

# **THE PUBLIC LAW OUTLINE**

## **An Outline of the new regime for Care Proceedings in England and Wales**

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## **The Care Review of the Child Care Proceedings System**

The *Review of the Child Care Proceedings System in England and Wales*, (published jointly in May 2006, by the Department for Constitutional Affairs (now Ministry of Justice), the Department for Education and Skills (now Department for Children Schools and Families) and the Welsh Assembly Government) considered and evaluated the progress of the Protocol for Judicial Case Management in Public Law Children Act Cases since its inception.

The new Public Law Outline (PLO) will replace the Protocol and is to be implemented via a Practice Direction from the President of the Family Division in April 2008.

The Care Review identified that there are around 14,000 applications (by child) for care or supervision each year, most of which are complex and take a long period of time to proceed from application to disposal – taking on average 51 weeks in care centres and 42 weeks in magistrates' courts (Family Proceedings Courts).

## **The Framework for a Family Court**

On the 11<sup>th</sup> July 2007 the President of the Family Division, Sir Mark Potter, set out the proposals for revision of the Protocol in a keynote speech –

*“We have to recognise that the number and complexity of child care cases are increasing in a way that is straining resources to the limit. The new guidance for local authorities and the Public Law Outline have been designed to complement each other to make the best use of resources.”*

He also indicated the development of a new framework for the family courts system directed to the following areas -

1. The practical arrangements for judicial management of a unified family court - comprising judges of the High Court, Circuit and District Judges, and magistrates of the family proceedings court.
2. Allocation criteria for the categorisation and distribution of family proceedings as between those groups of judges. A draft has already been circulated.
3. A public law case management practice direction applicable to all levels of court i.e. the Public Law Outline.
4. Gatekeeper and listing guidance covering the issue and allocation of proceedings, and the administrative support necessary in that respect which will be produced as the last element in place once the initiatives mentioned by Bridget Prentice are complete.

5. A private law case management practice direction (i.e. the revised Private Law Programme) yet to be completed and incorporated into the final element.
  
6. New Family Procedure Rules (currently being drafted by the Family Procedure Rule Committee) along the lines of the CPR and accommodating the new arrangements due to be completed in 2008.

The President clearly indicated that the Framework is designed to make the best use of existing resources across the Family Justice System: The allocations guidance, for example, is intended to assist the decision makers, or gate-keepers, to list cases in the appropriate level of court and to make the best use of family magistrates who are currently under used. The new rules are intended to ensure greater consistency of practice between the levels of family court and lead to greater retention of less complex care proceedings in the FPCs.

The Framework is underpinned by the work of HMCS, both through the Unified Family Service project, which is bringing together the administration of the different tiers of court as far as possible, and through its commitment to provide the magistrates and judges with sufficient support staff and, in particular, case progression officers in the County Court and specialist legal advisers in the FPCs, both of whom will play key roles in progressing cases within the timetables set by the judiciary.

## **Delay**

There was an early recognition by all agencies involved in the Care Review that a key factor in delay in care proceedings was insufficiencies in the pre-proceedings work of the Local Authorities. While this is inevitable in emergency cases, in many cases, initial social work assessments had not been completed before proceedings were issued, and in others insufficient enquiry had been made with regard to problem-solving within the family, which meant that much which could have been explored, or assessments which could have been made pre-proceedings, required exploration within the proceedings, with consequent delays and expense to the legal aid fund.

The Care Review recommended that change is needed to reduce the impact of delay on the children involved. The Care Review made a number of recommendations to improve the system for children and families subject to care proceedings and to ensure that all resources in the system are used in the most timely and effective way. In particular, it encouraged early intervention to find resolutions before cases reach court, and when cases do proceed to court, identified ways to improve the quality of local authority applications and improve case management procedures.

## **Judicial continuity**

The President has accepted on the part of the judiciary that –

*“... in some cases, judges have failed to get a sufficient “grip” on the proceedings at an early stage, isolating the essential issues and making and enforcing the necessary directions. This is addressed in the Public Law Outline and I am emphasising the need for judicial*

*continuity in its operation.”*

### **The key elements of change**

The Care Review highlighted 5 key areas for attention:

**Helping families –**

ensure families and children understand proceedings.

**Better informed resolution –**

ensure applications are only made after all safe, appropriate alternatives have been explored.

**Preparation for proceedings –**

improve quality and consistency of section 31 applications.

**During proceedings –** improve case management.

**Inter-agency working –**

encourage closer professional relationships.

### **The Care Proceedings Programme**

The Care Proceedings Programme was established to take forward the work arising from the Care Review, as well as other initiatives designed to reduce delay. The Programme is led by the Ministry of Justice with wide inter-agency involvement from the DCSF, the Welsh Assembly Government, the Judiciary, Cafcass, Cafcass Cymru and the Legal Services Commission. The Programme

also works closely with the Association of Directors for Children's Services, the Local Government Association, the Children's Commissioner and the Association of Lawyers for Children.

The work is overseen by an inter-agency Ministerial Group, Delivery Board and Implementation Steering Group. The focus for the Steering Group is to provide support to ensure family justice agencies embed the new procedures under the statutory guidance and the PLO into their own practices and systems and to ensure a programme of inter-agency training is delivered in the lead up to national implementation.

### **The consultation process and the 10 initiative areas**

The revised statutory guidance is currently out for consultation. DCSF launched a three month consultation on 21 June 2007 and the closing date for responses was 28 September 2007. The consultation was also issued to all Local Authorities in Wales, and this consultation closed on 19 October 2007.

At the same time, the President has sent the draft PLO to the Care Proceedings Ministerial Group, Delivery Board, Stakeholder Group, Family Justice Council and the Family Procedure Rules Committee, for comment by 13 September 2007.

The President is also keen for the experiences of 10 initiative areas to help inform the development of the PLO. The initiative areas were determined by the President in consultation with relevant Designated Family Judges.

The PLO is being tested in the following Care Centres and Family Proceedings Courts which feed into these centres:-

- Birmingham
- London
- Liverpool
- Warrington/Chester
- Newcastle/Sunderland
- Exeter/Plymouth
- Leicester
- Milton Keynes/Oxford
- Swansea
- Portsmouth

The outcome of the consultation and feedback from the initiative areas will help inform the final draft of the PLO, which is to be produced by the end of the year. Following agreement by the Lord Chancellor, the final version will be implemented nationally from April 2008.

Following the analysis of responses to the consultations in England and Wales the final guidance is expected to be issued in advance of the final PLO, which will give local authorities time to imbed these practices before the PLO is implemented nationally.

### **The revised statutory guidance**

Local authorities will be expected to submit better quality applications to court. The revised guidance places increased emphasis on pre-proceedings preparation of cases by local authorities to ensure that all the necessary steps

have been completed prior to issuing proceedings to avoid unnecessary delay during the start of the court process. This will ensure that all kinship care options have been fully explored, core assessments carried out and that care plans have been prepared and shared with families.

A key change is the entitlement of parents and those with parental responsibility, to non-means tested publicly funded legal advice. This can be accessed once the local authority has notified parents and others with parental responsibility of its intention to initiate proceedings. This additional legal help will cover liaison and negotiations with local authorities, with the aim of either avoiding proceedings or if this is not possible, identifying the key issues in dispute at an early stage.

### **Ensuring that local authorities will be able to meet the pre-proceedings elements**

In each of the initiative areas the court will closely and routinely consider what action has been taken by local authorities before a care application has been made, for example ensuring all kinship opportunities have been fully explored and that a core assessment has been completed.

While this is to be specifically included in the new guidance, it is very likely that local authorities in the initiative areas are already only making section 31 care and supervision orders on the basis of completed core assessments and with care plans already prepared. If certain pre-proceedings action has not been taken, the judge and/or legal adviser will consider issuing standard directions to ensure this work is taken forward as the case progresses.

The LSC notes relating to the PLO address possible concerns about the additional work that may be required by local authorities –

*“...since these changes are primarily about 'front loading' interventions rather than about adding additional stages to the process, we do not consider that there will be an overall increase in the burden on local authorities. In fact, the burden on local authorities may reduce, in terms of the simplification represented by the PLO, compared to the existing Protocol. “*

### **The notification to parents**

The notification to parents should be provided to them as soon as possible after the local authority has decided that it intends to make a section 31 Children Act 1989 application. The draft guidance makes clear that the communication to the parents should make clear the basis of the local authority's concerns about the welfare of the child. Unlike the other volumes of Children Act 1989 guidance, Volume 1 is as much of relevance to local authority legal advisers as it is to social workers and other children's services practitioners.

### **The main changes – the 4 stages**

The process will be more streamlined so that the six stages under the current Protocol will be reduced to four stages, greater emphasis on **pre-proceedings** preparation:

**1) Issue and First Appointment** to allocate and give initial case management directions

**2) Advocates meeting and Case Management Conference (CMC)** to identify issues and give full case management directions. Before the Case Management Conference (CMC), parties will be asked to complete a draft case management template order, which has been circulated to all initiative areas. Courts will be required at the CMC to identify and isolate the essential issues in the case and to make directions to ensure the relevant evidence is available to determine them.

**3) Advocates meeting and Issues Resolution Hearing (IRH)** to resolve and narrow issues and identify any remaining issues. At the IRH, the court will look at the evidence, encourage resolution of the issues (which by then should have narrowed or be capable of being resolved) and fix the final hearing, having defined the relevant questions still to be decided by the court. It is anticipated that, if the advocates and the court have done their job, in a substantial number of cases the matter may never require a final hearing.

**4) Hearing** to determine remaining issues

A key feature of the PLO is the increased emphasis on pre-proceedings preparation to ensure that applications are made only in appropriate circumstances and after alternatives have been properly explored. In this way the PLO seeks explicitly to take account of the revised statutory guidance, which sets out all the steps that local authorities need to complete before issuing proceedings.

The timetable for progressing a case will be fixed around the needs of the individual child involved and all cases will be listed in accordance with these individual timetables.

Enhanced case management and advocacy preparation is intended to ensure that the key issues in the case are identified early on. A new case management template order will help to support this, and a final hearing date will only be set when the issues have been narrowed down, so the final hearing can focus on only the main issues in dispute.

### **Advocates' meetings**

Each of stages 2 and 3 will be preceded by an essential and detailed advocates' discussion. The courts will be heavily reliant on the work done by advocates at this stage. The lawyers will be required to thrash out the issues, to explore the question of settlement and produce agreed documentation as a basis for the court to make directions at the CMC and IRH. If these advocates' discussions are to be effective, they cannot be held at the door of the court and the lawyers must devote proper time to them.

### **Remuneration**

The President has emphasised the necessity for the Legal Services Commission to appreciate that when providing its new model for advocates' remuneration it will be essential:

- a. to gear payment for advocacy services to the four stages of the Outline; and in particular
- b. properly to recognise and remunerate not only the CMC and IRH hearings but also the earlier advocates' meetings, the proper and careful conduct of which will be vital to the successful operation of the Outline.

### **Existing cases**

The draft PLO will not apply retrospectively to cases that are already in the Protocol system. Therefore all cases issued after implementation of the initiative locally should follow the processes under the draft PLO. The current Protocol will continue to be applicable to applications made before this point.

### **Concurrent planning and adoption cases**

Although the current timetabling does not appear to take into account the need for Adoption Panel consideration of care plans, the actual and/or potential involvement of an Adoption Panel is a factor that the court will need to consider in setting a timetable for the child in individual cases. The Family Justice Council has recently issued guidance on concurrent planning in care cases.

### **Additional assessments**

The new process seeks to ensure that assessments take place before care proceedings start. However, it is not the intention that all of the work done in proceedings is to be shifted pre-proceedings. It is important to ensure that core assessments are undertaken wherever possible before proceedings commence. Where the contents are disputed and the lack of agreement requires protective measures to be taken, the question of further assessments will need to be addressed in care proceedings.

### **Finding of fact hearings**

The court will factor Finding of Fact hearings into the timetable in the same way as presently. Finding of Fact hearings should be timetabled around the CMC so

that a Finding of Fact hearing is directed and an adjourned CMC can then consider the consequence for further directions.

### **Significant changes in circumstances**

In the event that there is a significant change of circumstances very late in the case, for example at the Issues Resolution Hearing, the parties should advise the court of this immediately. They may be able to agree directions and a next hearing date and advise the court of their proposals. In any event, the case management judge (which includes the legal adviser at FPC) will consider their proposals and determine the best way forward. This could result in approving the agreed directions or could include fixing an urgent hearing to review the situation and making directions for any necessary information to be available for that hearing.

### **Cases involving more than one child**

The timetable for the child may differ for different children and consideration will need to be given to all of the circumstances in a case to determine how and when the case should proceed. As at present, if one child's case will be ready well in advance of another's it may be appropriate to deal with it then. In considering whether it is in fact ready, the court will have regard to all parties' positions and will not consider the same issues in dispute on more than one occasion.

### **Contested ICO hearings**

The decisions about when contested ICO hearings will be held will be a matter of local resources. Some cases will be transferred on Issue, with the first hearing at

the County Court, and some will be listed before a legal adviser at the FPC. In cases before the FPC, the FPC should endeavour to deal with the ICO either on the day of the First Appointment or the next working day. The court should have sufficient information on the Issue of proceedings to determine the best way to proceed. In most cases, in accordance with the Outline, arrangements for contested interim hearings will be considered at the First Appointment. This will enable the parties with the court to identify the issues and evidence required for the contested hearing.

### **Evaluation of the PLO**

The LSC notes indicate that it will be important to gain an early indication of whether the PLO is having a positive impact. As the average care case lasts about one year, the full benefits of the initiatives are not likely to emerge immediately. However, the President and members of the Implementation Steering Group have agreed an approach to evaluation which looks at the extent of user engagement, will assess the quality of applications and the effectiveness of case management in those stages of the PLO that care cases reach. Lessons learnt in implementing the statutory guidance and PLO in the initiative areas will also help inform national implementation.

An inter-active online survey is being developed which all of those involved in the initiatives will be able to access. This will ask questions about the extent of user engagement and the impact of the new processes, both before proceedings have been issued and during the court process, depending on how far the case has progressed. Recognising that the commencement of the testing of the PLO varies from area to area, the Programme Team will liaise separately with each initiative area as to how and when this survey might be released in their area. It was hoped to start releasing the survey in some areas in September 2007.

In addition, the Ministry of Justice Research Unit will conduct a small number of visits to selected initiative courts to review court files where the new processes have been applied. Relevant centrally held data in HMCS, the Department for Children, Schools and Families, the Welsh Assembly Government, Cafcass, Cafcass Cymru and the legal Services Commission about the progress of cases will also be reviewed. The outcomes of these pieces of work will be fed back in a report to the President in October.

In addition, the President will be holding a meeting with DFJs in October to discuss their experiences in implementing the initiatives. The President has also asked DFJs to complete a 'record of allocation' form. Two copies of this form should be produced by the court, one of which should be kept on the court file with any orders, the other to be held centrally by the court. At a later date, the President will ask for the centrally held copies of these forms to be sent to him, in order to assess how allocation decisions have been taken in accordance with the draft allocations guidance.

The President has asked courts to keep copies of the 'record of allocation' forms. A 'case history monitoring form' has been provided to courts if they find this useful to help inform what is happening to cases which are applying the PLO.

### **The changing role of CAF/CASS**

CAF/CASS has developed new National Standards for CAF/CASS practitioners, being phased in from June 2007; these Standards have been endorsed by the President. The emphasis of the work of the Children's Guardians in public law cases will change to the extent that they will not only be appointed earlier, but they will also be required to provide analysis of the local authority work and

plans, for consideration by the advocates and the court at crucial stages in the proceedings, setting out any additional steps or action they consider to be needed.

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