The reforms to care proceedings – one step forward and two steps back? A critical evaluation of the new legal framework and its impact on the pre-proceedings stage

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Family justice reforms - care proceedings - local authorities - pre-proceedings

The family justice system in England and Wales has undergone a process of considerable reform in recent years, particularly in the area of care proceedings. Following the Family Justice Review the government introduced strict time limits to the duration of proceedings and also made changes to other elements such as limiting the use of experts, revising the Public Law Outline and developing statutory guidance for work undertaken prior to proceedings. The implementation of these changes has had mixed results. But what specific impact have the reforms had on the period prior to proceedings and how has this affected the main parties involved namely local authorities, parents and children? In the last few years a range of studies have been undertaken to assess this impact involving government departments, academics, practitioners and families including the Care Crisis Review. Drawing principally on this academic research along with other evidence, this article critically evaluates the impact of the reforms of the pre-proceedings landscape to determine their effectiveness. Ultimately, whilst the reforms are to be welcomed in some areas and provide certainty in process, they also risk shifting the focus away from working with families and avoiding court to one of evidence gathering and ensuring their care application is robust once proceedings are issued.

'The process of reform is little short of revolutionary'

This was the view taken by Sir James Munby P in commenting on the recent reforms of the family justice system.[1] Whilst they may be considered to be almost revolutionary, this article will address the effectiveness of the reforms to care proceedings and their impact on the role of the state, that is the local authority, prior to care proceedings.

The state's duty to protect children is a topical and emotive subject area and has received significant media coverage over the last twenty years or so, mainly due to widely reported cases such as Victoria Climbie[2] and Baby P.[3] There is even an argument that the media coverage of cases like these has been so great that it has informed government policy decisions.[4] It is therefore at the forefront of many people's minds. Additionally, there are currently 78,150 children looked after by the

state[5] and in the year April 2018 to end March 2019 there were 13,569 applications for care orders in England and Wales.[6]

Recent figures also show a general increase in the rate of care applications (applications per 10,000 child population) during the last 8 years.[7] There are fears that there is insufficient capacity in the system to address these trends and the care system is therefore now seen as being in crisis.[8] In July 2018 the report of the Care Crisis Review was published.[9] This consisted of a seven month review of the care system, funded by the Nuffield Foundation which involved consultation with key stakeholders including local government, the judiciary, Cafcass, social care practitioners and affected young people and families amongst others. The report provides recommendations for changes at appropriate points and has been fully welcomed by the incoming president of the Family Division, Sir Andrew McFarlane.[10]

This 'crisis' has been identified alongside a period of reforms to the legal framework with the aim of improving care proceedings and the care system. Central to these changes is the requirement for care proceedings to be completed within 26 weeks.[11] This article will consider the impact of these reforms on the work undertaken by the local authority prior to care proceedings being issued and the effect this has on the reform's overall aim of reducing delay in proceedings. To support this it will draw on the findings of recent research conducted by the Department for Education and a collaborative study involving the Universities of Bristol and East Anglia focussing on some pertinent aspects such as changes in the use of experts.

Further, the article will assess the extent to which specific developments such as judicial scrutiny of pre-proceedings, application of human rights and standards of local authority documentation support the aims of these reforms at the pre-court stage.

Finally, the analysis will focus on particular areas which, since the reforms arguably offer an improvement in local authority practice namely presentation of late carer andthe developing method of 'relationship-based practice'.

Ultimately, by evaluating the pre-proceedings stage and these particular aspects, the aim is to determine whether, far from addressing inherent problems in the system, the reforms have simply exacerbated the present crisis.

Before doing so, however, it's worth briefly outlining the nature of the recent reforms.

Background to legislative changes

The most recent review of the family justice system and child protection in England and Wales was the Family Justice Review (FJR).[12] The FJR was undertaken by an independent panel of experts in social work, children's services and legal practitioners who in 2010 were commissioned by the Ministry of Justice to carry out

an in-depth review of the family justice system. The panel was chaired by David Norgrove.

Whilst this review also covered private law matters, much of the public law focus concerned the issue of delay in court proceedings for child protection matters. Many of the FJR's recommendations were subsequently accepted by the government[13] and brought into statutory form in the Children and Families Act 2014 which amended certain provisions of the Children Act 1989.

There is also further guidance (in a practice direction) in the form of the Public Law Outline (PLO). This is the framework for the courts, local authorities and all others involved setting out how care proceedings are to be prepared and managed including elements such as structure and timescales.[14]

Following the FJR, but prior to the new legislation in the Children and Families Act 2014 coming into force, a new PLO was devised by the judiciary in 2013.[15] This introduced the 26 week timescale for the first time and in readiness for the forthcoming statutory changes. It was initially devised as a pilot scheme but was subsequently slightly revised in the form of the current PLO, this time backed up by the new legislation, both of which were implemented on 22 April 2014.

One of the FJR's most fundamental recommendations, now included in legislation[16], is the requirement that care proceedings are to be completed in less than 26 weeks unless extension is necessary to enable the court to resolve proceedings justly.[17]

Sir James Munby P sums this up clearly in *Re S*[18] where he refers to the first of his View from the President's Chambers series.[19] He states as follows:

'My message is clear and uncompromising: this deadline can be met, it must be met, it will be met. And remember, 26 weeks is a deadline not a target; it is a maximum, not an average or a mean. So many cases will need to be finished in less than 26 weeks.'[20]

Reduction of delay since FJR

The underlying aims of the reforms in care proceedings were to reduce delay. At the time of the FJR care proceedings were taking 56 weeks on average.[21] However, whilst there has been a general downward trend in the average duration from initial application to final court disposal, the most recent family court statistics available from the Ministry of Justice show the average timeframe for disposals of applications from April to June 2019 was 33 weeks which is greater than the previous quarter and the highest since the final quarter of 2013.[22] Whilst this is not below the 26 week threshold the statistics do reveal that 41% of cases were completed within 26 weeks.[23]

Nevertheless, there is a wider issue as to how this shorter period affects the key stakeholders involved, that is, children, parents, local authorities and the courts. Some of the key concerns arise during the period prior to the local authority commencing care proceedings at court, namely the pre-proceedings stage.

Pre-proceedings

Before considering these concerns further, it is worth briefly considering what pre-proceedings involve. In order to facilitate the 26 week timeframe, the current PLO sets out three key stages of the court process. However, there is also a pre-proceedings checklist of documents included in the PLO[24] that the local authority needs to have ready before the first stage can go ahead.[25] Amongst other things, this pre-proceedings stage covers aspects such as statutory assessments of the parents and child, meetings with legal advisers and also a letter before proceedings notifying parents of the local authority's plan to start care proceedings.

The pre-proceedings process was first put on a formal statutory footing in guidance published in 2008[26] although this has now been replaced. The latest guidance sets out the various steps involved[27] and the key stages are summarised below:

1. Following a referral to the social care department of a local authority, an initial assessment is carried out of the child and their family circumstances. Where a child is identified as being at risk of harm, or has suffered harm due to parental abuse or neglect, they are put on a child protection plan. This is developed in consultation with the child, parents and other agencies and is essentially a plan of action to address any concerns. If the child is identified as in need of urgent protection at this stage then the local authority can apply to court for emergency protection measures.[28]

2. Where the local authority is satisfied that the child remains at risk of significant harm and parenting has not improved it will then hold a Legal Planning Meeting.[29] This is attended by the social workers involved and a local authority lawyer; collectively they decide whether the criteria under s 31(2) of the Children Act is made out in respect of the child. This is as follows:

> 'A court may only make a care order or supervision order if it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
> (b) that the harm, or likelihood of harm, is attributable to –
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.'[30]

If so, the local authority will then decide whether to start care proceedings at that stage or allow a further period of support for the family with the objective of diverting from proceedings.

3. If the local authority does decide to start proceedings they will send the parents a letter of proceedings or a letter of issue.[31] This is the starting point for the formal pre-proceedings process. The letter of proceedings is sent where the local authority do not consider the risk to the child is such that an immediate application to court is required. It informs the parents that proceedings are being contemplated and invites them to a pre-proceedings meeting with the local authority. The purpose is to agree a revised plan for the child in order to address the local authority's concerns. It will set out clear expectations and timescales and the aim is to divert from care proceedings. The letter of issue is sent where the local authority consider an immediate application is needed; it informs the parents that proceedings are being issued.

4. Prior to the proceedings, the local authority will need to ensure it has complied with the requirements of the pre-proceedings checklist in the current PLO[32] including appropriate evidence and details of assessments.

Notably, the aim of diverting from care proceedings appears to be a key part of this process. However, the pre-proceedings period is one of uncertainty for the child and family. Whilst the local authority may engage with them and provide support during the process, the family (and perhaps their child) may be all too aware of the potential for the local authority to commence formal care proceedings in the event that the pre-proceedings stage does not lead to improvements for the family and child.

Pre-proceedings - reduction in delay?

Whilst the statistics seem to show timescales for care proceedings have been reducing since the FJR there is an argument that the effect of the statutory deadline for proceedings is merely to shift the delay from the courts to the pre-proceedings stage. Kim Holt and Nancy Kelly argue that since the Children and Families Act 2014 came into force, most of the work that was previously done by the courts is frontloaded and now forms part of the pre-proceedings stage, thereby imposing a higher burden on local authorities and other agencies but without the additional resources.[33]

For instance, one way in which the burden has shifted is arguably due to changes in the use of experts. One of the conclusions from the FJR was that an overuse of independent experts during proceedings was causing delay.[34] A key recommendation therefore was for courts to only allow experts to be instructed where this was necessary to resolve the case and also where the information was

not available, or could not be made available, from the parties already involved. The necessity requirement has now been put on a statutory footing although it has been slightly revised on the basis that experts are only to be instructed where "necessary to assist the court to resolve the proceedings justly."[35]

The approach of the FJR was therefore to move away from experts and place more emphasis on the assessments carried out by the local authority. The FJR's final report highlights the value to the court of social work expertise and it was felt that this contribution was previously lost due to the heavy reliance on independent expert reports. The report also provides that assessments should be clear and detailed and sufficiently evidence-based.[36] Indeed, although local authority social workers are expressly excluded from the definition of "expert" in relevant recent legislation[37] Munby J has confirmed that they are very much intended to be regarded as experts by the courts.[38]

Without this level of scrutiny and input at the proceedings stage there is now increased pressure on local authorities to ensure their assessments are rigorously undertaken. There will of course be assessments which are carried out at a time when the authority is contemplating proceedings. Therefore the risk of delay may yet be further exacerbated in the local authority's attempts to balance the aim of diverting from proceedings with the need to have a sufficiently robust assessment on which they can rely *if* the matter progresses to court.

There are of course other consequences of the reforms, some of which can be demonstrated in a series of recent studies. These will now be considered in the following sections.

Research in Practice study

One of the recent government reviews of the impact of the reforms on local authority practice was completed in April 2016. The Department for Education commissioned a team of researchers collectively known as Research in Practice to carry out a study on the impact on local authority practice.[39] The study involved interviews with 60 professionals including heads of service, lawyers and managers across 21 local authorities from each region of England between January and March 2015. It formed the third phase of a wider government project involving three phases overall, each one focussing on different aspects of the reforms. The findings from the third phase will be considered shortly, although it’s worth briefly mentioning the previous two studies as both these provide some indication of their effect on particular areas of practice.

The first phase involved a study which focussed on the early impact of family justice reforms and court judgments on local authority practice and pre-proceedings.[40] It found that the frontloading of work onto local authorities with increased emphasis on

the pre-proceedings stage was generally welcomed and that social workers were more proactive in completing detailed and robust assessments and ensuring higher standards of evidence than before the reforms.[41] Nevertheless, the study also found that some professionals sensed the frontloading had created greater delay in issuing proceedings and more pressure on workloads, exacerbated by the requirement for a higher standard of evidence during the pre-proceedings stage in comparison to before the reforms.[42]

Phase Two of the project explored local authority professionals' views on Special Guardianship Orders (SGOs).[43] These are orders made by the court appointing a person or persons to be a child's special guardian[44] and their effect is to grant parental responsibility to that person or persons for the duration of the order.[45] The remit of the study included professionals' views on aspects such as changes in the way SGOs are used and the court's approach to granting these orders amongst others. It built on findings from the first phase that the number of children leaving care through an SGO had increased in recent years as had the number of SGO cases arising during proceedings. In light of this, a key aim of Phase Two was to review local authority practice and decision-making further in order to form a clearer understanding of the views of local authority professionals in respect of the use of SGOs in comparison to previous years.[46] The study found that there was a sense among local authority and Cafcass professionals that the increase in SGOs was due to a combination of the reforms and recent case law decisions.[47] In the context of pre-proceedings, the study recognised that social workers were pro-active in identifying extended family members to act as potential special guardians at an early stage.[48] There was, however, evidence that in some cases family members were not identified until after proceedings had commenced[49] which in turn could place pressure on undertaking effective assessments of those individuals considering the 26 week timescale for proceedings.[50] The study therefore demonstrates some change in practice before proceedings since the reforms and the value placed on SGOs as a potential alternative arrangement although it also recognises the challenges in the late identification of potential carers.

This most recent third phase consisted of a study that built on the earlier phases in order to develop a more in-depth awareness of the impact of the reforms and in particular the reasons for differences in evidence concerning care case duration among the local authorities involved. Some of the key findings from this third phase will now be addressed.

One important aspect of local authority practice involves undertaking assessments of families and children and sometimes wider family members in order to establish whether children are at risk or could be protected. It was recognised in the study that, prior to the reforms, assessments by local authorities that were incomplete or not structured effectively did contribute to longer proceedings, since courts would have to order further assessments or additional evidence.[51]

This third study found, however, that following the reforms local authorities were continuing the positive practice identified in the earlier study and ensuring that frontloaded assessments were being completed at an early stage. It also found that this period enabled families to benefit from provision of adequate support and to make suitable changes to protect their children's safety. Furthermore, it recognised the positive role that family group conferences and family meetings played in enabling extended family members or potential carers to be identified during pre-proceedings.[52]

In spite of this, the report did find evidence of courts risking further delay by regularly rejecting the assessments undertaken by local authorities during pre-proceedings and ordering fresh assessments. The view of one manager consulted was that judges treat the proceedings as the start of the process and are not interested in prior steps taken. It was suggested that this could encourage local authorities to apply to court at an earlier stage when they are less prepared, contrary to the aims of the revised PLO**.** Other challenges identified included the delay in issuing proceedings due to the high volume of work during pre-proceedings, high cost of funding pre-proceedings assessments and limited availability of support services to assist the parental capacity in making changes**.**[53]

Partnership by Law study

The Partnership by Law project was an in-depth study of the pre-proceedings process undertaken by the universities of Bristol and East Anglia (UEA) between 2010 and 2012.[54] The study involved 6 local authorities and 207 case files. The researchers monitored the progress of these files via interviews with those involved such as social workers, parents and lawyers as well as observations of meetings and the setting up of focus groups. It produced some key findings on the impact of the recent reforms on pre-proceedings.

Firstly, the study demonstrated that even where a case has been through the additional pre-proceedings process and has ended up in court, this still doesn't serve to reduce the delay to any significant extent during the formal care proceedings. From its sample, 87 cases went straight to court and 120 went through a pre-proceedings process. However, the researchers noted that those that went straight to court took on average 52.5 weeks whereas those that went through pre-proceedings lasted 51 weeks; a reduction of merely a week and a half.[55]

The study also found that the average timeframe from the legal planning meeting to the end of formal care proceedings differed significantly depending on whether or not the pre-proceedings process was used. For the pre-proceedings cases the average was 70.2 weeks whereas the average duration for the cases that had not used that process was 59.2 weeks i.e. 11 weeks shorter. However, the study did find that care

proceedings were diverted in almost a quarter of all cases in its sample (where pre-proceedings were started).[56]

The pre-proceedings stage, therefore, arguably creates an extra layer of process which could contribute to further delay. For instance, whilst the aims of the letter before proceedings and follow up meeting with the family may be to divert from court and to enable the local authority to work with the parents, some have argued that this could lead to unacceptable, short-lived change. It may bring about short-term improvements in parental care, but it could be argued that social workers will need to monitor the care provided for a period of time in order to establish whether the standard of care will be maintained. This could of course take time, put any further action on hold and potentially place the child at greater risk.[57]

The whole process was introduced as part of a wider programme to reduce delay in care proceedings.[58] In spite of this research evidence, however, the process is now firmly established in statutory guidance and indeed its use was encouraged in the FJR's report.[59]

Judges and pre-proceedings

The Partnership by Law study also found evidence that the courts were in fact paying little attention to work done during pre-proceedings and that there was a perception amongst local authority workers, private lawyers and judges that the use of pre-proceedings has, in fact, not changed court practice.[60] Moreover, following interviews with the focus group of judges, the study found that judges viewed pre-proceedings as simply causing further delay:

'They preferred cases to come direct to court so that they could control what was done, and felt that the pre-proceedings process would only serve to delay cases which would inevitably need to come to court.'[61]

One significant finding was that judges viewed the local authority assessments during pre-proceedings as being insufficiently independent and therefore were inclined to require fresh assessments during formal proceedings. The fear of criticism from the Court of Appeal on this issue also hung over them.[62]

This last obstacle was considered briefly in the FJR's final report where it was suggested that the court's need to require further assessments could be reduced if there was judicial oversight of the pre-proceedings assessments by the local authority. This would address the accusation that these assessments were not independent. The proposal was however rejected on the basis that it would bring the pre-proceedings stage into remit of the formal proceedings themselves. It was felt that this would involve extra unjustified cost given many pre-proceedings cases do

not progress to court.[63] The notion of judicial pre-proceedings will be considered further shortly.

It would seem that all this undermines the objectives of the reforms for the courts and local authorities; to engage effectively with the pre-proceedings process and thereby reduce long term delay for the child. Indeed, the results of the study were acknowledged in the FJR's final report and it was recognised that at that stage the courts were paying little attention to pre-proceedings.[64] This would appear to indicate that the time and resources used by social workers during pre-proceedings are wasted to some extent and not sufficiently valued by the courts.

Pre-proceedings: judicial scrutiny?

Whilst there is statutory guidance for pre-proceedings work there is no judicial oversight of this stage. There is no judge in place monitoring progress with the issue of letters before proceedings, meetings with the parents or local authority assessments. All this is very much in the hands of the social workers, parents and their legal advisors. Although the FJR rejected the idea of there being judicial scrutiny, it is worth briefly considering the merits of a judicially monitored pre-proceedings system more closely, particularly given the research findings relating to the court's approach to pre-proceedings.[65] Would judicially monitored pre-proceedings be valued more highly by judges at the formal proceedings stage? Would assessments carried out by the local authority be regarded as more independent and thereby reduce the court's tendency to order further assessments? This would of course reduce delay during formal proceedings. Alternatively, it may be argued that whilst judicial oversight may offer these benefits, parents and children should still be entitled to refuse this at a stage prior to any formal proceedings commencing.

The notion of judicial monitoring was the focus of a small collaborative study undertaken by researchers from the University of West of England and University of Huddersfield of two pre-proceedings protocols that were launched by Designated Family Judges in Cheshire and Merseyside and Bristol.[66] These differed from the standard pre-proceedings process in two ways. Firstly, they required pre-proceedings to be completed within 26 weeks starting from the date of the decision to start pre-proceedings at the legal planning meeting and finishing with the date of issue of formal proceedings. Secondly, the local authority was not required, during formal proceedings, to repeat any assessments already undertaken during pre-proceedings. The court could of course order additional assessments during formal proceedings but it would avoid the risk of duplicating those already carried out. The study consisted of analysis of court statistics both before and after the introduction of the judge-led pre-proceedings protocol. It also analysed social workers' files and established a series of interviews with 48 participants including parents, social

workers, lawyers acting for parents, local authority lawyers, Cafcass representatives and judges amongst others. There were two aims of the study. Firstly, to consider the effect of judge-led pre-proceedings on the conduct of court proceedings, assessing whether there was a reduction in the number of cases that went to court and whether timescales were reduced during court proceedings. Secondly, the interviews provided an indication of the perceptions of the judge-led pre-proceedings from those involved. In particular, the interviews with parents provided insight into their own experiences.

The study found that most cases completed the pre-proceedings process within the 26 week timescale. Additionally, many of those were moved down to a statutory status deeming them to be less serious than one where the child was suffering or likely to suffer significant harm (children in need or child protection plan status as set out in legislation[67] or statutory guidance[68] respectively). For those cases that did progress to formal proceedings many were completed within the statutory 26 weeks. Furthermore, the study found that those cases subject to the judge-led protocol were shorter in duration. It is not possible to infer causality from the data and to determine whether the judge-led protocol had a direct impact on these shorter timescales, however some of the qualitative data indicated that some interviewees believed it would have been an influential factor.[69]

Moreover, following the interviews, the study found that many of those involved felt that the judge-led protocol did minimise the risk of delay or drift. Social workers felt there was a clearer structure, the protocol ensured that they were better prepared for court and that they organised assessments earlier in the process. Many of the practitioners also felt there was better communication and collaboration between them in order to meet the 26 week pre-proceedings timescale. In terms of judges, again the study findings were positive. They felt the documents presented by the local authority were much clearer, concise and with improved use of evidence which made their role easier enabling more effective consideration of the steps taken by the local authority and their arguments.[70]

The findings, however, did present some challenges. There was a concern among lawyers acting for parents, and Cafcass officers that the 26 week timescale for pre-proceedings did not allow the parents enough time to demonstrate an improvement in their parenting. Furthermore, the parents' legal representatives felt that once the case had entered the pre-proceedings stage, the local authority's focus was on its own preparation for court and maximising this preparation within the 26 week timescale as opposed to working with the families to avoid proceedings.[71] This again, reflects the ongoing tension between the need for local authorities to prepare robustly for court and the aim of diverting cases away from formal proceedings.

This recent study does demonstrate an alternative approach and may go some way to addressing some of the concerns raised by judges in the Partnership by Law study. A judge-led protocol may serve to reduce delay overall and judges did seem to

place more value on the work undertaken by the local authority including evidence, thereby enabling the efforts of social workers and the resources they draw on to be put to good use. Indeed, in an address at the annual dinner of the Family Law Bar Association Sir James Munby P voiced his support for judge-led pre-proceedings and announced forthcoming pilot schemes which will adopt this model:

> 'Innovative thinking will shortly see the piloting in selected courts for schemes with judicial and Cafcass involvement in the pre-proceedings phase of some types of care case. The idea may seem astonishing - how can a judge be involved pre-proceedings? - but we have to think in new and perhaps very radical ways about how best to make the child's journey through the care system as seamless as possible. The judicial phase of the process as we currently see it is only a part of a much longer process which needs to be better planned and coordinated than at present, not least in the interests of the children, and the parents, caught up in the system.'[72]

As yet, though, the current pre-proceedings process under the PLO and statutory guidance remains and is not subject to judicial oversight. Not only does this lack of judicial involvement raise issues such as drift and delay and lack of judicial confidence in the pre-proceedings stage, it also raises questions as to whether the rights of parents and children involved at this stage are sufficiently recognised and upheld throughout.

Pre-proceedings and human rights

So what are the rights of parents and children during pre-proceedings? The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) sets out the rights of those citizens whose countries are signatories to it. The ECHR was incorporated into UK domestic law by virtue of the Human Rights Act 1998 and these rights can therefore be enforced in the UK courts. There are two articles of the ECHR that are relevant to pre-proceedings; Article 6 which is the right to a fair trial and Article 8 which is the right to respect for private and family life.

Article 6

The pre-proceedings process involves administrative decision-making in respect of a child's future. Decisions are not made by the judiciary but are governed by the pre-proceedings process under the PLO and statutory guidance. Parents and children are directly affected by any decisions made during this stage and therefore under Article 6 ECHR they have a right to be heard. Article 6 provides as follows:

'In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing'

For the parents and child this would include the right to representation. This is arguably met in the wording of the letter before proceedings which is sent to the parents by the local authority. The letter strongly encourages them to seek advice from a solicitor and informs them of their right to be represented by their solicitor at the subsequent meeting with the local authority.[73] It would seem that this is Article 6 compliant although Kim Holt and Nancy Kelly do question whether compliance with Article 6 would in fact require the local authority to go further than this and *ensure* there is legal representation.[74] As the local authority would always have the benefit of their own solicitor there would seem to be a natural imbalance without this representation also being automatically afforded to the parents. Furthermore, even where there is legal representation for the parents there is mixed evidence of its effectiveness with some families even experiencing undue pressure from their lawyers to agree to the local authority's proposals.[75]

Additionally, it's arguable that children should be represented separately from their parents. In judicial proceedings this would usually be the case; a representative of Cafcass would be appointed by the court to act as an independent guardian for the child.[76] That person would advocate for the welfare of the child and ensure all involved act in the child's best interests. The guardian is also required to appoint a solicitor to represent the child during the proceedings.[77] The solicitor appointed by the guardian must be a member of the Law Society's Children Law Accreditation scheme.[78] In this way, the child has a voice. During pre-proceedings however there is no separate representation for the child either by a guardian or solicitor. Holt and Kelly argue that:

'…independent representation of children is essential if the rights and needs of children and parents are not to be conflated.'[79]

Consequently, this lack of representation risks breaching children's Article 6 rights in pre-proceedings and additionally their rights under Article 12 of the United Nations Convention on the Rights of the Child to which the United Kingdom is a signatory.. This provides that the child should be allowed to express their views and for those views to be taken into account in any judicial or administrative proceedings affecting the child.[80]..One recent study was undertaken involving two pilot schemes at three local authorities whereby a Cafcass representative was appointed to act as independent guardian representing the child during this stage, advocating for their welfare and with the aim of avoiding proceedings by negotiating an agreement between the parents and the local authority.[81] The study monitored these cases throughout the proceedings in comparison with a sample that had not had the benefit of Cafcass involvement. The results did show to some extent a higher diversion rate and shorter duration of proceedings for the cases involving Cafcass at pre-proceedings stage. Furthermore, the presence of Cafcass does go some way to

addressing interference with the children's Article 6 rights although Julie Doughty has questioned whether the Cafcass guardian would be sufficiently independent from the local authority during the process.[82]

As yet, however, it is unclear whether this approach would be adopted nationally. A recent government progress report on the implementation of the FJR recommendations acknowledges the findings of the pilot schemes. But it goes on to provide that at this stage the use of Cafcass in pre-proceedings is to be agreed at a local level between the relevant agencies and needs to be "affordable".[83] Given this uncertainty, arguably children's Article 6 rights remain at risk of being breached where there is a lack of independent representation for a child in pre-proceedings.

A related issue concerns the availability of legal aid. Parents are indeed entitled to legal aid following the issue of the letter before proceedings inviting them to a meeting with the local authority. The legal aid provision enables the parents to consult a lawyer for advice before the meeting and for the lawyer to attend the meeting with them. However, it has been argued that the non-availability of legal aid for children and the lack of possible extension of legal aid for parents during this period means it is limited and risks breaching the parents and child's Article 6 rights.[84] A further consideration is the non-availability of legal aid funding prior to the formal pre-proceedings process. It has been argued that the point where parents are most in need of legal advice is prior to pre-proceedings, in order for them to clearly understand their circumstances and the impact of entering the formal pre-proceedings process.[85]

The need for effective access to legal advice and representation by parents was an area identified for improvement by the recent Care Crisis Review. It was recognised that the reduction in the number of firms offering 'legal help' due to the recent reforms in legal aid has made it much more difficult for parents to obtain legal advice at this stage. The Review has therefore proposed that there should be wider provision of free legal advice for families funded by the Government and that the Ministry of Justice conduct an analysis of the impact of the current restricted access to legal advice on the number of children subject to care proceedings or in the care system and on public spending.[86]

Article 8

Article 8 of the ECHR is a qualified right and any interference with the right to respect for private and family life needs to be justified in line with the provisions of Article 8(2). It must be in accordance with the law, have one or more of the prescribed legitimate aims and be proportionate. In addition, following the case of *Bury MBC v D*[87] the courts now regard Article 8 as not only including a substantive right but also a procedural element. Whilst the interference with the parents' Article 8 rights (by placing the child into local authority care) may be clearly justified under 8(2) where the child is suffering or likely to suffer significant harm, the procedural element

requires the local authority to ensure the parents are involved in any planning of intervention into their lives. This would clearly cover the pre-proceedings stage. Indeed, this was made clear by Munby J in *Bury MBC v D*:

'It is elementary that under Article 8 parents have the right to be fully involved in the planning by public authorities of public authority intervention in the lives of their family and their children, whether before, during or after care proceedings…'[88]

This approach is re-enforced by provisions in the Children Act requiring a local authority (so far as is reasonably practicable) to ascertain the wishes and feelings of the parents before making any decision concerning a child who they are proposing to look after.[89] The key question is how much involvement is needed in order to meet this element of Article 8. This is unclear at present, although Judith Masson and others have questioned whether, in light of court decisions criticising the failure to involve parents, instruments such as the ECHR and Children Act do in fact create an enforceable right to the pre-proceedings process itself.[90]The recent decision of the European Court of Human Rights in *Strand Lobben and Others v Norway*[91] supports this further. The court emphasised the need to ensure that all views and interests are taken into account at this stage and that the procedure adopted contains sufficient safeguards commensurate to the gravity of the interference with Article 8 and the seriousness of the interests at stake.[92]

Pre - proceedings: Standards of local authority documentation

There is also now clear guidance from the courts as to the standards of evidence to be achieved during pre-proceedings by the local authority. In the judgment given in *Re B-S* [93] the court set a high bar on evidence required from local authorities where a case does end up in court. The case concerned a care plan for adoption and in considering the standard Sir James Munby P reiterated the message given by Lady Hale in *Re B (A Child)*[94] and held that non-consensual adoption was only to be ordered

'where nothing else will do'.[95]

He went on to state that to meet the standard and enable the court to decide the best option for the child:

'the evidence must address all the options which are realistically possible and must contain an analysis of the arguments for and against each option.' [96]

Although *Re B-S* concerned adoption the court took the view in *Re S (A Child)* that the approach taken would have general application.[97] The court also held in *Re B-S* that if the standard set isn't met a court would need to adjourn the proceedings even if this goes beyond the 26 week deadline.[98]

This, again, adds another element to the pre-proceedings work and may provide more certainty for local authorities in the quality and standard needed for documentation such as assessments. Indeed, Jonathan Dickens and Judith Masson note that although the standards set by the court in *Re B-S* are not binding precedent (as they weren't necessary for the decision in that particular case) the court seems to be treating them as rules with which local authorities should comply.[99] In order to shed some light on this issue, in the Court of Appeal decision in *Re R (A Child)*[100] the former President Sir James Munby confirmed that *Re B-S* was not a change in the law and was "primarily directed to practice".[101] Notwithstanding this clarification, whilst on one hand the decision in *Re B-S* may provide a clearer focus for local authorities, it has also been argued that the requirement to meet such a high standard risks further delay and possibly a return to reliance on experts which goes against the aims of the FJR.[102] Additionally, in commenting on the revised PLO the former President provided separate guidance on the nature and standard of evidence to be provided by the local authority prior to proceedings such as the social work statement and he also recognised the status of social workers as experts for the purposes of the proceedings themselves.[103] Whilst the former President emphasises the benefits of the frontloading of work on the local authority in diverting from proceedings,[104] there is also a risk that this emphasis on standards of evidence and quality of local authority documentation will shift their focus onto preparation for court rather than working with families to avoid that very outcome.

Relationship-based practice

The recent reforms have therefore resulted in some key challenges for local authorities at the pre-proceedings stage. At the same time, and as highlighted earlier, the number of care order applications is significantly high and escalating as is the number of current looked-after children. During this early stage it is, therefore, crucial for local authorities to work closely with families and to ensure their positive engagement and thereby avoid care proceedings.

One of the key themes from the Care Crisis Review is the notion that the key driver of partnership working between local authorities and families should be relationship-based practice. The aim of this is to build positive relationships with families and support their engagement with services requiring empathy on the part of the local authority and a wish for the family to succeed.[105] It was recognised that there was a need for an increase in this level of engagement between local authority services and families and that the current lack of engagement was a trigger for local authorities moving families further into the system and ultimately commencing care proceedings.[106] The review emphasised that where there was a failure to engage this should be treated as a failure of the *system* as opposed to a failure by the family, thereby endorsing the relationship-based practice approach.

One notable proposal was to convene a working group consisting of representatives from legal practice, social work and families to agree amendments to the guidance on pre-proceedings. This would incorporate the key messages relating to relationship based practice not only in respect of the immediate family but also with wider family members at this early stage.[107] Whilst these steps have some merit, it has also been argued that in order for relationship-based practice to work effectively, there is a need for less not more regulation of these early stages and that the recent reforms simply place a limit on the freedom of social workers to explore this relationship-based approach to its full potential.[108]

Presentation of late carer

One issue raised in all three phases of the RIP studies is the idea of an alternative potential carer (usually a member of the extended family) presenting themselves further on in the care proceedings.[109] This carries the risk that any additional assessment of this potential carer might extend the case time frame beyond the 26 weeks and the courts have identified this as one area where extensions to the 26 week requirement may indeed be necessary.[110] If, however, due to the time constraints such assessments of these late carers were refused, this could risk interference with a child's right to respect for family life, particularly where it was clear they had potential to provide good care for the child. It was suggested that one reason for these persons only coming forward at this late stage was their perception that if they presented themselves earlier this would go against the interests of the parents. Therefore such individuals only came forward once the parents had been excluded as carers.[111]

The Care Crisis Review therefore recognised the benefits of contacting wider family members in sufficient time before proceedings are started and of involving them in the provision of help and support to the family at this earlier stage. This could avoid the challenges of undertaking assessments of potential carers during proceedings whilst at the same time ensuring compliance with the 26 week timescale. Notably, the review identified an inconsistency between the limited time for assessments of relatives in care proceedings and the time made available for assessments of potential adoptive parents.[112] There are, however, clear advantages in contacting the wider family and identifying alternative potential carers at the pre-proceedings stage, and the use of relationship-based practice would certainly support this particular aim as that model could be adopted as a means of reaching out to extended family members and ensuring they are engaged in the process at an earlier stage.

Conclusion

Whilst the objective of the recent reforms is at first glance being met, the family justice system is arguably in a more uncertain position. The key priority of the reforms was to reduce delay in care proceedings and court statistics do show evidence of this quantitative reduction. In terms of the impact on local authorities, there is indeed evidence that the changes have to some extent been welcomed by practitioners.[113] In pre-proceedings work the recent statutory guidance[114] does ensure a clear structure for local authorities to follow in the period leading up to proceedings and its aim of diverting from proceedings is certainly to be commended. Alongside these improvements, the recent guidance from *Re B-S*[115] on local authority evidence also arguably provides local authorities with more certainty as to the standards of documents needed while they prepare for court.

Notwithstanding the above, the reality is that these reforms simply raise further fundamental challenges, particularly at the pre-proceedings stage. Arguably, the delay has simply been shifted from the proceedings stage to the period prior to proceedings. The need to ensure documents are ready and prepared, so as to enable local authorities to be confident the 26-week deadline will be met, places yet more pressure on already resource-stretched local authorities and consequently more delay at this earlier stage. In that sense, the statistics do not necessarily reveal the true picture hence the importance of combining both quantitative and qualitative research methods which take into account the *experience* of the parties involved, not just a measure of time passing. The aim of pre-proceedings work is to ensure proceedings are avoided and a family is kept together wherever possible with removal of the child being a last resort. Clearly, there will be cases where removal of a child is of course necessary for their protection. However, this pre-proceedings period is crucial for the family and the focus should be on working with the family to ensure they avoid entering into proceedings. Instead, the frontloading of work onto the local authority, and the court's requirement that the authority have its papers and evidence in order, arguably shifts the emphasis away from diversion and on to preparation for court.

The net effect of this is to shift the focus away from supporting these children and families to ensuring assessments are in place so the authority is ready for court. Indeed, it is notable that whilst the recent Care Crisis Review recognised that cases were being diverted from court in some areas of the country, by contrast, in other areas local authorities were simply using the pre-proceedings phase to collect evidence in preparation for court.[116] In the latter, this approach arguably works against the interests of children and their families as any efforts and resources previously deployed in working with the families and finding solutions to their problems are now directed towards ensuring a successful court application for the local authority.

This shifting of delay and emphasis can only work against the parents and child who are left in an even more vulnerable position, further exacerbated by limited legal aid for advice and legal representation and a potential failure to uphold their human

rights. It also fails to support particular cases where parents have experienced the late presentation of an alternative carer. The odds certainly seem stacked against them. In summary, whilst the reforms may have brought about more certainty and structure for the courts and local authority practitioners, the increased emphasis on process and procedure (in order to address delay) has simply introduced yet further fundamental pressures and risks for vulnerable parents and children.

Nevertheless, the recommendations from the Care Crisis Review concerning the need to contact wider family members early on and to implement relationship-based practice, particularly in the pre-proceedings phase, do have some merit. If these changes were developed further and were embraced by practitioners as opposed to focussing purely on process, evidence and timescales, they could potentially contribute to achieving one of the key objectives of the reforms; diversion from court. Fundamentally, this would allow the reforms to be implemented with an improved balance between state intervention and supporting families in addressing their own problems and therefore enabling their child to remain at home. Adopting this approach enables the home to be made safer and more nurturing through the engagement of social workers as opposed to families being subjected to ongoing assessments just in case they end up in court.

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[21] Ministry of Justice, n 12 above, 5

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[23] Ibid

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[62] Masson et al, n 54 above, 171

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