

<b>Title:</b> Amendments to Part 25 of the Family Procedure Rules 2010 relating to expert evidence <b>IA No:</b> <b>Lead department or agency:</b> Ministry of Justice <b>Other departments or agencies:</b> Department for Education	<b>Impact Assessment (IA)</b>
	<b>Date:</b> 15/11/2012
	<b>Stage:</b> Final
	<b>Source of intervention:</b> Domestic
	<b>Type of measure:</b> Secondary legislation
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<b>Summary: Intervention and Options</b>	<b>RPC Opinion:</b> RPC Opinion Status
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Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Measure qualifies as One-Out?
£m	£m	£m	No   NA
			No   NA

**What is the problem under consideration? Why is government intervention necessary?**  
Care proceedings currently take an average of 51.5 weeks to be determined in the family courts. This case duration causes uncertainty for children and may reduce the likelihood of them finding a stable placement. Evidence suggests that expert evidence is commissioned in the vast majority of public law cases and cases in which more experts are instructed tend to take longer. We believe that some of this evidence might be unnecessary and might be more tightly focussed. Amendments are needed to ensure the courts have the tools to refuse requests for expert reports where they are unnecessary. Amendments are needed in relation to other family proceedings to provide a consistent legislative framework.

**What are the policy objectives and the intended effects?**  
The policy objective is to reduce case duration in public law proceedings without having an adverse impact on case outcomes and to provide a consistent legislative framework for decision making by the courts on expert evidence across all family proceedings.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**  
Option 0: Do nothing  
Option 1: Amend the Family Procedure Rules to strengthen the court's control on the use of expert evidence in family proceedings relating to children, including agreeing the questions put to the expert.  
Option 2: Amend the Family Procedure Rules to strengthen the court's control on the use of expert evidence in family proceedings not relating to children, including financial remedy matters.  
The preferred option is to implement both Options 1 and 2. This will give the courts the tools to decline requests to instruct an expert or put expert evidence before the court when it is considered unnecessary for appropriate decision making in the case, and will put in place a consistent framework across all family proceedings.

**Will the policy be reviewed?** It will be reviewed. **If applicable, set review date:** 12/2017

Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	<b>Micro</b> Yes	<b>&lt; 20</b> Yes	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> No
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b>		<b>Non-traded:</b>

**I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.**

Signed by the responsible Minister: \_\_\_\_\_ Date: **Tom McNally**  
19/11/2012

# Summary: Analysis & Evidence

# Policy Option 1

**Description:** Amend the Family Procedure Rules to strengthen the court's control on the use of expert evidence in family proceedings relating to children, including agreeing the questions put to the expert.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	Not quantified

### Description and scale of key monetised costs by 'main affected groups'

We have not quantified the costs and benefits of this proposal as the commissioning of expert evidence will be subject to judicial discretion and therefore we cannot accurately predict how many expert reports will no longer be commissioned or will in future have a narrower scope. There is also no accurate baseline figure for current total expenditure on experts.

### Other key non-monetised costs by 'main affected groups'

The proposal may lead to familiarisation and adjustment costs for legal professionals and experts. There may initially be an increase in appeals against case management decisions of the court which would bring additional costs for HMCTS, local authorities, Cafcass/CAFCASS Cymru and the legal aid fund. In addition to these transitional costs, there would be an ongoing reduction in business for experts and possibly also for some legal services providers.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	Not quantified

### Description and scale of key monetised benefits by 'main affected groups'

### Other key non-monetised benefits by 'main affected groups'

If fewer expert reports are requested, cases may be resolved more rapidly which may benefit children. There may be a fall in workload for HMCTS, Cafcass/CAFCASS Cymru and local authorities if the policy leads to shorter case durations and a fall in the number of hearings in public law family cases. This may include reduced care costs for local authorities. There may be lower costs for legal aid and local authorities who pay for expert reports and reduced legal costs for local authorities.

### Key assumptions/sensitivities/risks

Discount rate (%)

We have assumed no impact on case outcomes or private law cases involving children. If experts currently substitute for work which should be carried out by local authorities or Cafcass or CAFCASS Cymru, those agencies may face increased costs and/or cases may be delayed if they are asked to undertake this work and if they cannot meet this workload. We have assumed court fees remain unchanged and no change in the underlying volume of court cases.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

# Summary: Analysis & Evidence

# Policy Option 2

**Description:** Amend the Family Procedure Rules to strengthen the court's control on the use of expert evidence in family proceedings not relating to children, including financial remedy matters.

## FULL ECONOMIC ASSESSMENT

Price Base Year 2012	PV Base Year 2012	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate:

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	Not quantified

### Description and scale of key monetised costs by 'main affected groups'

The proposal may lead to small familiarisation costs in the short term for legal professionals and experts working in family law cases, however we have not been able to monetise this.

### Other key non-monetised costs by 'main affected groups'

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	N/A	N/A	Not quantified

### Description and scale of key monetised benefits by 'main affected groups'

### Other key non-monetised benefits by 'main affected groups'

Implementing Option 2 alongside Option 1 may benefit HMCTS, the judiciary, legal professionals working in family justice and court users by providing a single, consistent framework for decision making by the courts across all family proceedings.

### Key assumptions/sensitivities/risks

Discount rate (%)

We have assumed that the changes will not affect how experts are used in private law cases not relating to children since we have no evidence to suggest that there is a significant problem with unnecessary use of experts in these proceedings.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			In scope of OIOO?	Measure qualifies as
Costs: N/A	Benefits: N/A	Net: N/A	No	NA

# Evidence Base (for summary sheets)

## Introduction

### The Family Justice Review

The Family Justice Review was commissioned in 2010 by the Secretaries of State for Justice and for Education and the Welsh Government. The FJR was invited to undertake a comprehensive review of the system of family justice in light of increasing pressures on the system and growing concerns that the system was not delivering effectively for children and families. Following an initial call for evidence and a subsequent consultation, the Family Justice Review published its final report on 3 November 2011. On 6 February 2012 the Government published its formal response to the Review, setting out its programme of reform for family justice.

The Family Justice Review made ten recommendations for reforms to the way experts are commissioned and paid for. The recommendations for reforms are focussed on public law family cases. Public law family cases are those in which local authorities have concerns about the welfare of children, and where local authorities seek a determination from the court about whether children should be taken into local authority care. Nevertheless, the same considerations can also be applied to the way experts are instructed in private law cases concerning children, such as the making of arrangements for the future care of children (e.g. contact and residence). Private family law also deals with other issues arising after the breakdown of a relationship such as divorce and dividing finances.

The Family Justice Review recommendations considered in this Impact Assessment are:

1. Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case. The Family Procedure Rules would need to be amended to reflect the primary legislation.
2. The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved. Independent social workers should be employed only exceptionally.
3. Judges should direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. Judges should set out in the order giving permission for the commissioning of the expert witness the questions on which the expert witness should focus.

This Impact Assessment considers the impact on all types of expert witness evidence. It is not restricted to independent social worker reports, which would be subject to the same considerations in the courts as other types of reports.

### Draft family justice legislation

It has always been the Government's intention that there should be a statement on the use of experts in primary legislation, in line with the Family Justice Review's recommendations set out above. The Government therefore published draft family justice legislation on 3 September 2012 which includes provisions on the use of expert evidence in family proceedings relating to children. The draft clause on experts would:

- Require the court's permission for an expert to be instructed or for expert evidence to be used;
- Require the court's permission for a child to be medically or psychiatrically examined or assessed for the purpose of obtaining expert evidence for use in the proceedings;
- Restrict expert evidence to that which is necessary to resolve the proceedings justly; and

- Require the court to consider a number of factors when determining whether to permit an expert to be instructed. These include the impact on the welfare of the child; the impact on timetable for the proceedings; what other expert evidence is available; and whether the information could be obtained from another person (such as one of the parties).

It takes time to secure and implement primary legislation and it is likely that the proposed primary legislation would not take effect before Spring 2014.

## The proposals

The Family Procedure Rules state that expert evidence will be restricted to that which is reasonably required to resolve the proceedings. However, anecdotal evidence suggests that this is not being applied consistently and that the threshold of 'reasonably required' is insufficient to prevent the routine commissioning of expert reports (and in many cases multiple reports, as discussed further below) even when it adds little to the court's understanding of the issues in the case. Amendments to the Rules should ensure the courts have the tools to refuse requests for expert evidence when it is unnecessary and unlikely to assist the court. This is intended to reduce delay in public law proceedings without having an adverse impact on case outcomes. This may reduce uncertainty for children involved in these cases and increase the likelihood of them finding a stable placement. The link between case duration and the use of experts is explained further below.

The Government considers that there is a pressing need to make progress to tackle delays in the system as soon as possible in order to prepare the ground for the introduction in primary legislation of a 26 week time limit on care and supervision proceedings. With nearly 21,500 children involved in applications for a care or supervision order in 2011, it is important to take action now to mitigate the harmful effects on children of delays in securing, in a more timely way, permanent placement in which they can form secure attachments to their carers.

These early changes to Rules are one of a series of steps that are being taken to reduce the length of time it takes for cases to conclude and to reduce the volume of cases currently in the system, including the development of judicial guidance and case management tools, more effective tracking of cases and the formation of a Family Justice Board with a remit to tackle delay across the system. The Department for Education is also working with the Children's Improvement Board to support local authorities in preparing cases more effectively for court. Without these preparatory steps, there is a significant risk that the effectiveness of future primary legislation to speed up cases will be reduced because the courts and other agencies will not have the capacity to conclude care and supervision proceedings within the proposed 26 week time limit. In Spring 2012, the Government therefore asked the Family Procedure Rule Committee to consider the scope for early changes to secondary legislation (the Family Procedure Rules) and the associated Practice Direction on experts in line with the Family Justice Review recommendations. The Family Procedure Rule Committee is responsible for making rules governing practice and procedure in family proceedings in England and Wales.

### *Family proceedings relating to children*

The amendments agreed by the Family Procedure Rule Committee, which would in due course largely be superseded by the proposed primary legislation, would:

- Require the courts to restrict expert evidence to that which, in the opinion of the court, is necessary to assist the court to resolve the proceedings (replacing the current requirement that such evidence must be 'reasonably required' by the court);
- Require the court, when deciding whether to permit an expert to be instructed, a child to be examined or assessed for the purposes of obtaining expert evidence, or expert evidence to be put before the court, to take account of a set of specified factors. Currently, no factors are specified. These include the impact on the welfare of the child; the impact on the timetable for proceedings and whether the evidence which is needed is available from another source such as the local authority, as well as the factors listed below that will apply in family proceedings not relating to children; and

- Require the court to settle the questions that are to be put to the expert to ensure they are focused on the determinative issues for the court.

The Family Justice Review focused on the use of expert evidence in public law (care and supervision proceedings). However, the Family Procedure Rule Committee concluded that it would be appropriate to apply the new threshold for expert evidence, the factors and the other changes set out above to all proceedings relating to children, including private law cases. This is to ensure that the impact on children is considered carefully regardless of the type of proceedings, and reflects the fact that welfare considerations are of paramount importance to the court in all proceedings relating to children. It also reflects the current position in the Rules that the court's control over expert evidence is greater in family proceedings relating to children (where permission is required to instruct an expert and not just to put such evidence before the court) compared with other types of proceedings. This approach is also consistent with the draft provisions in the Children and Families Bill which cover all proceedings relating to children.

#### *Family proceedings not relating to children including financial remedy matters*

The Family Procedure Rule Committee is responsible for making court rules in relation to all types of family proceedings, not just those relating to children which were the subject of the Family Justice Review. The Committee considered therefore whether the changes outlined above had implications for the Rules on the use of experts in other types of proceedings. We have no evidence to suggest that there are significant problems with the use of experts in these proceedings or that they are being used unnecessarily and leading to delays. Having considered the responses to a targeted consultation with key interested bodies in August and September 2012, the Committee concluded that it would be inappropriate to have in place a differential (lower) threshold for expert evidence in decisions on matters such as financial remedy proceedings. The existence of two different regimes for different types of proceedings would be more complex for those using the courts and could potentially lead to inconsistency in approach by the courts. It would also risk sending an incorrect and perverse signal that expert evidence is less important where matters which could have a profound impact on a child's future life are at stake compared with issues relating to the appropriate division of a couple's finances.

The amendments agreed by the Family Procedure Rule Committee would:

- Require the courts to restrict expert evidence to that which, in the opinion of the court, is necessary to assist the court to resolve the proceedings (replacing the current requirement that such evidence must be 'reasonably required' by the court);
- Require the court, when deciding whether to permit expert evidence to be put before the court, to take account of a set of specified factors. Currently, no factors are specified. These factors include the issues to which the expert evidence would relate; the questions which the court would require the expert to answer; the impact on the timetable for the proceedings; and the cost of the expert evidence.

#### **Affected groups**

These proposals may affect everyone involved in family justice, specifically the following groups:

- Parties involved in family proceedings including families and children.
- HM Courts and Tribunals Service (HMCTS).
- The Judiciary.
- Local authorities.
- Cafcass (Children and Family Court Advisory and Support Service) and CAF/CASS Cymru

- The Legal Services Commission (LSC), which administers the legal aid fund.
- Legal professionals working in family justice.
- Experts commissioned in family proceedings. These experts come from a wide range of professions including social workers, psychiatrists, psychologists and medical professionals as well as experts in financial matters such as accountants and surveyors.
- Charities and other voluntary groups working in family justice.
- Other court users.

### **Case durations in the family courts and expert reports**

We believe that the commissioning of multiple experts contributes to increased case length and cost in care proceedings. A review of a sample of approximately 400 public law case files where an order was made in 2009 found that expert reports were commissioned in 87% of cases and in 74% of cases more than one expert was commissioned<sup>1</sup>. Whilst we cannot say that the increased use of experts necessarily causes delay in public law family cases, higher numbers of experts are associated with longer cases. In the case files reviewed public law family cases involving expert reports were longer on average than cases where no expert reports were requested. Cases with no expert reports lasted an average of 26 weeks, cases where between one and three expert reports were requested took an average of 50 weeks, cases where four to six expert reports were requested took an average of 52 weeks, and cases where seven or more expert reports were requested took an average of 65 weeks.<sup>2</sup>

Evidence from a file review exercise indicates that expert reports are ordered less frequently in private law proceedings concerning children (37% of cases, with an average of two reports in those cases). Cases where at least one expert was requested were longer (at 65 weeks) than the average of 46 weeks. As with public law proceedings, we cannot say that increased use of experts necessarily causes delay in private law family cases concerning children.

We have no evidence that private law family cases concerning children face significant problems with unnecessary commissioning of expert reports or that expert reports are contributing to significant delays. Nor do we have any evidence that there are significant problems relating to expert evidence in other types of private law family proceedings. Therefore we do not expect that this legislation will affect how experts are commissioned in private family law proceedings. Nevertheless, the Family Procedure Rule Committee concluded, for the reasons highlighted above, that a consistent approach should be taken across all family proceedings. In proceedings relating to children specifically, this will ensure that the impact on children is given sufficient weight in the decision making process. In addition, the Family Justice Review expressed concern about the effect of multiple assessments on children who are required to tell their stories again and again.

In some cases expert reports are necessary and beneficial to the case. However, anecdotal evidence received via the Family Justice Review consultation suggested that in other cases expert reports are not adding value to the case and are increasing delays for children. The Family Justice Review highlighted the problems associated with long case durations in the family courts. In 2011 nearly 21,500 children were involved in applications for a care or supervision order. The latest data available (2<sup>st</sup> quarter of 2012) shows that care and supervision applications took on average 51.5 weeks to be completed. Delays can be damaging to children. The longer a child spends in temporary care arrangements, the more likely they are to form attachments to their carers, and the more distress they are likely to feel when they are moved to another temporary or permanent placement<sup>3</sup>.

In addition expert reports are a significant expense for the legal aid fund and for local authorities. The cost of expert reports is usually split between all parties in the case. Parents and children involved in public law family cases are entitled to legal aid without a means or merit test<sup>4</sup> so their share of these

<sup>1</sup> Cassidy, D., and Davey, S. (2011). *Ibid.*

<sup>2</sup> Cassidy, D., and Davey, S. (2011). *Ibid.*

<sup>3</sup> Davies, C and Ward, H. (2011), *Safeguarding children across services; messages from research.*  
<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-RR164>

<sup>4</sup> Civil legal aid is means and merits tested. It is only available to those who cannot afford it, or who have a case that has a reasonable chance of winning and is worth the money it will cost to fund it.

costs are met by legal aid. Information on the exact cost of expert reports is not collected by the Legal Services Commission; payments to experts are recorded as disbursements along with other expenses such as travel. In 2011-12 about £62m was spent on disbursements in special Children Act 1989 cases (such as care and supervision cases) by the legal aid fund. Anecdotal evidence suggests that expenditure on experts accounts for about two-thirds of the LSC's overall disbursement spend across all categories of funding; if this proportion is applied to special Children Act 1989 cases it would equate to about £40m. If court cases are shorter as a result of these changes there may in some cases also be reduced legal costs being met by the legal aid fund, local authorities and potentially by individuals who do not receive legal aid. This is contingent on how legal professionals are paid currently and how their workload might change in future. Where local authorities use their own in-house lawyers, they might experience a direct cost saving if workloads are reduced as a result of having to consider fewer or more tightly focused expert reports.

Local authorities are also party to public law cases and incur expenses for expert reports. In addition the costs of some assessments, such as residential assessments, are paid entirely by local authorities. Shorter court cases could also mean reduced costs to local authorities of placing children in care.

Guidance and Rules of Court on the focused use of experts introduced in 2011 have not prevented a high number of reports being commissioned in care and supervision proceedings.

## **Economic Rationale**

The conventional economic approach to government intervention to resolve a problem is based on efficiency or equity arguments. The Government may consider intervening if there are strong enough failures in the way markets operate (e.g. monopolies overcharging consumers) or if there are strong enough failures in existing government interventions (e.g. waste generated by misdirected rules). In both cases the proposed new intervention itself should avoid creating a further set of disproportionate costs and distortions. The Government may also intervene for equity (fairness) and redistributive reasons (e.g. to reallocate goods and services to the more needy groups in society).

In this case we believe that government intervention is justified on efficiency grounds.

In theory, the family justice system is to ensure that family law proceedings are concluded with a minimal input of time and resources whilst maintaining a best possible outcome for children and families involved.

However, the current set-up of regulations around the use of experts in the family justice system does not provide the right incentives to ensure efficient decision making, possibly contributing to a heightened average length of proceedings. The length in turn, may lead to a delay in securing better outcomes for children (equity argument) and an inefficient allocation of resources in the family justice system.

Government intervention here is necessary to increase fairness for children from quicker case resolution as well as resource efficiency.

## **Cost and Benefits**

This Impact Assessment identifies both monetised and non-monetised impacts on individuals, groups and businesses in the UK, with the aim of understanding what the overall impact to society might be from implementing these options. The costs and benefits of each option are compared to the do nothing option. Impact Assessments place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However there are important aspects that cannot sensibly be monetised. These might include how the proposal impacts differently on particular groups of society or changes in equity and fairness, either positive or negative.

## **Base Case / Option 0**

This is the do-nothing option. Under this option, it is assumed that experts continue to be commissioned in the vast majority of care and supervision proceedings, and there are no changes to the commissioning of experts in other types of proceedings. In care and supervision proceedings, it is assumed that there continue to be delays in parties being able to agree the questions to be put to the expert, with



consequent delays in sending letters of instruction to the expert to enable them to start work, and that some letters of instruction remain insufficiently focused on the key issues for the court.

Because the do-nothing option is compared against itself its costs and benefits are necessarily zero, as is its Net Present Value (NPV)<sup>5</sup>.

### **Option 1 – Amend the Family Procedure Rules to strengthen the court’s control on the use of expert evidence in family proceedings relating to children, including agreeing the questions put to the expert.**

We expect that this change will lead to a reduction in the number of expert reports commissioned in public law family proceedings. However, expert reports will still be commissioned where the court considers that they are necessary to resolve the proceedings. As a result we cannot predict how many expert reports will no longer be commissioned. We expect that reductions in expert reports will occur mainly in cases where the assessment could be undertaken by the local authority, Cafcass or CAF/CASS Cymru or where the expert’s evidence is unlikely to add value to the case. We also expect that this should lead to more concise expert reports with a narrower scope and should focus experts on the determinative issues.

It should be noted, however, that the changes to the commissioning of experts are not being taken forward in isolation, and decisions may be influenced by other factors including wider initiatives to reduce delays, judicial guidance and training initiatives, and initiatives to enhance social work assessments. It may therefore be difficult to ascribe any impact observed in the data solely to the Rule changes on experts.

### **Costs of Option 1**

HMCTS, the Judiciary, local authorities, Cafcass or CAF/CASS Cymru practitioners and legal professionals working in family justice will incur some familiarisation costs from learning about the revised decision making process. This will involve ensuring that they are familiar with the amendments to Rules of Court and supporting Practice Directions. As the Rule changes affect only one part of the Family Procedure Rules, we expect this will be fairly minimal.

The judiciary may face additional time costs in relation to the time they may need to take to settle the questions which are to be put to the expert and to ensure this is set out in the court order giving permission for the expert to be instructed. We expect this to be fairly minimal as the party/lead party responsible for instructing the expert is expected to include proposed questions within a draft court order and, if possible, to have shared this with other parties involved in the instruction of the expert in advance of the hearing.

Experts may experience a fall in income as fewer reports may be commissioned and those that are commissioned may take less time. Therefore experts may experience a fall in workload.

A secondary impact of reducing the volume of experts is that legal professionals working in family justice may also experience a fall in workloads from this source if the number of hearings and preparation associated with hearings can be reduced. The impacts on them depend on how they are paid and the extent to which they can substitute to other work.

We have assumed that these reforms will have no adverse impact on case outcomes (e.g. whether an order is granted or not). As a result of this assumption there would be no costs for the families and children involved in these cases.

It is possible that there may at least initially be an increase in appeals against case management decisions of the court to refuse requests for an expert to be instructed or expert evidence to be put to the court, or against decisions of the court to narrow down the issues on which an expert is asked to report. Any increase in appeals would bring additional costs for HMCTS, local authorities, Cafcass/CAF/CASS Cymru and the legal

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<sup>5</sup> The Net Present Value (NPV) shows the total net value of a project over a specific time period. The value of the costs and benefits in an NPV are adjusted to account for inflation and the fact that we generally value benefits that are provided now more than we value the same benefits provided in the future.

aid fund. However, we do not expect this to be significant as the current volume of appeals is low. In 2011 there were 62 appeals filed in the Court of Appeal Family Division, of which 29 were allowed.

## **Benefits of Option 1**

### Families and Children

Reducing the number and scope of expert reports commissioned in public law cases could lead to shorter cases. This may reduce uncertainties for the families and children involved and may help to reduce the negative outcomes for children associated with spending a long time in transitional arrangements. If children experience multiple placements while proceedings are ongoing, this can cause distress in the short term and directly impact on a child's long term life chances by damaging the ability to form positive attachments. For some children it may improve the likelihood of them finding a stable placement – the longer proceedings last, the older a child gets and the less likely it is that a child will find a secure and stable placement, particularly through adoption<sup>6</sup>.

### HMCTS

Reducing the number and scope of expert reports commissioned may reduce the number of hearings required in each case and therefore the resources required to process each case.

In terms of staff time, we estimate that on average a public law case in the County Court requires about 16.5 hours of administrative time to process<sup>7</sup>. Using an average salary for court staff this equates to approximately £260<sup>8</sup>. We do not have data about the administrative processes of the Family Proceedings Court, but we expect that administrative requirements are similar for those cases which are heard there. There are other HMCTS costs in addition to staff time which have not been quantified, e.g. other facilities costs. A reduction in resources required to process each case would reduce this figure however we are not able to quantify by how much.

In addition to the administrative staff time, there is considerable judicial involvement in these cases. We do not have reliable estimates of the average amount of judicial time used in each case but a recent review of case files found that there was an average (mean) of 8.1 hearings in public law cases. In cases involving a care application there were an average of 8.8 hearings. In addition to the time spent in hearings, judges have to prepare for cases.

We do not collect data on the number of hearings scheduled to consider whether expert reports should be commissioned or to consider their assessment, and so we cannot estimate the time spent on these matters. However, anecdotal evidence suggests that reducing the number of reports would reduce the number of hearings required and would allow hearings to be scheduled more quickly because there would be no need to wait for experts to be appointed and complete their reports. This should reduce the amount of judicial and administrative resources required per case.

It is not expected that staffing numbers would be reduced as a result of this policy and therefore the reduction in staff resources would generate an efficiency benefit but not a financial saving. It is expected that the spare staff resources generated by these reforms would be used to reduce delay in other cases.

There may be an increase in economic efficiency if the same outcomes in cases are achieved with fewer resources.

We assume that court fee levels per case will not change as a result of this proposal. HMCTS recover some court costs through fee income; in family cases HMCTS currently under-recover costs. Our assumption is that the proposals in this Impact Assessment would not lead to any changes to court fees therefore any overall reduction in court costs per case would lead to an economic efficiency gain through improved cost recovery.

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<sup>6</sup> Evidence taken from the interim report *Family Justice Review Interim Report* (2011) paragraphs 4.57 – 4.64

<sup>7</sup> The figure relates to cases that have started and concluded in the County Court. The majority of care and supervision cases will commence in the Family Proceedings Court (FPC) and then transfer to the County Court, so some of the administrative and judicial workload will be completed by FPC staff.

<sup>8</sup> This is based on an administrative salary of £21898, uprated by 25% for on-costs. Hourly figures are based on a working week of 37 hours, 47 weeks a year.

## Legal Services Commission (LSC)

The LSC pays for the majority of the cost of expert reports in public law proceedings. A reduction in the number and scope of these reports would therefore reduce costs for the legal aid fund. It is not possible to quantify this benefit because we cannot predict which expert reports would no longer be commissioned. As an illustration, if 10% of the costs of expert reports could be saved we might save approximately £4m per year. This is based on the assumption that expert costs account for approximately two thirds of disbursement costs in care and supervision cases. In addition a reduction in claims for these reports should lead to an administrative time saving for the LSC, although we expect this to be minimal.

As explained above a reduction in the number of expert reports could lead to a reduction in the number of hearings. This may reduce the legal costs associated with public law cases. These legal costs are largely met by the LSC. Legal aid costs in public law cases are paid through a series of graduated fees. Hearing fees under the Family Advocates Scheme range from £75.83 to £286.16 depending on the court and the length of the hearing. An additional 25% may also be claimed if an expert has to be challenged in court. If the number and scope of expert reports could be reduced it is possible that legal aid costs could be reduced. However, as we do not collect information on the number of hearings connected to expert reports, we cannot accurately predict the impact on legal aid costs.

## Cafcass/CAFCASS Cymru

In all care and supervision cases a Guardian will be appointed to represent the child. Guardians are always provided by Cafcass or CAFCASS Cymru, and may be Cafcass/CAFCASS Cymru employees or self-employed contractors. If there are fewer hearings in a case then there are secondary impacts that each case would require less resource from Cafcass or CAFCASS Cymru in terms of the Guardian's time. It is not expected that staffing numbers would be reduced as a result of this policy and therefore any reduction in staff resources would generate an efficiency benefit but not a financial saving. It is expected that any spare staff resources would be used to reduce delay in other cases.

## Local authorities

Local authorities are parties to all care and supervision cases. Local authority social workers attend court and spend time preparing for court. In addition, local authorities pay directly for a proportion of the cost of expert reports, including the full cost of residential parenting assessments which are understood to be more expensive than other types of expert reports.

We expect the total number and the scope of expert reports to reduce as a result of this proposal. As with legal aid costs, this would mean reduced costs for local authorities. We do not know how much local authorities currently spend on expert assessments and we cannot accurately predict how many expert assessments might no longer be commissioned.

If the number of hearings was reduced then each case may require less resource from social workers. It is not expected that staffing numbers would be reduced as a result of this policy and any reduction in staff resources would generate an efficiency benefit but not a financial saving. It is expected that any spare staff resources would be used to reduce the duration of other cases.

In addition local authorities pay legal costs for bringing public law cases, both for their in-house legal staff and for barristers (if they are instructed). If there were fewer hearings and less work was required for each case on average, there could be resource savings here. As with HMCTS, Cafcass, CAFCASS Cymru and social workers these are secondary impacts and it is expected that any spare staff resources would be used to reduce delays in other cases. If less work was required from barristers this may result in lower costs for local authorities.

Local authorities would also gain from any reduced care costs as a result of court cases taking less time.

## Non-legally aided parties in public law cases

Parents are entitled to legal aid in public law cases without a means or merits test. Other parties to these cases such as grandparents are only eligible to receive legal aid if they meet the legal aid means and merit tests. Some parties to the case may, therefore, pay their own legal costs or may represent themselves in court. If there were fewer hearings in future these legal and time costs could be lower.

## **Option 2 – Amend the Family Procedure Rules to strengthen the court’s control on the use of expert evidence in family proceedings not relating to children, including financial remedy matters.**

We do not expect that this change will lead to a reduction in the number of expert reports put before the court in family proceedings not relating to children since we do not have evidence that there is currently a problem with unnecessary use of expert evidence in these proceedings. This is supported by evidence provided in response to the Family Procedure Rule Committee’s consultation on these changes. Respondents commented that there are significantly fewer expert reports ordered in financial remedy cases and that they are not used excessively.

Parties in these proceedings will still be able to put expert evidence before the court where the court considers that it is necessary to resolve the proceedings. As these decisions are a matter for the court, we are unable to quantify the effect if the proposals were to lead to a reduction in the frequency with which the court agrees that expert evidence may be put before it.

### **Costs of Option 2**

HMCTS, the Judiciary, local authorities, Cafcass, CAF/CASS Cymru practitioners and legal professionals working in family justice will incur some familiarisation costs from learning about the revised decision making process. This will involve ensuring that they are familiar with the amendments to Rules of Court and supporting Practice Directions. In the longer run there will be no additional costs.

We have assumed that these reforms will have no adverse impact on case outcomes. As a result of this assumption there would be no costs for the parties involved in these cases.

### **Benefits of Option 2**

Implementing Option 2 alongside Option 1 may benefit HMCTS, the judiciary, legal professionals working in family justice and court users by providing a single, consistent framework for decision making by the courts across all family proceedings. Legal professionals will not, for example, need to provide evidence tailored to meet one threshold in some proceedings and another threshold in other types of proceedings.

### **Risks and Assumptions**

#### *Changes to proceedings relating to children*

We assume that the underlying volume of cases will remain the same in future.

A key assumption underpinning the expected impacts is that reducing the number of expert reports and focusing reports on the determinative issues will not generate an adverse impact on case outcomes in care and supervision proceedings (e.g. whether the order is granted or not), or on the quality of decision-making. However, it is possible that at least initially there may be more appeals against case management decisions where the court has refused a request for permission to instruct an expert or for expert evidence to be used in court, or where a court has sought to narrow down the issues on which an expert should focus.

The basis of this assumption is that the Family Justice Review panel concluded, on the basis of the evidence it received including following a full public consultation, that in some cases expert evidence has been sought when it has added little to the understanding of the court and the information could have been obtained from one of the parties, such as the local authority. The Review also found that sometimes parties add their own questions to the expert resulting in a long list of unedited questions which can be repetitive and lacking in focus. Judges will retain discretion to permit experts to be instructed when necessary to resolve the case and therefore information that is integral to good quality decision making will remain available to the court. This should ensure that the interests of the child and the parents will be considered when the court is determining whether or not to permit expert evidence. The court will be expected to agree the questions that are put to the expert and this should ensure they are focused on the key issues that will enable the court to take a decision on the outcome of the case.

There is a risk that this assumption might not hold. If so then the costs of worse case outcomes could potentially be significant, and might affect children, their families, HMCTS, Cafcass, CAF/CASS Cymru, local authorities and the Legal Services Commission. This may be so even if outcomes were worse in relation only to a small number of individual cases rather than in relation to the generality of cases. However, we consider that this risk is likely to be low because the welfare of the child and child's interests are taken into account when the courts make a case management decision about expert evidence. Furthermore, the welfare of the child is the paramount consideration when the court makes the final determination in a case concerning the upbringing of a child under the Children Act 1989.

There is anecdotal evidence that expert reports, particularly independent social worker reports, may sometimes be used to replace or replicate local authority assessments. If this is happening then restricting expert reports may lead to greater pressure for local authority social workers to enhance the quality of the evidence they offer or to be more consistent in meeting their current obligations to submit evidence to time. If so there is a risk that the reforms would generate increased costs for local authorities, and/or there is a risk that cases might be delayed if local authorities could not complete this work without requiring additional time.

When deciding whether to permit an expert to be instructed, the courts will need to undertake a balancing exercise which includes considering the impact of that decision on the overall timetable for the case. If local authorities are unable to complete the work within the court's timetable or to the court's requirements, there is a risk that an expert will still need to be commissioned, reducing the effectiveness of the measures designed to reduce the use of expert evidence.

However, action to support local authorities in their work on care proceedings is also under development via the Children's Improvement Board. The Department for Education are also facilitating discussions with the College of Social Work to ensure that court preparation and presentation skills become an integral part of initial and continuing social work training in England. Similar discussions are being facilitated by the Welsh Government with the Care Council for Wales, and being progressed through the Family Justice Network for Wales.

It has been assumed that court fees will remain unchanged. In all cases where staff resources might be saved, it has been assumed that spare staff resources would be re-deployed to reduce case duration in other cases and hence to generate benefits in other cases. As such an efficiency gain would be generated, which would be associated with the higher overall degree of cost recovery.

The evidence and concerns collected through the Family Justice Review relating to experts focused on problems arising in public law cases. We have no evidence to suggest that private law family proceedings relating to children face equivalent issues with experts, including delays or unnecessary commissioning of expert evidence. Whilst the proposed changes will apply to these proceedings, it has been assumed that in such cases experts are currently being instructed in appropriate cases. Therefore a requirement on courts to commission expert evidence only when necessary to resolve the case should have no impact on private law proceedings.

There is a risk that this assumption might not hold. If private law cases displayed similar characteristics in this regard to public law family cases then similar types of impact might apply albeit to a lesser extent given the lower incidence of expert reports in private law cases. One difference is that in private law cases legal aid is not provided to all parents. Changes to the scope of legal aid funding which are due to take effect in 2013 may lead to more self-represented litigants in private law family cases. Self-represented litigants may be more or less likely to seek permission from the court to instruct an expert than represented litigants.

We have assumed that in future the costs of expert reports will be unchanged i.e. that experts will not increase their required rates in public law family cases as a result of any reduced demand for their work.

We have assumed that expert costs represent about two thirds of the disbursement costs in legal aid.<sup>9</sup>

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<sup>9</sup> MoJ Internal Assumption

### *Family proceedings not relating to children including financial remedy matters*

We have assumed that there will be no impact on the frequency with which the court permits expert evidence to be put before it in these proceedings. If this assumption turned out to be incorrect, we would expect to see similar impacts on experts, the Legal Services Commission and the legal aid fund, HMCTS and legal professionals to those set out under Option 1 above. We might also see similar effects in relation to appeals against case management decisions of the court to refuse requests for expert evidence to be put before the court. Parties might be affected negatively if they have commissioned an expert on the assumption that they would be able to use that evidence to make their case and were subsequently refused permission to put that evidence before the court. Parties might be affected positively if a reduction in expert evidence reduced the length or cost of proceedings.

We do not have reliable data on the volume of expert reports in proceedings that are not related to children. Anecdotal evidence indicates that expert evidence features less frequently in these cases, and therefore any impact is likely to be smaller in scale. This is particularly true in relation to the Legal Services Commission as fewer parties in these proceedings are publicly funded and changes to the legal aid scheme due to take effect in April 2013 will mean that private law family proceedings, with certain exceptions, are out of the scope of the scheme.

We expect that court fee levels will not change as a result of this proposal.

#### **One In, One Out Impact**

The proposals within this Impact Assessment under Option 1 are out of scope of One In One Out as they relate to the procedures around Government spending through legal aid spending and spending of other Government bodies. Option 2 has no ongoing impact.