Written evidence from NSPCC (CFA0071)

HOUSE OF LORDS CHILDREN AND FAMILIES ACT 2014 SELECT COMMITTEE INQUIRY

The NSPCC's mission is to prevent cruelty to children in the UK. We're leading the fight against child abuse in the UK and Channel Islands. We believe that every childhood is worth fighting for.

1. To what extent has the Act improved the situation for the most vulnerable children, young people and families in England? To the extent that it has not, is this because of the Act itself, its implementation, or challenges which subsequently emerged, whether lasting or temporary?

The Children and Families Act 2014's has a welcome aim of improving the timeliness of family justice proceedings. Overall, however, the NSPCC believes that the Act has not improved the situation for children involved in the family courts, with the 26-week limit on care cases rarely being met[1] and the timeliness of private law cases continuing to worsen.[2] It is therefore crucial that factors such as the resourcing of the family justice system as a whole be considered in future drives to improve efficiency. The NSPCC identified four key issues around the impact that the Children and Families Act has had on children subject to family law proceedings. These covered:

- **26-week limit on care proceedings**: this reform has not been successful in limiting care proceedings to 26 weeks. From October to December 2021, only 23% of cases were disposed of within this time.[3] It is important that timely decisions are made in cases affecting children. However, the timetable must be guided by what is in the child's best interests. We support the recommendations made by the Public Law Working Group that in a 'small, albeit significant' number of cases, extensions of the 26-week limit should be made permissible by judicial approval to achieve a just outcome in the child's best interests.[4]. We are concerned that in certain cases, over-adherence to the 26-week target can prevent the use of innovative interventions, which are more likely to meet the long-term needs of the child and can result in high quality evidence which improves permanency planning. We highlight the NSPCC Infant and Family Team (IFT)[5]

[1] Family Court Statistics Quarterly: October to December 2021 - GOV.UK (www.gov.uk)
[2] *Ibid*
[3] *Ibid*
[4] Public Law Working Group (2021) Recommendations to achieve best practice in the child protection and family justice systems, p.65. Access online: Microsoft Word - March 2021, report (final).docx (judiciary.uk)
[5] Infant and Family Teams | NSPCC Learning

as an example of an assessment and treatment programme that improves the quality of permanent placement decisions through high quality evidence about the child's development, mental health, and relationship with their foster carer(s) and birth parent(s).[6]

- **Limits on expert evidence**: Minimising unnecessary delays is a welcome aim and we agree with the recommendation of the Public Law Working Group that professionals working with children and families should feel confident reporting to and advising the court (rather than outsourcing this to experts) and there should be a focus on the "necessity" of engaging experts. However, we would advocate for a broad, purposive interpretation of "necessity" so those with insight into individual children and families' situations or with significant experience of key issues in a case are able to feed into the court's decision-making so children's best interests are consistently prioritised. Our experience has been that some expert evidence can make a vital contribution to the safety of children subject to family proceedings. For example, given their knowledge and experience of working closely with infants and families, practitioners working in teams such as IFT have been able to help improve placement decisions in public cases. Experts also can scrutinise the safety of contact arrangements where domestic abuse has been alleged in private cases. With resource constraints already limiting the availability of such evidence, it is crucial any limits on expert evidence does not negatively impact children's welfare.

- **Requirement to consider mediation**: mediation is not an appropriate form of dispute resolution for private family law proceedings where domestic abuse is occurring or has occurred. With domestic abuse being alleged in 62% of private law families cases, mediation should only be reserved for a minority of cases.[7] The Ministry of Justice's Harms Review, however, heard evidence of domestic abuse victims being inappropriately diverted to mediation. Mediation where abuse is a possible issue risks resulting in unsafe arrangements for children following family separation. The exemption from mediation in cases where domestic abuse may be an issue must be consistently applied.

- **The presumption of parental involvement**: the Harms Review heard evidence that this presumption has encouraged the courts to overlook the welfare of the child as the overriding consideration in cases where significant harm has been alleged, including cases involving domestic abuse. The presumption was reported as rarely disapplied, even where there is evidence of a risk of harm to a child and contributes to the family courts' 'pro-contact culture', that being the priority given to arranging contact

[6] Jamieson, M. (2015) Therapeutic interventions with birth parents and foster carers of maltreated children: a systematic review. [Unpublished].
[7] Adrienne Barnett, Domestic abuse and private law children cases: a literature review, 2020

between a child and the non-resident parent. Although a practice direction requires courts to consider whether the presumption applies in cases where domestic abuse is alleged, there is not adequate resourcing to always carry out assessments into abuse allegations. These issues must be considered and addressed by the Government's ongoing review into the presumption of parental involvement. The current status of the review is unclear, but its results must be forthcoming to properly inform the Committee's post-legislative scrutiny.

2. Have the reforms to the family justice system succeeded in making the system faster, simpler and less adversarial? How has the Act interacted with other reforms to the family justice system, for example the changes to legal aid?

a. Does the 26-week limit on care and placement proceedings strike the correct balance between justice and speed?

The Public Law Outlines a 26-week time limit for completing care proceedings (which can be amended through a series of eight-week extensions) and recommendations from the Family Justice Review (2011) explain that the Government needed to take a 'firm approach' to tackle unnecessary delays in care and supervision cases. These delays lasted an average of 48 weeks when the Review's final report was published.[8] Timely decision-making for children and young people was intended to prevent the damage long proceedings can have on a child's chance of finding a secure and stable placement, alleviate the risk of distress and anxiety of proceedings on the child and their family, and reduce the risk of children remaining exposed to risks in the home while proceedings were delayed.

However, a number of factors, including the pressures on capacity in the family courts, the covid-19 pandemic, and the complexity of making decisions about the futures of vulnerable children have meant the average length of care proceedings reached 47 weeks in October to December 2021, with only 23% of cases being disposed of within 26 weeks. [9]
We agree that it is important that timely decisions are made in cases affecting children's lives. However, we are concerned that pressure on courts to comply with the 26-week rule risks complex care proceedings being rushed, potentially to the detriment of the child.

The main aim of every care case should be about meeting the needs of the individual child: the timetable should be guided by what is in the child's best interests, rather than the other way around. In certain situations, for

[8] Family Justice Review Final Report (publishing.service.gov.uk)
[9] Family Court Statistics Quarterly: October to December 2021 - GOV.UK (www.gov.uk)

example when all parties agree about the child's future and the court has received the required evidence, speedy disposal of care orders are possible. However, the complexity of acquiring and analysing evidence to make decisions about permanency means proceedings need to allow for rigorous assessment of parental capacity. Courts should also be enabled to use evidence-based interventions which combine assessment with treatment, where these are more likely to meet the needs of the child and have been shown to be in the child's best interests.

Children in care face a variety of lower outcomes compared to their peers,[10] and although the most common reason for a child to leave care is to return to their family, reunification too often happens without proper support, and the rate at which children subsequently re-enter the care system is higher than other exit routes.[11] Learning from serious case reviews (now child safeguarding practice reviews) has highlighted key issues with how local authorities undertake reunification, with delays or lack of assessments, lack of understanding and parents' needs and poor planning, monitoring and observation.[12] The poor outcomes and vulnerability of looked after children, and the lack of support for families when children leave care, highlights how vital it is that care proceedings are conducted in children's best interests. Balancing justice and speed should not prevent the family courts from making decisions about safe permanency based on high quality evidence from lengthier family interventions.

The current statutory framework allows for eight-week extensions to the 26-week target where courts consider the extension necessary to resolve proceedings justly.[13] The NSPCC believe that judges should have discretion to timetable beyond the 26-week limit at the start of the process, rather than rely on extensions. While we support the 26-week limit where it reduces drift and delay in cases, we are concerned that the current average length of care proceedings suggests children and families are having to endure the anxiety of repeated eight-week extensions until proceedings are resolved. Giving judges the discretion to timetable beyond the 26-week limit would assist in complex cases and allow local authorities to plan lengthier holistic assessments and evidence-based interventions. These can then lead to high quality permanency decisions for the child and reduce the risk of contested views about the child's future. By extending the timetable in line with the duration of the intervention, judges can make decisions

[10]Oakley, M., Miscampbell, G., and Gregorian, R. (2018) Looked after children: The Silent Crisis, Social Market Foundation. Access online: Looked-after Children: The Silent Crisis (smf.co.uk).

[11] McGrath-Lone, L., Dearden, L., Harron, K., Nasim, B. and Gilbert, R. (2017) 'Factors associated with re-entry to out-of-home care among children in England', Child Abuse & Neglect, 63, pp. 73-83.

[12] NSPCC (2015) Returning children home from care: learning from case reviews. Available online: Learning from case reviews briefing: returning home from care (nspcc.org.uk).

[13] Children and Families Act 2014 (legislation.gov.uk)

about the child's future based on the evidence provided by the intervention. An example of such an intervention is the NSPCC Infant and Family Team (IFT). IFT can help children recover from early trauma and abuse, enable secure and stable foster placements, and prevent birth parents from abusing and/or neglecting their children in the future.

IFT, delivered in London and Glasgow, is one example of an assessment and treatment programme for infants and young children who are in foster care because of abuse and neglect, and care proceedings are underway. This 9–15-month programme is longer than the 26-week timetable, but the length of the Infant and Family Team model allows for a holistic focus on attachment, placement stability, and an open-collaborative approach to case management. This sets a precedent for improved accuracy of decision-making about the child's future and minimises the risk of placement disruption in the short-term. Based on the New Orleans Intervention Model, the multidisciplinary team works towards the reunification of children to the safe care of their birth parents, wherever possible, and makes recommendations to the family court regarding the potential for a child to return home, or the need for permanent care arrangements. There is an extensive body of evidence which demonstrates the effectiveness of the New Orleans Model in the United States context, with positive results of fewer subsequent referrals for maltreatment where children were returned to birth parents.[14]

The intervention focuses on relational assessments by exploring the relationships between the child and the different adults involved in their care e.g., parents and foster carers. Each case referred involves work to help children, foster families, birth parents and siblings. The team uses structured interviews, observations, and questionnaires to assess birth parents' mental health, parental relationship, and the problems and trauma they have faced. Key to the assessment, which takes place over a ten-week period, is whether the parents can recognise the neglect or abuse and can reflect on its causes.[15] Treatment follows assessment, which focuses on the parent-child relationship though interventions may also include foster parents. The aim is to enhance the child's mental health and wellbeing, which is an approach particularly unique to the Infant and Family Team.

The University of Glasgow is testing the effectiveness of the Infant and Family Team programme against mainstream services in Glasgow and London through a Randomised Control Trial, with a final report due in 2023. However, we already have learning to share about the benefits of a

[14] Zeanah, C. H., Larrieu, J. A., Heller, S. S., Valliere, J., Hinshaw-Fuselier, S., Aoki, Y. & Drilling, M. (2001) 'Evaluation of a preventive intervention for maltreated infants and toddlers in foster care'. Journal of the American Academy of Child & Adolescent Psychiatry, 40, 214-221.
[15] Department for Education (2017) The New Orleans Model: Early Implementation in a London Borough, Evaluation Report

programme which, although longer than the 26-week target, does not impinge on the safety of the child, who remains in foster care for the duration of the Infant and Family Team intervention. The evaluation of the New Orleans Model in the United States shows that the mental health of those children who had been through the programme was comparable to children who had not been abused, seven years after their participation.[16] The evidence from the United States also shows that children who were adopted after the programme's completion had improved stability and better outcomes.

b. How well have the limitations on expert evidence served children in the family justice system?

Previously, expert evidence could be requested by lawyers in the family courts where it was 'reasonably required'. Since January 2013, this expert evidence is only allowed where it is considered necessary. This new rule is enshrined in the Children and Families Act 2014. Courts have an active duty to restrict expert evidence in cases in which it is not deemed necessary. The 2011 Family Justice Review, acknowledged a "trend towards an increasing and, we believe, unjustified use of expert witness reports, with consequent delay for children".[17]

Improving timelines of cases involving children, where possible and safe, is a welcome aim. We agree with the recommendation of the Public Law Working Group that professionals working with children and families should feel confident reporting to and advising the court (rather than outsourcing this to experts) and there should be a focus on the "necessity" of engaging experts. Delays in proceedings and in finalisation of court orders can cause young people involved in proceedings considerable uncertainty. MoJ analysis of the reforms found a 48% drop in the appointment of experts since the reforms.[18] Respondents to an MoJ review into the reforms did find that experts were providing reports more quickly since the implementation of the limits, partly because experts had fewer appointments in the family court.[19] Another factor in the case of care applications for more rapid processing of expert evidence may be the 26-week limit for these cases being introduced at the same time.[20] Participants in the MoJ study also suggested that the reduction in the pool of experts felt following the reforms may lead to delays, while others doubted that use of experts was the key reason for delays in the family courts.[21] It should be noted that the timeliness of private and public

[16] Robinson, L. R., Boris, N. W., Heller, S. S., Rice, J., Zeanah, C. H., Clark, C. & Hawkins, S. (2012) 'The good enough home? Home environment and outcomes of young maltreated children'. Child & Youth Care Forum, 41, 73-88.

[17] Family Justice Review Final Report, November 2011

[18] Ministry of Justice, The use of experts in family law understanding the processes for commissioning experts and the contribution they make to the family court, 2015, p.18

[19] Ministry of Justice, *op cit*, p.31

[20] Ministry of Justice, *op cit*, p.31

[21] *Ibid*

law cases has worsened. In October to December 2021, it took on average 44 weeks for private law cases to reach a final order up 7 weeks from the same period in 2020. This continues the upward trend seen since the middle of 2016.[22] As discussed above, the 26-week limit on care cases has not been met since 2016.[23]

It is crucial that limits on expert evidence address unnecessary delays while not impacting the welfare of children who are involved in proceedings. Participants in the MoJ research, for example, expressed concern of the potential impact of the reforms on families and children, due to the complexity of the issues before the family courts: "participants felt that families and children may require a range of interventions and resources that were not being considered in the absence of expert evidence, particularly from psychologists, psychiatrists and independent social workers".[24] The work of the Infant and Family Team, detailed above, is an example of expert evidence that improves the accuracy of decision-making about a child's future, minimising the risk of placement disruption while also offering tailored support to address problems identified and strengthen the parent-child relationship.

In relation to private law proceedings, Practice Direction 12J, discussed in more depth below, directs courts to consider whether expert safety and risk assessments should be made where a case involves allegations of domestic abuse. Such assessments are critical to ensuring the safety of children following the making any of contact arrangements. The Ministry of Justice's Harms Review found, however, that resource constraints limit the availability of such risk assessments, as well as the thoroughness of the ones which do take place.[25] Due to the nature of the abuse, proving coercive or controlling behaviour was seen as particularly difficult without expert evidence, but such evidence was often not available.[26]

Limits in the use of experts must not negatively impact children and families by making access to expertise even harder after resource constraints.The Committee should take a broad look at the causes of continuing delays in cases in the family courts. Any future reform of the family justice system must involve resourcing sufficient to tackle ongoing backlogs and ensure a timely experience for young people involved in cases. Removing unnecessary reliance on experts is welcome where it helps to streamline cases, but clearly more must be done to improve efficiency in family cases involving children. Further, access to expert evidence must not be curtailed where such evidence is necessary to understanding fundamental questions around a child's safety. Clearly, expert evidence can provide important information around the welfare of a child in both public and private cases.

[22] Ministry of Justice, Family Court Statistics Quarterly: October to December 2021

[23] *Ibid*

[24] Ministry of Justice, The use of experts, *op cit*, p.30

[25] Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, Final Report, June 2020

[26] *Ibid*

c. What has been the effect of the requirement to consider mediation?

Mediation is not an appropriate means of resolving family disputes where domestic abuse may have taken place. The Ministry of Justice themselves acknowledge that domestic abuse victims should not be compelled to attend mediation before having access to the family courts so are therefore eligible for exemption. Practice Direction 12J (PD12J) specifically states that where there is evidence that domestic abuse may be relevant to a case, the court must ensure that parties are not expected to go through alternative dispute resolution as this would not be safe. Mediation in such instances may further unequal power dynamics between parties and cause additional harm to domestic abuse victims. With domestic abuse being alleged in 62% of private law families cases, this means that mediation should only be reserved for a minority of cases.[27] Some victims of domestic abuse will not know they are victims of this type of abuse before proceedings begin, so thorough examination of the appropriateness of mediation in each case is necessary.

The Ministry of Justice's Harms Review, however, heard evidence of domestic abuse victims being inappropriately diverted to mediation, with the exemption to mediation available to domestic abuse victims not being consistently applied.[28] A further issue identified was a lack of quality risk assessment tools for mediators to correctly identify cases involving abuse. Some parents responding to the MoJ's Harms Review stated that they felt criticised for not attempting mediation, despite having provided information about domestic abuse. [29] Mediation in cases where domestic abuse may be an issue will not adequately safeguard children involved in proceedings, as the extensiveness of evidence gathering, risk assessments and fact finding into abuse allegations is not sufficiently thorough outside of the court proceedings. Mediation where abuse is a possible issue risks resulting in unsafe arrangements for children following family separation.

The Domestic Abuse Commissioner, through their proposed family courts monitoring mechanism, plan to specifically scrutinise the use of mediation and exemptions in domestic abuse cases. [30] Independent Domestic Abuse Services recommend a national review into mediation services in relation to domestic abuse to ensure adequate safeguarding is taking place.[31] The NSPCC urge for Ministry of Justice policy and PD12J to be consistently applied so that parties are not expected to go through mediation where there is evidence that domestic abuse may be an issue in a case. The family

[27] Adrienne Barnett, Domestic abuse and private law children cases: a literature review, 2020

[28] Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, Final Report, June 2020, p.89

[29] *Ibid*, p.90

[30] Domestic Abuse Commissioner, Improving the family court response to domestic abuse, 2021

[31] Independent Domestic Abuse Services, Domestic Abuse & Family Courts, 2021

justice system needs to be well-equipped to examine allegations of domestic abuse, and mediators need to be well trained to spot signs of domestic abuse in the cases they process.

d. How has the presumption of the involvement of both parents in the life of the child after family separation affected proceedings?

As per section one of the Children's Act 1989, in private proceedings concerning children with separating parents, the child's welfare must be the court's paramount consideration in any decision about their upbringing and with whom they have contact. The 'welfare checklist' in section one directs that the court must have regard to the child's wishes, needs, the potential impact of change and level of harm they have suffered or will suffer. Section one also states that courts must only make an order if that would be better for the child. The presumption of parental involvement requires courts to presume that the involvement of each parent in the child's life will further the child's welfare. This principle was already present in case law but was given a statutory foundation in 2014.

Although involvement of both parents in a child's life post-separation is appropriate in many instances, there is evidence that the presumption has encouraged the courts to overlook the welfare of the child as the overriding consideration in cases where significant harm has been alleged, including cases involving domestic abuse. Respondents to the Ministry of Justice's Harms Review argued that the presumption puts too much stress on the relationship between the child and the abusive parent, above that of children's safety.[32] Rather than examining the implications on the child's welfare in each case, the presumption was said to encourage courts to judge cases generically. Overall, the presumption was reported as rarely disapplied.[33]

Further, the MoJ's review found that the presumption contributed to the court's 'pro-contact culture', that being the priority given to arranging contact between a child and the non-resident parent over other considerations such as around the child's safety. This culture has been identified in research prior to the MoJ's Harm Review.[34] Such a culture is said to have "resulted in a systematic minimisation of allegations of domestic abuse", a lack of understanding of such abuse and the acceptance of counter-allegations without sufficient scrutiny.[35] Such a culture also has implications on the extent to which children's voices are heard, with

[32] Ministry of Justice, Assessing Risk of Harm to Children and Parents in Private Law Children Cases, Final Report, June 2020, p.87
[33] *Ibid*, p.88
[34] Hunter, R., Barnett, A. and Kaganas, Introduction: Contact and Domestic Abuse, 2018
[35] Ministry of Justice *op cit*, p.4

submissions highlighting how credence is given in the family courts to the views of children wanting to have contact with a non-resident parent but not those who do not wish to have contact.

The presumption of parental involvement is relevant to Practice Direction 12J (PD12J). PD12J dictates how family proceedings should proceed where domestic abuse has been alleged or admitted. Following a 2017 update to the Direction, the court is required to consider carefully whether the presumption of parental involvement applies in each case. PD12J further puts an emphasis on early fact finding and risk assessments around DA allegations and directs the abusive parent to domestic abuse perpetrator programmes. The MoJ's review heard evidence of resource constraints limiting the application of PD12J, with many risk assessments and fact findings into domestic abuse allegations either not taking place or lacking thoroughness.[36] Further, despite the Direction requiring a consideration of the application of the presumption of involvement, contact was said to be almost always ordered, frequently without restrictions and requirements to address abusive behaviour. [37] Another issue highlighted in the Review was credence given to claims of 'parental alienation' whereby children's views against contact with one parent and therefore contrary to the presumption of parental involvement were seen as contaminated by the other parent, usually the mother. [38] This results in claims of domestic or other abuse being dismissed or minimised, while claims of alienation are taken seriously by both judges and other court professionals such as Cafcass officers. The NSPCC does not believe there is sufficient evidence to support the concept of parental alienation.

The primary inquiry in determining what arrangements should be made for a child by the family court should be whether a court order preserves and advances the child's welfare, as per the welfare checklist. The MoJ's Harms Review presents convincing evidence that the presumption of parental involvement skews such an inquiry to prioritise parental interests in contact, with the result of limiting how serious allegations of domestic abuse are taken and contributing to courts' 'pro-contact culture'. These issues must be considered and addressed by the Government's ongoing review into the presumption of parental involvement.[39] The current status of the review is unclear, but its results must be forthcoming to properly inform the Committee's post-legislative scrutiny of the Children and Families Act. The presumption should not continue to apply if the review finds that it exposes children to potential harm.

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[36] *Ibid*, p.28
[37] *Ibid*, p.7
[38] *Ibid*, p.7
[39] Hansard, Presumption of Parental Involvement Review, debated on Monday 9 November 2020

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