—there are 40 court areas, as opposed to the four we have—we are already at something of a tipping point, because to be telling other courts, which have not got pathfinder, "This is what it's all about. This is what you do—but you can't do it", seems wrong. In Wales, it will just be the area around Swansea that does not have it. I think we are getting to the stage now where, as part of what we do, we need to be getting everyone to prepare for pathfinder, first, because that is a good thing—a lot of the ideas are good—secondly, because it will get them to address the backlog in their courts; and, thirdly, because it will make it easier for pathfinder to land with them when it comes.

Q26 **Caroline Nokes:** Sir Andrew, thank you very much for coming along to give evidence. I want to ask specifically about parental alienation and how well the family courts address that issue.

Sir Andrew McFarlane: It is an issue that has always occurred. I am so

long in the tooth and this has always been around, with one parent saying that the other one is changing the child's view of them, but there has been a complete upsurge in the number of cases in which it is alleged. I suspect that you particularly will know, as I do, that it is often fed by understanding that is given to separating parties that, if allegations are made against you, you might counter that with parental alienation. So we have seen a real rise in the number of cases where it is alleged.

It is very difficult for the court because in the end, although parental alienation is a label, it is certainly not a syndrome. It is not a diagnosis, but a label that is used. What the court needs to be doing is not so much deciding whether something is ticking the parental alienation box or not; it needs to be looking at what is actually happening to a particular child in a particular family, and whether the parents are behaving in a way that is harmful or not—just as that would be the question if some more physical harm or sexual abuse was being alleged. I encourage courts to move away from the label and simply see whether there is something that needs to be investigated in a case, and if so, to get on and investigate it.

Q27 **Caroline Nokes:** How effective are those investigations, and what is the level of reliance on psychologist expert witnesses? There have certainly been significant concerns raised in regard to the quality of some of those experts.

Sir Andrew McFarlane: There has been concern raised. I suspect you will know that I presided over an appeal that raised the issue. Frustratingly, it wasn't a vehicle that allowed me to deliver any definitive determination to say that some experts should or should not be instructed. It certainly brought to light, to my mind, that the term "psychologist" can be used by anybody. I could call myself a psychologist. The key thing is whether they are registered with the relevant health professional agencies. At the moment, some of the experts who are instructed in these cases aren't registered, and there is a degree of concern about them.

In that case, because I just didn't think it was the place for a judge hearing an appeal to lay down the law to that degree, saying that a whole group of individuals can't be instructed, I indicated that it was properly a matter for either those professional agencies or for Parliament. Further discussions have taken place. It is not at all an easy topic. The position has now been reached that it is going to go back to the Family Procedure Rule Committee to see whether it is in a position to lay down some basic requirements that individuals have to meet in order to be able to be instructed in these sorts of cases.

Q28 **Caroline Nokes:** Is there any anticipation of how long that might take?

Sir Andrew McFarlane: I think that something will go to the rule committee now that hasn't been before, so it will be something like six months.

Q29 **Caroline Nokes:** Six months from now—so the turn of the year?

Sir Andrew McFarlane: Yes.

Q30 **Caroline Nokes:** Six months ago, I think the Family Justice Board published the draft guidance on responding to allegations of alienating behaviour. What has been the response to that?

Sir Andrew McFarlane: I know this, but I am going to have to look it up. It was good. We had 93 responses, but some of them ran to over 40 pages. The Family Justice Council did it, and it is completing its review of it all. The final version of the guidance is expected in the autumn.

Q31 **Caroline Nokes:** You have expressed your concern about unregistered experts. How do you communicate that to judges in the family courts, and how have they responded?

Sir Andrew McFarlane: I said as much as I felt I could say in that judgment. I have spoken at judicial training courses. I am happy to tell the Committee that my line has been that it should be the norm to instruct people who are registered. If the court is being invited to instruct someone who is not registered, there has to be a particular reason why that is the necessary instruction rather than any option for someone who is registered.

Q32 **Caroline Nokes:** Finally on this, perhaps I can take you back to something you said in response to a question from Sir Bob—that you could argue that it is something wrong with society that there are such levels of conflict, and that parental alienation, or an allegation of parental alienation, is being used to weaponise relationships in family court proceedings. What role should Parliament have in trying to bring about greater levels of harmony, or should I say perhaps less ambitiously, lower levels of disharmony?

Sir Andrew McFarlane: I think it would be ambitious of Parliament to legislate to produce greater levels of harmony, but the sorts of proposals that Dr Mullan was referring to are the sorts of steps that can be taken, where there is disharmony, to assist people in working out what they might do to avoid making things worse and increasing the level of conflict. Parliament can approve resources for that, which would be helpful.

I sound like a car salesman, but I am so persuaded that pathfinders are the right courts, but it doesn't need law to change this. The law that the pathfinder court applies to the cases is exactly the same, but it needs very modest resources to roll it out across the country. The way of thinking behind pathfinder is to avoid conflict, to encourage focus on the children, to encourage people to work out what the resolutions will be rather than deciding how they are going to fight the fight. It is likely to save resources in societal terms and it will certainly save resources in the court system.

Q33 **Caroline Nokes:** I was taken with your comment that you wanted courts to become problem-solving courts. That is a cultural shift, isn't it?

Sir Andrew McFarlane: Yes; it is a cultural shift on our side, because we are lawyers, in the end. It goes back to the comparison I made with a litigant-driven process, which we have at the moment for these cases. It is no surprise that we have that, because that is what litigation is normally about. If you are in the civil court, the parties are the drivers of the

process, and the judge is the judge, whereas I do not think that is helpful for the families. I think we need to be doing something different.

There is a district judge in Dorset who is running the pathfinder there. When I visited, she said, "Andrew, this is what family law should always have looked like, all the way down the years." I think it is different, and a lightbulb moment for me. I would hope that Parliament would also spot, in the busyness of life, that this is something of real value that could make a real difference.

Q34 **Chair:** That is very interesting. One of the sad facts, as we talked about, is that there is a degree of antagonism within the system. Of course, underpinning that, as you said, in many of the cases now is domestic abuse of one kind or another. That appears, sadly, to be growing.

Sir Andrew McFarlane: It is. Also—and this is the way life is—a very broad community of people come to court about their children. Often, they are nationals from different countries, and often, the way that disputes and family relationships are organised in those countries is different from ours, and they face a judge approaching it. So there are a range complexities in these cases. It is easy to look at the statistics and say "Why is this backlog so high?", but behind them are a lot of frightened and damaged people in tricky situations.

Q35 **Chair:** In fact, a large number of people are representing themselves—litigants in person in the family courts—and that is much higher than elsewhere.

Sir Andrew McFarlane: It is, but part of the Government's proposal is to pilot early legal advice, which will surely go some way towards managing expectations.

Q36 **Chair:** Is that something you want?

Sir Andrew McFarlane: Yes.

Q37 **Chair:** Looking purely at the domestic abuse aspect, a number of steps have been taken since the harm panel's recommendations four years ago. What remains to be done to ensure that where there is domestic abuse and it has come through to the family courts, the experience of the survivors of that abuse is as good as it can be? There were concerns at one time that there was not the same support.

Sir Andrew McFarlane: There are still concerns. There has been a campaign, which was promoted in *The Sun* last week—these are people who have had a bad experience and organisations that know what they are talking about that are describing a negative experience. You can never improve it so that that is not a difficulty. Every single judge in the country who does family work has gone through a half day of training on domestic abuse in the last 18 months. As well as reminding them about concepts they will have known about, that really brought home the element of domestic abuse that is coercive, controlling behaviour. It does not matter what the physical actions may or may not have been; you can be

damaged just as much by a relationship where there is no physical interaction.

Moving on from that, I have been struck by the positive professional relationship I described between the domestic abuse professionals and the court in north Wales, Cardiff and Dorset. I have asked around since then, and I think nearly all the local courts now have relationships like that with the local professionals. My aim is to make sure that 100% have that. It is one thing to go on a half-day training course, but if part of your regular experience at work in your court is having domestic abuse professionals coming in and advising and you know them, listen to them and respect their advice, you will pick up their approach to this issue by osmosis. For me, that is a better way of interacting with professionals.

Q38 **Chair:** One specific thing that was done was the Domestic Abuse Act 2021 prohibiting cross-examination of the victim by the perpetrator of the abuse. Very often, they would be acting in person. We have the concept of the qualified legal representative to take on the cross-examination where that is necessary in the interest of justice. It seems that the QLR scheme has not been taken up very well. About 113 QLRs were used in the 12 months after it was launched. Given the volume of business, that does not seem very high. What is your take on that?

Sir Andrew McFarlane: That is not the statistic I have. The point that the QLR scheme has not been taken up in all the cases it should have been is certainly right, but when the Act was passed by Parliament, in so much as judges ever go and cheer, there was judicial cheering. Before that, the judges had been asking the questions themselves, which always seemed uncomfortable and potentially looked unfair. It was a very welcome introduction, and it is extremely frustrating that it has not been taken up.

Being candid, the QLR scheme has not been taken up for a range of reasons. The rate of pay is not high at all. Initially, travel expenses were not paid. They are now; the Lord Chancellor introduced that in January. That will hopefully make a difference. As the court is so busy, the lawyers who might become QLRs are fairly booked up and busy doing their own work, so there is not a ready pool of people to undertake the work. Also, in order to be authorised as a QLR, you have to go on a training course at your own expense as a barrister—it is only available to barristers at the moment; the solicitors do not have a training course they can go on. So there is a range of frustrating impediments to making it work.

Q39 **Chair:** In July of last year, in "A View from The President's Chambers", you yourself referred to the "frequent and widespread difficulties" that were being encountered and said that it was "dispiriting and concerning".

Sir Andrew McFarlane: I went to Newcastle in the autumn to visit the court, and I said, "I've got a couple of days free. If you want me to do a case, give me whatever you want." They gave me a fact-finding case that a district judge would normally have with two litigants in person. I had to ask all the questions. I had to ask the first lady "in chief" because I

wanted to get her to give her case. Then he gave me the list of questions that he wanted me to ask her. I asked her the questions, and then he went in the witness box. It was a very unsatisfactory process for them and for me, but it was an eye-opener: this is what district judges and magistrates have to deal with day in, day out. I think that to get the QLR up and running, training is probably the bit—

Q40 **Chair:** The training is key. More than the fees?

Sir Andrew McFarlane: It is not really for me to say about the fees. Of course, the fees won't help. The Law Society is looking at providing training for solicitors, and it will be very welcome if it does.

Q41 **Chair:** There has been quite a lot of discussion in the criminal jurisdiction about pre-recorded cross-examination in sexual cases—section 28 cross-examination. There has been quite a lot of debate about fee levels and how much preparation is required by the advocate to fully grasp what needs to be cross-examined. Do the same considerations apply?

Sir Andrew McFarlane: I think they do. The sorts of cases that you describe in the criminal court will have more paperwork in them than a typical fact-finding case. It is not easy. The QLR doesn't come in to represent the person. It is quite a tricky role: you have to know enough about the case to understand what the questions are about, but you have to avoid being drawn into advising the individual.

Q42 **Chair:** Exactly. You have to have a grip of the papers. I get that.

Let me ask you about the only other thing that has been raised with us. I had a letter from the chief executive of Women's Aid, who was concerned that, whatever the good intentions with the efforts to make more special measures available in the family courts, they are often not accessible to survivors. The offer is heavily dependent on the individual court, and she was concerned about the level of communication. Many survivors do not know whether their request for a form of special measures, whatever it may be, has been granted until they arrive at court. They therefore go to court in a state of some nervousness and uncertainty about whether they will have a screen, a link or whatever.

Sir Andrew McFarlane: I certainly get that. You can picture the scene if you are such a person. It is the Courts Service's responsibility to do this, and they work very hard. It is individuals in the court office doing it. Special measures are requested in a significant number of cases, and one hopes that they work in a lot of cases. Our system is overborne with cases—it is not the most efficient system—so it will inevitably be the experience of someone getting to court and not knowing—

Q43 **Chair:** There is a presumption in favour of that—

Sir Andrew McFarlane: Or at the last minute they are told, "Oh, you do want special measures," so the person feels that a fuss is being made. It gets the case off to a difficult start.

Q44 **Chair:** What more can be done practically to remove the level of concern

that Women's Aid raised with us?

Sir Andrew McFarlane: Increase the efficiency of the court system to be able to know far more robustly whether this is or isn't. We could move to a sort of booth set-up in every court, so that every hearing is special measures, but that I think would not be—

Chair: It would be difficult.

Sir Andrew McFarlane: One idea—this is just an idea that I have had sitting here; it does not have any pre-history—is to have the special measures in place as the default, and then they could be removed. They are much more likely therefore to be there on the day. All of this requires resources. When you move on to special measures including a private room in the secure side of the building, there has to be a staff member with the individual during the day to move the person, so it is not an option that is free of resource implications.

Q45 **Chair:** Is it made worse by the age and sometimes the condition of a lot of the court buildings that the family courts have to use?

Sir Andrew McFarlane: I am sure it is, because they were not built for that.

Q46 **Chair:** That is a problem, isn't it?

Sir Andrew McFarlane: Yes. The Lady Chief Justice gave evidence to you, and she, I and the other senior judges want to move away from a system that simply puts Elastoplasts on the buildings. We want a long-term view on what sort of court system we want. It goes back to what I was saying about the court of the future, and for there to be planning with the vision to achieve whatever that long-term solution is. To live day by day is not an easy world to live in, if you are trying to work in the buildings. There is a limit to what I as a judge should properly say to you as politicians on the spending of money, but that would be my view.

Q47 **Chair:** Certainly, if it is getting to a stage where the practical operation of the court is made harder by the condition of the buildings, that is a legitimate concern for you to raise with us.

Sir Andrew McFarlane: Yes. On any one day, there are buildings where the lifts do not work, there is a leak, or the power has gone off. Some of these buildings have seen their time.

Chair: That is helpful.

Q48 **Tahir Ali:** According to CAFCASS data, in 2017-18 there were 103 applications for deprivation of liberty orders, increasing to 579 in 2020-21. Why do you believe DoLs applications have increased so significantly in recent years?

Sir Andrew McFarlane: To help the Committee and anyone watching, these cases relate often to teenagers—sometimes to younger people—who need a level of protection from themselves and for others to be protected from them, so it is decided that their liberty should be restricted in some

way. The statutory scheme for achieving that is through making a secure accommodation order, under section 25 of the Children Act 1989. The secure estate, as it is called—the state-run premises that provide secure accommodation—is limited and very oversubscribed. I think that around 60 or 70 young people every day are being put forward for what may be no, one, or two beds in the secure estate. That is the situation on the ground.

If they cannot be the subject of a secure accommodation order, there is a need for some different authorisation for them to be restrained. They therefore come to the High Court, which exercises its inherent jurisdiction to authorise deprivation of liberty orders—DoLs—in the way that it might do separately under the Mental Capacity Act for an adult. Over the course of the last 10 years, we have been undertaking greater numbers of those sorts of cases. Your question is, why have the numbers gone up? I am getting round to the question now.

The cohort of young people we are seeing has changed. Some of these young people—not a lot, but some—are victims of county lines and serious organised crime, and hitherto they might have been banged up in the criminal justice system. They are seen as victims and local authorities take care proceedings to protect them, but they have got to be put somewhere that stops them going back to the gang, and protects them as best it can from being contacted by the gang.

There have always been troubled youngsters. It splits almost precisely the genders 50/50—they are not all boys or all girls. They are very mixed up and may self-harm or cause harm to others. They are out of control. The number of those has gone up. I think life is very complicated if you are a youngster having trouble staying on the rails now. Drugs and alcohol are available to you, and all sorts of other relationships that you can get into online make life more complicated. There is also a proportion of youngsters who might hitherto have been in the mental health service—in child and adolescent mental health—who now are not, but need to be contained.

My take is that it is a slow creep of different factors coming in. I and other judges in the Family Division have spoken of this publicly in judgments, because we feel it is inherently unsatisfactory. We are operating this jurisdiction because we take the view that we have to for the protection of children. We are doing it knowing that Parliament has set up a different scheme, and we are operating without Parliament considering what we are doing. I would be very comfortable with Parliament, at some stage, having a look at this.

Also, separately—this is the end of what I am afraid is a long, rambling answer—there is legitimate public concern, and certainly concern among judges, about the accommodation that these young people have to be put in. Often, they are ad hoc arrangements that are organised by a commercial agency, often for commercial benefit of a high order. The fees that are charged for looking after a youngster are very high, and they come out of the local authority's budget. Understandably, Ofsted wishes—

and has a duty—to ensure that all children's homes are regulated. Often, these unregistered places that we have to use do not want to be regulated. Regulation comes with a whole range of requirements that some of these organisers of care do not want to submit to. I always get confused about which is a buyer's market and which is a seller's market, but because they are often the only resource available, the child has to be put with them.

In the case that I gave a judgment in, which was called Re X and involved a youngster who is now soon to be 17, I went up to visit her in the accommodation she was in last July. It was a house on a housing estate in a midland industrial town, next door to everyone else living in the area, but with four carers on a rota with her in the house. She was not allowed out because she would do a runner and was not safe, and she was there in that accommodation week in, week out. The whole thing seems, to me and to those other judges dealing with it, highly unsatisfactory—to put it in the most neutral terms. I have raised this in judgments and I have had meetings with Government. It has been taken up, as I understand, across Government now—the DFE, the Department of Health and the MOJ—to look at what can be done about this. The review of care that Josh MacAlister undertook covered this as well. I do not think I am speaking out of turn as a judge in raising this, because when I came president, I said it was top of the list of things that worry me. As I sit here six years on, it is still top of the list of things that worry me.

Q49 **Tahir Ali:** Would it be the case that the High Court is being used to gap fill because of inadequate resources?

Sir Andrew McFarlane: You might say that. We do what we are asked to do because it is necessary, and of course we do it. The volume is high—we have had to establish a whole listing process and we have two judges full time, every working day, dealing with the new cases that come in, and then they go through. On resources and whether it is gap filling, I am calling out what we are doing in the hope that, if it is a matter of concern, it will be taken up.

Q50 **Tahir Ali:** What circumstances led you to create the national DoLs list, and what impact is it having on how DoLs applications are handled?

Sir Andrew McFarlane: That is a helpful question. For new listeners, as it were, until two years ago, these applications for deprivation of liberty would be issued in the local court for the local authority where the child was being looked after, and they would pop up in the list of the local judge. It could only be heard by a judge authorised to sit in the High Court, and that judge typically would be very busy doing cases, and these cases come in on an afternoon out of the blue and they take an hour or two. That was unsatisfactory. Also, our system was not able to count them, so we did not know how many there were in the country. I decided to bring them all into London and established what we wrongly called the DoLs court, first off, so that a local authority anywhere in England and Wales that wants to apply for a deprivation of liberty authorisation has to issue it in the Royal Courts of Justice. That is now heard in the DoLs list,

by one of the two judges who sit there. That has been good, because, first, it relieves the sudden unplanned case popping up in the local court and, secondly, it gives us a chance to count them and enables you to give the statistic that you gave.

When we set it up, we were holding on to the cases in London all the time, but that is not satisfactory, because if they are going to carry on and come back every three or four weeks or so, they need to have the same judge. Because the rota of judges in London was changing, you could not get the same judge. Also, the young person often—I did this in Re X—wants to meet the judge and feel that they are their judge. Now, if the case has longevity, it goes back to the local court in a planned way. That is what we are doing, and that is why we did it.

Q51 **Tahir Ali:** Can you give us your reflections on the transparency pilot, which was rolled out to 16 more courts in January?

Sir Andrew McFarlane: As I said in my introductory words, it has been a positive experience. You will recall that, when I started it, I did so with a report, after a review, and I said that it had been in the "too difficult" box for a long time, because it is. You have to be sufficiently open to give the public, through the press, confidence in what the courts are doing on behalf of the public, but at the same time maintain the confidentiality of the parties. This is a genuine pilot, and I have always been plain, at every turn, that if I was given evidence that the confidentiality of the children, particularly—the parties in these cases—was being breached, I would stop it.

Q52 **Tahir Ali:** How have families reacted to the cases being reported, albeit anonymously?

Sir Andrew McFarlane: In various ways. We do not have feedback from every family. Sanchia Berg and the BBC team sat for some weeks up in Leeds and produced a report on five different cases, one each morning, on the "Today" programme in, I think, the autumn. In two or three of those, the parents were really pleased that the press had highlighted what was going on in their case. The mother in the case that led to Harriet Harman's amendment was on the radio last week saying that she was really glad this had happened. Equally, I have had reports of parents being really uneasy that the press are there—that this is a private case. I am also told that, once the case gets going, that unease subsides: you get used to the journalist in the room. It is, as it should be, a mixed set of reactions.

Q53 **Tahir Ali:** Are you aware of any instances of people being identified via jigsaw identification, or otherwise, as a result?

Sir Andrew McFarlane: I'm not. I am pretty sure that I would be told about that. That is the real worry. I think the journalists are of course on their best behaviour, because they know this is a pilot and they want to get it right. Equally, I undertook a long set of hearings involving the ruler of Dubai, in which 15 or 20 journalists sat in every hearing but were subject to strict reporting conditions; they heard a story that was very rewardable, and they abided by the rules very strictly, so I am quite taken

by the professionalism of journalists. Equally, journalists do not want to be on the wrong end of contempt of court proceedings. At the moment, they have stuck to the rules about identification, and it hasn't happened. However, one is constantly wary about that, and we will have to deal with it if it comes to pass. In the modern world, simply not putting someone's name in a report does not avoid, as your question indicates, the potential for them to be identified through the jigsaw methods.

Q54 **Tahir Ali:** Has the project helped to mitigate the problems caused by the chilling effect of section 12 of the Administration of Justice Act 1960?

Sir Andrew McFarlane: The disappointment with the pilot is that there aren't a lot of journalists, and they have not been coming in great numbers to the court. I think it would be wrong for me to use what anecdote I have to say that it has or has not.

Q55 **Tahir Ali:** What further steps need to be taken to enhance transparency? For example, is work under way to make the court list more informative?

Sir Andrew McFarlane: That is a question that goes to the root of the difficulties we have. At the moment, the court list simply has some meaningless number, and you can't tell whether the case is about one topic or another, or whether it is going to last five minutes or four days. We have developed a system of basic letters to put on the court list that will identify to journalists roughly what category of case it is, but that is no more than a make-do. I encourage judges, if they have a case coming into their list that is of genuine public interest, to alert the local media about it, which seems to me a perfectly tenable way forward. Equally, the rules have changed, and parties to a case can now talk to journalists and tell them about it. It always used to be that a lot of press reporting about the family court was after the event, where an aggrieved parent went to speak to one of the journalists who regularly ran stories about this to say, "This was awful. This happened three weeks ago," whereas now, if they are worried, they can go before, and the journalist would be welcome in court.

More generally, as I have said a number of times in other settings, there is much more to transparency than the journalists simply coming in: simply being more open; me sitting here and talking like this; local judges having a sensible relationship with the local media; us producing more and more authoritative data about what we do, and we have a group working on that; and judges producing anonymised judgments of ordinary cases—not the top-flight football stars, but what happens on a wet Tuesday afternoon in Sheffield, or whatever it might be—will all add, bit by bit, to the public awareness of what we do. All these things are being progressed.

Q56 **Caroline Nokes:** I want to just come in on the point you made about not having received complaints about jigsaw identification. How would a participant in proceedings know who to complain to?

Sir Andrew McFarlane: They would go back to the judge who was hearing the case. They would not come to me.

Q57 **Caroline Nokes:** And how would they know that they should do that?

Sir Andrew McFarlane: Because the judge will have made the order saying, "Do not report this, that or the other." The order has failed, in the example you were putting forward, to achieve confidentiality, so the litigant would go back to the judge who made the order.

Q58 **Caroline Nokes:** I just want to establish at what point the litigant would be informed of that. How would they know who to complain to?

Sir Andrew McFarlane: I don't know. Perhaps we ought to make that explicit. That is what they would do instinctively, certainly if they were represented.

Q59 **Caroline Nokes:** But we have heard that many of them are litigants in person. Around the transparency, I just wanted to—

Sir Andrew McFarlane: Yes, I think that is a good point. Those who are more directly involved with the pilot may be saying, "Why doesn't he say this?", but I haven't got the answer to that. I don't think we expressly, in ordinary terms, say, "If there is a problem, come back and do this."

Caroline Nokes: It strikes me that journalists and legal bloggers have behaved themselves so far, and I just wanted to understand—that first person who does not behave themselves—

Sir Andrew McFarlane: I will take that away. I think that is a very good point.

Caroline Nokes: Thank you.

Q60 **Chair:** We talked a bit earlier about judges. At the beginning, Sir Andrew, you referred to the concerns that judges have, legitimately, which you have raised. One of the issues is shortfall of judges, isn't it? Not just in the Family Division, but it is quite marked in the Family Division as it is in some other jurisdictions, particularly at the district judge level. Am I right?

Sir Andrew McFarlane: It is. It is also geographically more pronounced in the south-east, and it is at district judge level.

Q61 **Chair:** That is where the bulk of the family work is done, by the district judges, isn't it?

Sir Andrew McFarlane: Yes, and the magistrates. There is a need for legal advisers to the magistrates; that is an existential post, because if they do not have a legal adviser, they cannot sit. There are difficulties in maintaining them; we train them up—it is a good training—but quite a lot leave. So it is not just judges; it is legal advisers.

Q62 **Chair:** Lord Burnett, when he was Lord Chief Justice, referred in his last report to the district bench continuing to struggle to attract the numbers needed. Is that still the case?

Sir Andrew McFarlane: It is. It has only been a short time and there has not really been a change in that.

Q63 **Chair:** On the other hand, it seems much easier to recruit part-time judges—the fee-paid judges, as we call them, or the deputy DJs—than it is to get people to sit salaried, full time.

In the family context, the Lady Chief Justice, Baroness Carr, gave us some thoughts as to why that might be generally. Is there anything in the family context that stands out about that?

Sir Andrew McFarlane: I think it is the same. The district judges sit in civil and family, and we are dealing with the same people. I think that what the Lady Chief Justice said was right. Being a fee-paid judge is relatively attractive. It is flexible—you only need to work when you are prepared to work—and you get travelling expenses to the court.

Q64 **Chair:** Carry on with your practice.

Sir Andrew McFarlane: You can carry on with your practice. If you are salaried, you do not get travel expenses to the court. You get a pension entitlement now as a fee-paid judge. So I can see why there is not a great incentive.

Q65 **Chair:** Do you think that the particular intensity, and sometimes emotional pressure, of the work that is done in family court is a factor as well? I have been very struck, if I might say, when I have visited the family courts, with the calmness with which your colleagues have to deal with some very testing, personally difficult issues for the parties.

Sir Andrew McFarlane: Yes. Coping with that element of work, which is particular to family, or certainly more striking in family, is something that family lawyers and family judges take on as part of their professional skill. But it is pressured and, obviously, being a full-time judge, you are exposed to it full time. Something that is happening more and more, and it is certainly very welcome, is people becoming salaried judges but starting at least on a part-time basis. That has led to the demographic of the district bench and the circuit bench moving to a younger generation who, for lifestyle reasons, choose to have a steady job rather than being a barrister or solicitor when they have childcare. That is a good song to sing in terms of people joining up on a part-time basis. That also gives some alleviation from the stress that would be the case if you were 100% employed.

Q66 **Chair:** I think that the current split is roughly two to one in family. I think that, in the figures I saw, it is 66% to 34% for full-time salaries against fee-paid. Does that make sense to you?

Sir Andrew McFarlane: In terms of those statistics, I think I saw one that was 75:25.

Q67 **Chair:** I know that the Lady Chief Justice talked in terms of 80:20.

Sir Andrew McFarlane: That seems right to me.

Q68 **Chair:** And that would work for family as well?

Sir Andrew McFarlane: Yes.

Chair: I get that.

Sir Andrew McFarlane: Partly, and I think this is more particularly important in family, there is judicial continuity. In both public and private law, to have the same judge every time you pop up in court is very helpful and not to is unhelpful.

Q69 **Chair:** That is a problem at the moment.

Sir Andrew McFarlane: If you have part-time judges, you have to rebook the same person.

Chair: You have to rebook the slots and they may not be available. So that is the advantage of more salaried.

Sir Andrew McFarlane: Yes.

Q70 **Chair:** Finally, in the Family Division of the High Court, you have about 19 High Court judges. They are dealing with some of the most complex and challenging work—literally life and death in some cases—in terms of what has to be done. Are you concerned about retention or the risk of burnout with your judges, who are dealing with that really serious and draining work?

Sir Andrew McFarlane: I am certainly concerned, as all leadership judges are, with wellbeing. Different individuals can cope with different pressures in their own way, and their own home circumstances can also contribute to that. I am not aware particularly of burnout, which puts it in quite graphic terms, but it is pressured. Something that we have not spoken about is that the family judges, or some of them, also undertake all of the work in the Court of Protection. The higher-end welfare issues in the Court of Protection, which do often result in life-and-death decisions, come up to the High Court level, so that is not an insignificant part of the work.

Q71 **Chair:** So that is a significant burden. Do you anticipate any difficulty in recruitment trends going forward? Have you got many retirements coming up at that level?

Sir Andrew McFarlane: No. The movement that we are looking at is a matter of public record. We have a competition, as these things are called, being run by the Judicial Appointments Commission, and we are looking for at least three, if not four, new judges to start in the autumn, but I am confident that we will get—

Q72 **Chair:** That's good. A final thought: particularly going back to the district level, we had quite a lot of evidence from the Association of His Majesty's District Judges about the impact of LASPO and the fact that far more people are now appearing in person. I think that one quite graphically said, "Well, in the old days before that, when there was legal aid, I could list about 10 cases in the day"—

Sir Andrew McFarlane: Yes, I read that, and I think—

Chair: Does that ring true to you?

Sir Andrew McFarlane: Yes, it does, and it is not that litigants in person are deliberately making it take longer, but they are new to the experience and—

Q73 **Chair:** It just takes longer.

Sir Andrew McFarlane: Yes, and there is also no professional that the judge can turn to, to say, "Will you draft up the order in this case?" So it all falls back on—

Q74 **Chair:** Exactly, yes. So judges are having to draft up orders, which they weren't having to do in the past, on top of hearing the case.

Sir Andrew McFarlane: Yes.

Q75 **Caroline Nokes:** Can I just ask a quick question around shortages? You mentioned geography, with particular shortages in London and the south-east, but what about shortages by gender?

Sir Andrew McFarlane: I have not got the figures, but I would suspect that, for the family judges, if anything, the preponderance is towards women.

Q76 **Caroline Nokes:** I suspect that you are right. Could you tell me whether there has been any work done to understand how retention of women is supported?

Sir Andrew McFarlane: I don't know, but I can reply—

Caroline Nokes: I think it would be interesting. We know that, in many sectors post covid, women over 50 were opting for the great retirement. I just wondered whether that had also been the case in family law.

Sir Andrew McFarlane: No, that is not my feeling. I get to know when people retire, and the retirements that have happened recently have been people who are coming to the ordinary end of their careers—they have done their full stint. But I will ask about that. I just do not know, and it would be a proper thing to ask about.

Caroline Nokes: Thank you.

Chair: Indeed. If there is any material—if there are links—do by all means write to us and we can publish that along with the rest of the evidence. That is very helpful.

Q77 **Dr Mullan:** I wanted to ask about the potential opportunities for the judiciary to learn from historical decisions about individuals that you made as a cohort. My question is prompted by a constituent of mine who was involved in care proceedings and had a local authority and family members attempt to persuade the court not to return a child to the custody of some other individuals. The court ultimately decided that it would make that return of custody, and consequential to that decision the child suffered serious and irreparable harm.

Of course, I would not expect you to comment on any individual case in

any way, shape or form, but I met that lady and she observed, I think quite fairly, that she noticed that everyone else involved in the decision was subjected to quite a thorough process of reflecting on the decision, on how it might have been dealt with differently and so on. She asked me genuinely, "What happens with the judge?", which got me thinking about the grey area around legally justifiable decisions. You might quite rightly say, "If people are unhappy with the decision, they could legally challenge it," but, of course, there are decisions that might be legally justifiable but that were perhaps not the wisest decision.

I wrote to the Lady Chief Justice about this issue, seeking to understand what the process is and what reflection the judiciary might undertake in these sorts of cases. I was not really given anything tangible that I thought would demonstrate taking up opportunities to learn and reflect. So the first thing I wanted to ask is, what mandatory training will someone who ends up as a family court judge making these incredibly serious and consequential decisions typically have undertaken to help them in that role?

Sir Andrew McFarlane: This is care proceedings?

Dr Mullan *indicated assent.*

Sir Andrew McFarlane: They go on an, I think, five-day residential course, whether they have any experience in family law or not. They then have a mentor judge that they sit in with. I think it is for a week; it may be longer, but that mentor judge is available to them in the short to medium term and then they start sitting. They are then brought back for a continuation course, which is two days. There is an overnight residential course every two years. The Judicial College in the—

Q78 **Dr Mullan:** Two days every two years?

Sir Andrew McFarlane: Yes. The Judicial College in the meantime sends regular bulletins and updates. There is online training and the like to access. It is a continuing process of exposure to the issues. They will be sitting at a court centre where there will be other experienced heads—other judges with more experience available.

It is, as you will anticipate, the norm for judges who have got a tricky decision to go and knock on the door of the judge next door or to ask the others about it in some other way. It is very supported as an experience, although the judge on the day is on his or her own, sitting in the courtroom.

Q79 **Dr Mullan:** Can you shed any light on whether there is any more structured process for asking judges to reflect or learn if, as I said, they have made decisions that might be legally sound but that have had consequences that they would probably personally themselves wish had not transpired?

Sir Andrew McFarlane: Your constituent asks a perfectly proper and astute question. You will know that, when a tragedy happens, there has to be a serious case review. I think they are called something different now,

but I am so long in the tooth that I still call them serious case reviews. That is where all the agencies come together to meet and talk.

The question of whether the judge should be sitting around that table and be questioned about what they have decided has been raised formally over the years, and the judicial response is always that, for the judges to maintain the independence of their decision-making role, they should not be subject to an audit after the event. The judiciary and the court will therefore provide as much documentation to assist the serious case review, but the judge speaks through his or her judgment and should, and normally will have, explained their reasons for doing what they did, which has turned out to be a decision with tragic consequences, if that is that is the case. That is where the line is drawn, and that is where we maintain it. If that needs to be looked at, it needs to be looked at.

Q80 **Dr Mullan:** I would be interested in your views. Do you think that is an entirely satisfactory scenario?

Sir Andrew McFarlane: Informally, you could not be a judge involved in something like that and not hear about it without thinking about it. Judges do not live in a sealed box. I know nothing about the case you are talking about, but as a professional and a human being, you would obviously reflect; but because of the need to allow judges to make their decision independent of any further formal scrutiny other than that of the Court of Appeal, that is where the line is drawn.

Q81 **Dr Mullan:** If it is a hard and fast rule that you cannot even be involved in a discussion about what you may or may not have done externally, do you think at the very least that the judiciary itself could establish its own procedures for ensuring that? You have said "obviously" and "you would expect", but I could not tell my constituent, nor could any MP, that a judge did necessarily sit down and read the serious case review. We would not be able to say that it definitely happened.

Sir Andrew McFarlane: No. You could not, because you would not know. There is a priority to be attached to judicial independence, which is part of the overall priority attaching to the rule of law. The judges are not answerable to Parliament for their decisions nor to MPs or constituents. In the same way that integrity in terms of confidentiality about judicial training is maintained, there would not be a formal process whereby you or your constituent could be told, "Yes, the judge has been subject to some internal process within the judiciary."

Q82 **Dr Mullan:** So you think that it would breach judicial independence for the judiciary itself to have a process internally?

Sir Andrew McFarlane: What I am saying is that it would be a breach of judicial independence for you to be entitled to know what had happened.

Q83 **Dr Mullan:** Yes, but if there is an established procedure that the judiciary agrees will happen, that is different from saying, "Did this judge in this case do this, yes or no?" You could just have that process. Do you think it is entirely satisfactory that there is at the minute no formal process at all

to review potentially—

Sir Andrew McFarlane: I have not said that; I am just saying that it is not something that the judiciary will be publicly giving an account of.

Q84 **Dr Mullan:** Today we are talking about the fact that, as you advocated, we are increasing transparency so that people can sit and watch cases and in terms of the media. Do you think it is defensible in the long term to say to the public, "You can know nothing about how we react to cases with serious harms"?

Sir Andrew McFarlane: You raise a significant constitutional issue. You have said that you are in touch with the Lady Chief Justice, and I think this is more properly dealt with by her rather than me.

Q85 **Dr Mullan:** Unfortunately, she has not chosen to engage with me on this.

Chair: I think we have probably gone as far as we can on this.

Sir Andrew McFarlane: It is not for me to sit here without any warning of this question and respond on behalf of the judiciary. What I would say as my own personal view is of no value. I am not saying that you are raising something that should not be raised, but I think there are different channels where it ought to be pursued where it can be looked at with reflection.

Q86 **Dr Mullan:** I want to ask you about data and IT, which you mentioned earlier. The Government have recently announced their plan to push back the completion deadline for the private law portal, yet the public law portal seems to be moving ahead with greater success. What do you think has been different in how the two projects have been rolled out, and what has led to perhaps different outcomes in that regard?

Sir Andrew McFarlane: Ironically, I think it is partly the way that it was done. The public law portal was an early product of this reform programme at a time when the model was that we would work in an agile environment, so it would be rolled out before it was properly ready and then worked on while people got to grips with it. That wasn't a very healing process in terms of those working with it.

The portal has come good in the end, and most people are comfortable with it now, but it was decided that the private law programme would only come out when it was match fit and ready for action. It has turned out, unfortunately, to have more technical difficulties than was thought, so I think that is why. It was always going to come out later. I am not technical, but the public law programme involves more parties and more formal stages. Private law has two parties normally, and it is fairly straightforward. I don't understand why it is more complicated, but I suspect there are technical issues that are way beyond me.

Q87 **Dr Mullan:** What feedback have you had from court staff and advocates—on court visits, for example—about the new portals and online tools?

Sir Andrew McFarlane: It has settled down. At its time, this was said to be the biggest change project being undertaken across Government. It was being visited on people working really hard in a court system with cases every day. The reaction of staff and judges initially was negative, despite the fact that we all absolutely positively welcome the change. I visited a judge in another jurisdiction last week and they are still working on paper—that judge's room was full of paper files. The idea that we should be moving to a digital system is obvious, and I am very pro it. Now that the systems are working, I think most judges would say that they can see the benefit of it, that the financial remedy side does not work so well, that the public law side works well and that the divorce system works with alacrity.

Q88 **Dr Mullan:** On data collection, you have talked before and in this session about the need for data. What progress do you think has been made on data collection in family law cases?

Sir Andrew McFarlane: We have commissioned research to work out what we can get, and that research has not come back yet. The hope is that the new computer systems will count in a far more sophisticated way what is happening in the cases. That is the hope; you chance upon me at a time of hope rather than realisation.

Q89 **Dr Mullan:** You have previously spoken positively about the Nuffield Family Justice Observatory. Could you share what impact you think that is having, and what we might learn from it for wider data issues?

Sir Andrew McFarlane: Before the Nuffield Family Justice Observatory was established, there was nothing. Occasionally academics might report on some aspect of family justice, but there was nobody focused on doing that or willing to do it at the request of the system.

The Nuffield Foundation provided the funding, and Lisa Harker and her team at the observatory are admirable. They are very flexible and insightful. They were of enormous value in covid; I was able to ask them in the April to report about remote hearings and how they were experienced, and they reported very quickly. I could go on for ages about the scope of what they have done.

In particular, identifying how we deal with babies who are born into care has been of a real insight. That is giving rise to the court and the local authority in Blackpool, aided by Nuffield, looking to establish a problem solving court called the baby court. That inevitably may be a variant of FDAC and take that sort of approach. Time and again, they have been of enormous value.

Q90 **Dr Mullan:** Is there anywhere in particular that you think they could look at next, where they might be able to make a contribution?

Sir Andrew McFarlane: I think I would need notice of that. I can't think—they are normally ahead of me.

Q91 **Chair:** That has been very helpful, Sir Andrew. We have covered a lot of ground, and I appreciate that. As a wrap-up, going forward for the rest of

your time as president, are there any particular priorities? To use your phrase in Re X, is there anything else that needs to be called out in the family justice system?

Sir Andrew McFarlane: The priority has got to be the rolling out of pathfinder to every court. It seems to me to be impossible, now that we have established this wholly different model that is better and more efficient, and saving resources, that that is not rolled out. My shoulder is going to be at the wheel of rolling pathfinder out as we go forward. The ambition is to get it out to many places over the next year. I am also keen to continue the transparency developments. I am also keen on FDAC being available in every area—it is a postcode lottery at the moment.

Q92 **Chair:** So a lot more of that problem-solving approach.

Sir Andrew McFarlane: More of that problem solving. The more that we can get into that mindset, the more we move away from litigant-driven family cases to cases that focus on solving the problem.

Chair: Thank you very much, Sir Andrew, that has been very clear. Thank you for your time and evidence.