

Child Protection and the Modernised Family Justice System

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A. Introduction

The Family Justice system,¹ together with the regulation of social work practice in relation to public law cases, is undergoing comprehensive reform. Significant changes are in prospect,² not least the creation of a unified family court³ and of a Family Justice Service. Courts will be reorganised, judicial case management stressed and a better IT system introduced. This chapter, however, focuses on the changes that will affect the courts and child welfare professionals engaged in dealing with the safeguarding and protection of one of the most vulnerable groups in society: children. It will focus on the Family Justice Review, the Munro review, the Government response to these and the proposals for a ‘modernised family justice system’. It will seek to examine the implications of the impending changes for the child protection system and it will suggest that these changes will not necessarily lead to better decision-making in relation to vulnerable children and their families. In addition, the changes will leave social workers and perhaps even judges more vulnerable than ever to criticism.

B. The Background

The practice of social work and the way social work is regulated have changed frequently over the years, often in response to perceived crises or child abuse scandals. In particular, *Working Together*, first published in 1999 and revised a number of times since,⁴ has set out ever tighter guidance governing what procedures

*My thanks to Christine Piper for her comments on an earlier draft.

¹ In relation to both public and private law.

² Mr Justice Holman, *The Family Justice Modernisation Programme. Implementation Update Number One* (Judiciary of England and Wales 2012).

³ Crime and Courts Bill 2012. See also Mr Justice Holman, *The Family Justice Modernisation Programme. Implementation Update Number One* (Judiciary of England and Wales 2012) p 3; David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary para 36.

⁴ While the notion of ‘safeguarding’, present in the 2010 and the new versions of *Working Together* (DCSF *Working Together to Safeguard Children. A guide to inter-agency working to safeguard and promote the welfare of children* (HMSO 2010); DfE *Working Together to Safeguard Children. A guide*

social workers should follow. The guidelines provided were intended to prevent the recurrence of the ‘mistakes’ made by professionals that were identified in successive inquiries. However the emphasis on procedure has been criticised as having led to the over- bureaucratisation of social work. In addition, the guidance has not, it seems, solved the problems besetting the child protection system which is still seen to be deficient. Recently, the Peter Connelly (Baby Peter) case brought child protection centre stage again and highlighted the shortcomings of social workers.⁵

Contemporary concerns about social work in the context of child protection emerged in the wake of the Maria Colwell inquiry in 1974. Often cited as the event that led to the modern day construction of child abuse as a social problem, this inquiry turned the spotlight on the risks posed by families to the children within them. According to the inquiry report, those risks should have been identified; social work had the knowledge base needed to decide when and how to intervene to protect children. However, it said, the social workers involved were incompetent and had failed to do what was required.⁶ And criticisms of this nature have persisted ever since.

Parton records that there were 29 inquiries during the decade that followed. He observes:

There was a remarkable similarity between the findings.....Most identified: a lack of interdisciplinary communication; a lack of properly trained and experienced frontline workers; inadequate supervision; and too little focus on the needs of the children as distinct from those of their parents and families as a whole. The overriding concern was the lack of coordination between the various agencies.⁷

The Jasmine Beckford case, he says, portrayed social workers as essentially “naïve”, “gullible”, “incompetent (and negligent)”, “barely trained...” as well as “powerful,

to inter-agency working to safeguard and promote the welfare of children (HMSO 2013) require a broader approach to securing children’s well-being, child protection remains a major concern.

⁵ Nigel Parton, ‘Child Protection and Safeguarding in England: Changing and Competing Conceptions of Risk and their Implications for Social Work’ (2011) *Brit J of Soc Work* 854, 867.

⁶ Nigel Parton, *Safeguarding Childhood* (Palgrave Macmillan 2006) 4, 6.

⁷ *Ibid* 32

heartless bureaucrats”⁸. The Tyra Henry and Kimberley Carlile inquiries concluded that social workers did too little too late.⁹ The Colwell and the Laming reports,¹⁰ separated by nearly 30 years, both criticised the abilities of the individuals and pointed to faults in the systems in place at the relevant times. There was ‘confusion and failure to communicate’; ‘poor ...recording’ of information; ‘a general failure to use the case file in a productive and professional way’; ‘a failure to engage and communicate directly with the children themselves’; and ‘a severe lack of consistent and rigorous supervision’.¹¹ The Cleveland Report was also critical of social workers but, in that case, the problem was seen as over-zealous interference within the families concerned; state intervention in the family was viewed as being potentially abusive.¹² Each inquiry led to calls for better communication and co-ordination between the various organisations involved in child protection and for better knowledge of ‘the signs and symptoms of child abuse so that it could be spotted in day-to-day practice’.¹³

The social work profession, the legal system and governments have all struggled to find ways of responding to these criticisms and of protecting children while preserving the privacy of the family. It came to be seen as important, in order to achieve this balance, to identify ‘high risk’ families.¹⁴ Policies, practices and the law have gone through successive changes, in pursuit of ‘better’ ways of identifying risk, preventing abuse and supporting families. As noted above, measures were also introduced to tighten up social work practice and to ensure that social workers act within set time limits, record decisions and follow the correct procedures.¹⁵ Increasingly, the proceduralisation of social work has come to be seen as a way of managing risk and, more recently, the provision of universal and targeted services has come to be seen as a way of averting risk.

⁸ Ibid 33.

⁹ Ibid 33.

¹⁰ Lord Laming, *The Victoria Climbié Inquiry. Report of an Inquiry by Lord Laming*. Cm 5730 (2003).

¹¹ Nigel Parton, *Safeguarding Childhood* (Palgrave Macmillan 2006) 48.

¹² Ibid 35.

¹³ Ibid 34.

¹⁴ Nigel Parton, ‘Child Protection and Safeguarding in England: Changing and Competing Conceptions of Risk and their Implications for Social Work’ (2011) *Brit J of Soc Work* 854, 858.

¹⁵ See eg DCSF *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* (HMSO 2010)

So, concerns about the child protection system are not new. And the responses to concerns have differed depending, at least to some extent, on the political climate and on the nature of the criticisms directed at social work. The Maria Colwell case led to a downgrading of the blood-tie while research¹⁶ showing that children in care were allowed to ‘drift’ contributed to a move in favour of permanency. In contrast, the Cleveland inquiry, with its emphasis on parents’ rights, helped to shape the Children Act 1989 so that the legislation and guidance stress the need for restraint when it comes to coercive intervention.¹⁷ Now it seems there is strong political support, backed up by research, for a move back to prioritising permanency and away from postponing the removal of children in order to try to effect the change that might keep the family together.

The impetus for the current re-evaluation of the child protection system came initially from political, economic and professional concerns first, about the way courts have been dealing with cases and, secondly, about the pressures on social workers. The main problem motivating change in the way care cases are dealt with in court was, and still is, the perception that inordinate delays within the family justice system when proceedings are initiated are having a harmful impact on children. Allied to this have been concerns that the proliferation of experts within the family courts has been compounding delay and ramping up costs. Concerns about social work practice have centred on the perception that it has become bureaucratized to the point where procedures, rather than ‘real’ social work, are dominating practice. As a result, the government commissioned the Family Justice Review under the chairmanship of David Norgrove, as well as the Munro Review of Child Protection, headed by Eileen Munro. Following these reports, the Family Justice Modernisation Programme was entrusted to Mr Justice Ryder. The Family Justice Review focuses on the progress of cases when they get to court and the Munro Review focuses on social work.

¹⁶ Jane Rowe and Lydia Lambert, *Children Who Wait. A Study of Children Needing Substitute Families* (Association of British Adoption Agencies 1973).

¹⁷ See Alison Diduck and Felicity Kaganas, *Family Law, Gender and the State* (Hart Publishing 2012) pp 622-23; 636-38.

The terms of reference¹⁸ of the Family Justice Review stipulated a number of ‘guiding principles’ intended to provide a ‘framework’ for the review. The first of these reiterated the paramountcy principle and added: ‘delays in determining the outcome of court applications should be kept to a minimum’.¹⁹ The only other guideline relating to public law was that courts should protect the vulnerable and ‘avoid intervening in family life except where there is clear benefit to children... in doing so’.²⁰ The document does, however, go on to give a general instruction that, ‘The review should take account of value for money issues and resource considerations in making any recommendations’.²¹

The terms of reference of the Munro Review are contained in a letter to Prof Munro from Michael Gove MP.²² He stated:

My first principle is always to ask what helps professionals make the best judgment they can to protect a vulnerable child?

I firmly believe we need reform to frontline social work practice. I want to strengthen the profession so social workers are in a better position to make well-informed judgments, based on up to date evidence, in the best interests of children free from unnecessary bureaucracy and regulation.....²³

Three principles will underpin the Government’s approach to reform of child protection: early intervention; trusting professionals and removing bureaucracy so they can spend more of their time on the frontline.....²⁴

He went on to pose the question: ‘How can risk be managed so that agencies do not develop a blame culture and their focus remains on protecting children?’²⁵

¹⁸ Ministry of Justice, Family Justice Review: Terms of Reference (2010) in David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Annex A.

¹⁹ Ibid 190.

²⁰ Ibid.

²¹ Ibid 191.

²² Michael Gove, Letter to Professor Munro (10 June 2010)

<http://www.education.gov.uk/childrenandyoungpeople/safeguardingchildren/protection/b00219296/munro> (accessed 21 February 2013)

²³ Ibid 1.

²⁴ Ibid 2.

The terms of reference, of course, set out the government's concerns and priorities and construct the problems to be addressed. The reports, accordingly, focus on these issues. It is not surprising, therefore, that the focus of the Family Justice Review is on delay and cost while the focus of the Munro Report is on bureaucracy.

C. The Family Justice Review and the modernised court system

Constructing the Problem

The main problem bedevilling court hearings was constructed both by the government and the Family Justice Review as that of delay. The Parliamentary Under Secretary for Children and Families at the time, Tim Loughton, made it clear that the government's priority was to address this: 'Reducing delay is our main purpose in reforming public family law'.²⁶ Norgrove,²⁷ in turn, identified delay as the principal focus of the Family Justice Review. The Interim Report did concede that, 'Not all cases can be resolved quickly'. But, it continued, 'these should be the exception and deliberate, not the norm and happenstance'.²⁸ Throughout the Interim Report, delay is constructed as being harmful to children in most cases and the solution posited is that decisions should be made more quickly:

60. Our starting point is that delay harms children. Long proceedings mean children are likely to spend longer in temporary care, are more likely to suffer placement disruption, and may miss opportunities for permanency. The longer they spend in temporary care, particularly at a young age, the more difficult it becomes to secure them a permanent and stable home. Long proceedings may mean children are subject to unsatisfactory arrangements for contact with their families. They may also delay the implementation of therapeutic and other support intended to address the harm they have suffered.²⁹

²⁵ Ibid 3.

²⁶ Tim Loughton, Law Society Family Justice Review Summit Round Table Discussion Speech (2012) (www.education.gov.uk/inthenews/speeches/ accessed 7 August 2012). Tim Loughton was Parliamentary Under Secretary for Children & Families.

²⁷ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Foreword

²⁸ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 61.

²⁹ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary. See also *ibid* Foreword; para 14.

And the Final Report maintained this focus:

Cases take far too long. With care and supervision cases now taking on average 56 weeks (61 weeks in care centres) the life chances of already damaged children are further undermined by the very system that is supposed to protect them.³⁰

The cost both to the taxpayer and often the individual is high.³¹

The delays, the Interim Report said, can be attributed not only to rising case loads³² but also to a dysfunctional system where distrust among professionals leads to duplication of work as well as the appointment of too many experts.³³ Judges, in their quest for certainty, and because of their distrust of the assessments presented to them by social services, order too many expert reports.³⁴ In addition,, Norgrove suggested, judges appear to hope that the combination of the lapse of time and expert reports might ‘reconcile parents to accept a decision or at least to go along with it’.³⁵ The court’s scrutiny of care plans, which is further evidence of distrust of the judgment of Local Authority staff, leads to further delays³⁶ and discourages Local Authority staff from preparing cases thoroughly.³⁷ The result of all these delays, according to Norgrove, is that children, who need stable attachments, are damaged.³⁸ Moreover, the cost of cases is spiralling.³⁹

Solutions to the Problem

³⁰ See also David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary para 5. See also para 56.

³¹ Ibid Executive Summary 5. See also Explanatory notes. Draft Legislation on Family Justice 2012 (Cm 8437) para 42.

³² There was a significant increase in the number of applications after the Baby Peter case in 2008 (David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 2.33).

³³ Ibid Executive Summary paras 10, 63.

³⁴ Ibid Interim Report para 2.52.

³⁵ Ibid Executive Summary para 64.

³⁶ Ibid Executive Summary para 66; Interim Report para 4.70.

³⁷ Ibid Interim Report para 4.70ff.

³⁸ Ibid Executive Summary paras 8-9; Interim Report para 4.58ff; David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) paras 2.9-10.

³⁹ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary para 12; Interim Report para 2.37; David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) para 2.12.

The solutions put forward to address the problems identified within the family justice system included measures to streamline the organisation of courts.⁴⁰ So, for example, the Report recommended judicial continuity⁴¹ as a way of achieving better case management⁴² as well as greater speed and efficiency.⁴³ However, the main recommendation to address the problem of delay was far more direct. A six month time limit, which could be extended only in exceptional cases, would be imposed for the completion of care cases.⁴⁴

The Report also proposed measures that would require a change not only in the way that courts function, but also in the attitudes as well as the practices of judges. The thrust of these proposals is that judges should be more ready to remove children from parents and be less concerned to oversee the work of social workers. So, the Report said, judges should not allow parents' rights to prevail at the expense of their children's best interests.⁴⁵ They should stop trying to police the content of care plans; the limitations of the law need to be recognised and courts should stop trying to predict the future in their scrutiny of such plans.⁴⁶ And they should not require or allow so many expert reports.⁴⁷

The Interim Report suggested that the courts appear to be motivated by doubts concerning the ability of local authorities to deliver 'high quality care plans'.⁴⁸ But, it said, it is not the proper function of the courts to 'inspect the work of a local

⁴⁰ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary para 6; Final Report para 2.23.

⁴¹ Ibid Executive Summary para 32; Final Report paras 2.119ff. See also President's Guidance: Listing and hearing care cases (bulletin number 3, 2011) and President's Guidance: Allocation and continuity of case managers in the Family Proceedings Courts (bulletin number 4, 2011).

⁴² David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary para 31.

⁴³ Ibid Executive Summary para 29; Interim Report para 3.60.

⁴⁴ Ibid Executive Summary paras 80-81; David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary paras 70 - 74.

⁴⁵ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary para 71. See also David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary para 57.

⁴⁶ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary para 62. See also David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary paras 72-3; para 77 ff; paras 4.115-7.

⁴⁷ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) Executive Summary paras 89ff.

⁴⁸ Ibid Interim Report para 4.153

authority'.⁴⁹ Although satisfactory social work practice is 'sometimes missing' this is a problem that will somehow have to be dealt with.⁵⁰ The Final Report too makes it clear that faster decision-making is constructed as better for children and that courts are expected to set aside their misgivings about removing children and about the reliability of local authorities.

Prejudice against care as an option for children and distrust of local authorities are fuelling delays in the system..... Courts need to recognise the limits of their ability to foresee and manage what will happen to a child in the future. They must also learn to trust local authorities more.⁵¹

i) *Quicker decisions by the courts*

The Family Justice Review recommendations have been applauded as an important antidote to delay; 'robust' case management is regarded as crucial.⁵² However, it has also been pointed out by commentators that delay is unavoidable in some cases and that some delays are not caused by the courts. There are parents who are unable to face their circumstances and so do not instruct solicitors.⁵³ Delay is also caused by parents' chaotic lifestyles and failure to attend assessments. Delays can also be attributed to Local Authorities. They sometimes do not have assessments completed in time. They fail to hold Family Group Conferences in time. In addition, potential family carers are not identified until late in the proceedings.⁵⁴

Apart from these problems, and the Interim Report of the Family Justice Review acknowledged this, attempts to improve case management in the past through the Judicial Protocol and then the Public Law Outline have been unsuccessful.⁵⁵ Those 'at

⁴⁹ Ibid Interim Report para 4.167.

⁵⁰ Ibid Interim Report para 4.167.

⁵¹ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Foreword; Final Report 4.

⁵² See eg 'Law Society Supports Family Justice Modernisation Plans', Family Law Week, September 2012 pp 1-2.

⁵³ Catherine Baksi 'Cautious Welcome for Children and Families Bill (Law Society Gazette 10 May 2012) <http://www.lawgazette.co.uk/news/cautious-welcome-children-and-families-bill> (accessed 26 February 2013).

⁵⁴ *Three weeks in November...three years on...Cafcass care application study*(Cafcass 2012).

⁵⁵ Julia Pearce and Judith Masson with Kay Bader, *Just following instructions? The representation of*

the coal face' thought that most of the cases they dealt with were too complex to fit the required structure.⁵⁶ This may be an indication that the new time limit may not be strictly implemented; it may be treated as inappropriate in many cases because of their complexity.

Certainly, the Norgrove recommendations have not found universal favour within the legal profession. Judge Crichton has indicated that he disagrees that cases can be concluded in six months and he has denied that courts spend an inordinate amount of time scrutinising care plans.⁵⁷ The Association of Lawyers for Children has 'consistently' opposed the time limit and the curtailment of the court's ability to scrutinise care plans.⁵⁸ Representatives of the Association contend that when cases come to court, the information available to the judge is often of poor quality and is not up-to-date, there is no attempt or plan to effect change in the family and there is no adequate assessment of problems like substance abuse. The Association's representatives conclude:

The judges cannot be asked to abandon the paramountcy of the child's welfare in order to meet a 6 month time limit nor to turn a blind eye if the local authority's plans for the child are not in his best interests.⁵⁹

Nevertheless the Children and Families Bill 2013 embodies both a restriction on the scrutiny of care plans and a time limit. The court must examine the care plan when deciding whether to make a care order but it is only required to consider the 'permanence provisions' specifying the long term arrangements for the child's care such as parental care or adoption.⁶⁰

parents in care proceedings (University of Bristol 2011) cited in David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 4.89.

⁵⁶ ⁵⁶ Julia Pearce and Judith Masson with Kay Bader, *Just following instructions? The representation of parents in care proceedings* (University of Bristol 2011) cited in David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 4.90.

⁵⁷ Judge Nicholas Crichton, 'Comment. The Family Justice Review' Jan 2012 *Family Law*.

⁵⁸ Martha Cover and Alan Bean 'Comment: The Government and the FJR' 2012 April *Family Law*.

⁵⁹ *Ibid.*

⁶⁰ Clause 15.

A time limit of 26 weeks⁶¹ is imposed for the completion of court proceedings.⁶² This period can be extended only if the court considers this step ‘necessary to resolve the proceedings justly’.⁶³ Extensions are for up to eight weeks at a time and are ‘not to be granted routinely’ and require ‘specific justification’.⁶⁴

Mr Justice Ryder suggests that the 26 week pathway will probably apply where the ‘threshold is agreed or is plain at the end of the first contested interim care order hearing by reason of the decision made at that hearing’.⁶⁵ However, even in ‘planned and purposeful’ delay cases, he said, courts will be encouraged to decide whether the parent can resume care within the child’s timetable.⁶⁶ Courts will have to be mindful that:

It is not a parent’s right inherent in Articles 6 and 8⁶⁷ to have their parenting improved by the state in care proceedings in every case and certainly not at the expense of the child.....⁶⁸

ii) *Expert Evidence- Restricting the use of ‘old’ experts and the making of new ones*

One of the most frequently cited reasons for delay (and expense) is the proliferation of expert evidence. The solution, therefore, is to curb the use of experts. Both the Norgrove Report⁶⁹ and Mr Justice Ryder⁷⁰ saw this as one of the ways to facilitate

⁶¹ The time limits restricting the duration of interim orders are to be removed.

⁶² Clause 14(2).

⁶³ Clause 14, introducing a new s32(5) Children Act 1989.

⁶⁴ Draft s 32(7) Children Act 1989, Children and Families Bill 2013, clause 14.

⁶⁵ Mr Justice Ryder, *The Family Justice Modernisation Programme. Fourth Update from Mr Justice Ryder* (March 2012) 3.

⁶⁶ *Ibid.*

⁶⁷ Of the European Convention on Human Rights.

⁶⁸ The Hon Mr Justice Ryder, Association of Lawyers for Children. Annual Conference Keynote Speech (16 November 2012) 12

http://www.alc.org.uk/news_and_press/news_items/annual_conference_2012_keynote_speech/ (accessed 27 February 2013). See also *Re G (Interim Care Order: Residential Assessment)* [2005] UKHL 68 [2006] 1 FLR 601 [24].

⁶⁹ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary paras 89-92.

⁷⁰ Mr Justice Ryder, ‘Judicial Proposals for the Modernisation of Family Justice’ (Judiciary of England and Wales July 2012) www.judiciary.gov.uk/Resources/.../ryderj_recommendations_final.p. (accessed 27 February 2013).

the streamlining of court proceedings. The emphasis now is on timeliness.⁷¹ Judges will be expected to adopt a ‘rigorous approach to case management’ which will promote fairness and which will entail balancing the rights of the parents against the prospect of harm to the child caused by an adjournment and the lapse of time.⁷² The commissioning and instructing of experts will be an important part of the judge’s case management duties.

The Family Justice Review cited research⁷³ revealing the use of multiple experts in a large proportion of cases⁷⁴ and observed that there was a correlation between duration and the use of experts. Although the study referred to suggested that duration might also be related to the greater complexity of the cases concerned,⁷⁵ the Review focused on criticisms of the use of experts and, in particular, the use of independent social workers. In its Interim Report, it considered the argument that independent social workers merely replicated what local authority social workers did,⁷⁶ and it went on in its Final Report to say that judges should rely on local authority social workers instead:

Expert evidence is often necessary to a fair and complete court process. But growth in the use of experts is now a major contributor to unacceptable delay. [J]udges must order only those reports strictly needed for determination of the case.

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 in proceedings. Independent social workers

⁷¹ Mr Justice Ryder, ‘Judicial Proposals for the Modernisation of Family Justice’ (Judiciary of England and Wales July 2012) para 40 www.judiciary.gov.uk/Resources/.../ryderj_recommendations_final.p. (accessed 27 February 2013).

⁷² Ibid para 39. See also ibid para 6.

⁷³ Judith Masson, Julia Pearce and Kay Bader with Olivia Joyner, Jillian Marsden and David Westlake, *Care Profiling Study*. Ministry of Justice Research Series 4/08 (Ministry of Justice 2008)

⁷⁴ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 4.106.

⁷⁵ Ibid para 4.107.

⁷⁶ Ibid para 4.111.

should be employed only exceptionally as, when instructed, they are the *third* trained social worker to provide their input to the court.⁷⁷

Mr Justice Ryder in turn said that experts are ‘misused and over used’ and maintained that in each case, the judge should ask whether the expert evidence a party seeks to introduce is not within the expertise of the court or existing witnesses.⁷⁸

There is indeed some evidence that reliance on experts may be a waste of time and money. In her study, Ireland found that a fifth of the psychologists surveyed were not qualified to provide a psychological opinion and that ‘nearly all’ of the experts were not in clinical practice but had become full time ‘professional’ expert witnesses. They were out of date and were using assessments that were defunct or which had no validity.⁷⁹ The Chair of the Experts Committee of the Family Justice Council has also commented that there is a need for better quality control in relation to expert reports.⁸⁰

However, Ireland cautioned that her research was preliminary and not generalisable.⁸¹ And the research of Brophy et al⁸² into the work of independent social workers concludes that, far from duplicating the work of the local authority social worker, ISWs perform a valuable role. The study found that they were not used, as suggested by the Family Justice Review,⁸³ as a ‘second opinion’ by parents to support claims based on human rights. Instructions were usually joint and the independent social

⁷⁷ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) Executive Summary, paras 86-7 (bold in original).

⁷⁸ The use of experts should not be limited ‘arbitrarily’ but they should not be called to provide a report on ‘common place research’ (Mr Justice Ryder, ‘The Modernisation of Family Justice: An Interview with Mr Justice Ryder’ (Family Law Week Update 3 December 2012).

⁷⁹ Jane Ireland (2012) Evaluating Expert Witness Psychological Reports: Exploring Quality (University of Central Lancashire 2012) p 30 www.uclan.ac.uk/news/files/FINALVERSIONFEB2012.pdf (accessed 27 February 2013).

⁸⁰ Dr Heather Payne, quoted in ‘Research evaluates expert witnesses and quality of court reports in the family courts’ Newsletter, Family Law Week April 2012 p10 <http://www.familylawweek.co.uk/site.aspx?i=d197193> (accessed 27 February 2013).

⁸¹ It seems the research has not been peer reviewed. See ‘Psychologists as Expert Witnesses – The Facts’ Psychology Direct website <http://www.psychologydirect.co.uk/psychologists-as-expert-witnesses-the-facts/> (accessed 4 Dec 2012)

⁸² Dr Julia Brophy, Charlie Owen, Judith Sidaway and Dr Jagbir Jhutti Johal, *The Contribution of Experts in Care Proceedings. Evaluation of independent social work reports in care proceedings* (CISWA-UK 2012) <http://www.ciswauk.org/2012/04/the-contribution-of-experts-in-care-proceedings-evaluation-of-the-work-of-independent-social-work-assessments/> (accessed 27 February 2013).

⁸³ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) para 3.133.

worker acted as an independent expert witness for the court.⁸⁴ Forty percent of care cases come to court without a core assessment, and there was therefore no duplication in such cases.⁸⁵ Where the ISW was asked to assess a person when it appeared that a local authority assessment had already taken place, this was because the earlier assessment had not included that person or because circumstances had changed.⁸⁶ The assessments therefore added new information. ISWs were also able to engage and assess parents who were in conflict with local authority social workers. Reports were of high quality and generally filed in time.⁸⁷ Rather than being a cause of unnecessary delay, ISW reports may help to reduce the likelihood of a contested hearing and make it easier to adhere to timetables.⁸⁸ Significantly, Brophy et al conclude:

Findings ... indicate that in certain circumstances courts may be severely hampered in the absence of access to the skills and expertise provided by ISWs – not least in case managing to meet the six month ‘standard’ for completion of care cases recommended by the FJR and accepted by Government....

The FJR did not seek hard information on the use of ISWs. Moving forward on policy change in the absence of evidence runs a high risk not simply of failing children through poor outcomes – but of increasing delay⁸⁹

Nevertheless, the Children and Families Bill 2013⁹⁰ imposes constraints on the use of experts. It provides that expert evidence from an independent expert cannot be presented unless the court has authorised the instruction of the expert or unless it consents to the evidence being admitted.⁹¹ And the court may give permission only if it is ‘of the opinion that the expert evidence is necessary to assist the court to resolve

⁸⁴ Ibid Executive Summary iv.

⁸⁵ Ibid Executive Summary vi.

⁸⁶ Ibid Executive Summary v.

⁸⁷ Ibid Executive Summary vii.

⁸⁸ Ibid Executive Summary vii.

⁸⁹ Ibid Executive Summary viii.

⁹⁰ See, also, Draft Legislation on Family Justice 2012 (Cm 8437).

⁹¹ Clause 13(1) and (2) read with cl 13(8).

the proceedings justly'.⁹² Factors to be taken into account when making this evaluation include delay, the availability of other sources of the relevant information and cost.⁹³

The use of 'unnecessary' expert evidence, then, is seen as an 'inappropriate' 'multi-layered alternative to judicial decision-making'.⁹⁴ Judges will be expected to rely more on the abilities of Local Authority social workers and Cafcass. They will have to assess what specialist knowledge is needed to do justice in each case and they will be required to reach swift and confident decisions. This means that the single Family Court,⁹⁵ which will be established when the Crime and Courts Bill is made law, will face a paradox; while being expected to act more quickly and more decisively in cases involving vulnerable children, the information available to judges on which to base their decisions will be limited. The answer to this problem, it seems, is to seek to ensure that judges develop their own knowledge base.

Judges who decide family cases are to be encouraged to become specialists not only in family law⁹⁶ but also, to some extent, in child welfare. In making their decisions, judges are supposed to be efficient case managers and to be knowledgeable about children as well,⁹⁷ particularly as far as the effects of time on children are concerned:⁹⁸

4.213 Case management is a skill but it also needs a change of culture, so that the judge ceases to be solely an arbiter. The case management function in public law cases is complex. It involves traditional judicial skills of forensic analysis of evidence and interpretation of the law, inquisitorial skills used to reach conclusions about what might happen, an ability to measure and balance

⁹² Clause 13(6). See also cl 13(11). This has been criticised as likely to generate litigation: Family Justice Review Draft Legislation. Law Society Submission (The Law Society October 2012) p 4 www.lawsociety.org.uk/.../family-justice-review-draft-legislation/ (accessed 5 December 2012).

⁹³ Clause 13(7). It has been suggested by two practitioners that the better experts are in demand and so are more expensive and take longer to report. Within the context of a 26 week limit, they warn, 'a crisis potentially looms' (Jo Delahunty and Kate Purkiss 'What Price Justice? Experts or Treating Clinicians? LB Islington v Al Alas and Wray' [2012] Fam Law 832, 835)

⁹⁴ Ibid para 41.

⁹⁵ See David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) paras 2.158ff.

⁹⁶ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) paras 2.109, 2.133ff.

⁹⁷ Ibid paras 2.32, 2.215.2.221, 2.227.

⁹⁸ Ibid Executive Summary para 68.

relative risks and benefits to children, an understanding of child development and social work practice and an ability to manage time, resources and people.⁹⁹

Judges are expected to be prescient risk assessors, evaluating risk and achieving a balance between perceived risks and protections against it.¹⁰⁰ Now, to help them do this, instead of calling upon expert witnesses, they themselves will be expected to find out what they need to know; they will be required to consult a framework of good practice. The materials provided, which will be contained in a virtual Family Court Guide, will signpost the ‘good practice which should be used to improve outcomes for children’.¹⁰¹ In addition, ‘[p]eer-reviewed research materials which are accepted by a reasonable body of professional opinion will be made available to judges and practitioners’.¹⁰²

Everyone involved, then, is supposed to become conversant with child welfare knowledge. And judges in particular must have a ‘good’ knowledge about child development, including the impact of abuse, neglect and delay. They must know about recent research. They must also have knowledge about safeguarding issues as well as domestic violence and have an awareness of risk assessment and management.¹⁰³ Judges, in effect, will be the new ‘experts’.

iii) *Judicial Expertise*

The first overview of research materials has now been published.¹⁰⁴ It provides an account of research showing the detrimental impact of neglect and abuse on children’s development and how the effects of maltreatment resound throughout the child or young person’s life. It refers to research identifying delays within the child protection

⁹⁹ Ibid. See also *ibid* Executive Summary paras 47, 50.

¹⁰⁰ Mr Justice Ryder, ‘Judicial Proposals for the Modernisation of Family Justice’ (Judiciary of England and Wales July 2012) www.judiciary.gov.uk/Resources/.../ryderj_recommendations_final.p. (accessed 27 February 2013) para 42.

¹⁰¹ Ibid para 44.

¹⁰² Ibid para 51.

¹⁰³ David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) para 2.194, Fig 1.

¹⁰⁴ Rebecca Brown and Harriet Ward, *Decision making Within a Child’s Timeframe. An Overview of Current Research Evidence for Family Justice Professionals Concerning Child Development and the Impact of Maltreatment* Working Paper 16 (Childhood Wellbeing Research Centre 2012) <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CWRC-00117-2012> (accessed 27 February 2013).

process. It blames the use of experts and in particular the use of repeated assessments and the use of assessments of groups of relatives. It maintains that professionals focus too much on the interests of the parents, rather than on those of the children.¹⁰⁵ It argues that there is a need for quicker decisions.

The culture of the professionals, which is fostered by the philosophy of the Children Act, is that it is best for children to be brought up in their families, This, say the authors of the overview, is causing too much hesitation in the form of excessive deliberation.¹⁰⁶ There is a short period within which action can be taken to safeguard children and delay limits the opportunity to do so.¹⁰⁷ Where parents cannot overcome their problems, it is better for children to be in the care of the local authority and adoption for very young children is best.¹⁰⁸

The authors draw attention to a study showing that 93% of the parents in that study who could change did so within the first six months of the child's birth. The authors concede that the study involved a very small number of children and a small sample. Nevertheless they conclude, somewhat surprisingly, that it has 'obvious implications for timescales for decision-making and for intensive interventions'.¹⁰⁹ Indeed, they state that the evidence of the impact of child neglect and abuse provides 'a compelling case for taking early decisive action'.¹¹⁰

Part of the reason for making overviews of current research such as this available appears to be to enable courts to dispense with the services of expert witnesses in respect of the matters considered.¹¹¹ However, as one barrister has pointed out, the reason courts use experts is not because lawyers are incapable of looking up basic principles in different disciplines. It is because they are not best placed to apply those

¹⁰⁵ Ibid Summary Chapter 5; paras 5.18 and 5.20.

¹⁰⁶ Ibid Paras 5.6; 5.11.

¹⁰⁷ Ibid Summary Chapter 5.

¹⁰⁸ Ibid Paras 5.2; 5.6

¹⁰⁹ Ibid Para 5.7.

¹¹⁰ Ibid Para 4.58.

¹¹¹ See Mr Justice Ryder, 'The Family Justice Modernisation Programme. Fourth Update from Mr Justice Ryder' (Judiciary of England and Wales March 2012) p 4 <http://www.judiciary.gov.uk/publications-and-reports/reports/family/the-family-justice-modernisation-programme/family-newsletter-april-2012> (accessed 27 February 2013).

principles in individual cases.¹¹² A judge may well have no difficulty understanding that early decisive action is preferable in most cases. However the question is whether it is what is needed in the case before him or her.

One possible effect of requiring judges to rely on their own research might be to exacerbate the tendency of the law, identified by King and Piper,¹¹³ to be selective when assessing the available research and also to over-simplify the research chosen. Judges faced with research showing the benefits of contact in the private law arena have translated this into a presumption or ‘assumption’ that contact is good for children and should be ordered unless the assumption is ‘offset’.¹¹⁴ Given a research overview that unequivocally states that swift and decisive action should be taken to remove children from parents who are found wanting, judges may well devise a new assumption to that effect. There is the danger that ‘expert’ judges will prioritise speed over other important considerations.

D. The Munro Review and the reform of social work.

Within the family justice system, then, expert evidence is to be limited. It will be rendered unnecessary because judges will be able to rely on their own enhanced expertise. In addition, they are to be expected to rely more on the skill and knowledge of social workers. Social work expertise too is to be upgraded and, it is said, social workers will be given the freedom to allow it to be used to best advantage. Alongside the review of and changes to the legal system, there has been a review and there have been changes to social work. Munro set out the aims of the review:

1.... This final report sets out proposals for reform which, taken together, are intended to create the conditions that enable professionals to make the best judgments about the help to give to children, young people and families. This involves moving from a system that has become over-bureaucratised and

¹¹² Leanne Buckley-Thomson, ‘Expertly done? A look at the use of experts in family proceedings and changes proposed by Mr Justice Ryder prior to the announcement of his final proposals’ (Family Law Week 23 July 2012) <http://www.familylawweek.co.uk/site.aspx?i=ed99194> (accessed 27 February 2013).

¹¹³ Michael King and Christine Piper, *How the Law Thinks about Children* (2nd ed, Arena 1995) 50-52.

¹¹⁴ *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Domestic Violence)* [2000] 2 FLR 334, 364, 370.

focused on compliance to one that values and develops professional expertise and is focused on the safety and welfare of children and young people.¹¹⁵

For Munro the principal impediment to sound social work is what she considers to be the excessive regulation of social work practice. In her view, targets and performance indicators have become goals in themselves, obscuring what should be the focal point of social work: the welfare of the children. The time limits specified in *Working Together* have also become ends in themselves. According to Munro, practitioners and their managers see the targets and local rules as limiting their ability to stay child centred and as having reduced their capacity to work directly with children and families. Also, the standardisation of the child protection process means that social workers cannot tailor their responses to the needs of each child and family.¹¹⁶

2.... The review's first report... described the child protection system in recent times as one that has been shaped by four key driving forces:

- the importance of the safety and welfare of children and young people and the understandable strong reaction when a child is killed or seriously harmed;
- a commonly held belief that the complexity and associated uncertainty of child protection work can be eradicated;
- a readiness, in high profile public inquiries into the death of a child, to focus on professional error without looking deeply enough into its causes; and
- the undue importance given to performance indicators and targets ... which have skewed attention to process over the quality and effectiveness of help given.

3 These forces have come together to create a defensive system that puts so much emphasis on procedures and recording that insufficient attention is given to developing and supporting the expertise to work effectively with children, young people and families.

6 The review is recommending that the Government revise statutory, multi-agency guidance to remove unnecessary or unhelpful prescription and focus

¹¹⁵ Professor Eileen Munro, *The Munro Review of Child Protection. Final Report – A child-centred system* (Cm 8062, 2011) Executive Summary <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062> (accessed 27 February 2013).

¹¹⁶ *Ibid* Executive Summary para 5.

only on essential rules for effective multi-agency working and on the principles that underpin good practice.

The Government had previously identified bureaucracy as the problem in its terms of reference for the Munro Review, so it is not surprising that, in its response to the Review, the Government endorses Munro's characterisation of the problems besetting social work and her proposed solutions:

2.Together, we want to build a child protection system where the focus is ... on the experience of the child or young person's journey from needing to receiving help. That means reducing central prescription and interference and placing greater trust in local leaders and skilled frontline professionals.... It means a system characterised by:

- children and young people's wishes, feelings and experiences placed at the centre;
- a relentless focus on the timeliness, quality and effectiveness of help....
- recognising that risk and uncertainty are features of the system where risk can never be eliminated but it can be managed smarter;
- trusting professionals and giving them the scope to exercise their professional judgment in deciding how to help children, young people and their families;
- the development of professional expertise to work effectively with children, young people and their families;.....¹¹⁷

The new, stripped down version of *Working Together*¹¹⁸ has implemented the main recommendations made by Munro to remove time limits and to eliminate the distinction between initial and core assessments. However it is, in substance, not very different from the earlier version of *Working Together* when it comes to the investigation and assessment of possible significant harm. The document makes

¹¹⁷ A Child- Centred System. The Government's Response to the Munro Review of Child Protection (DfE 2011) <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00064-2011> (accessed 27 February 2013).

¹¹⁸ DfE *Working Together to Safeguard Children. A guide to inter-agency working to safeguard and promote the welfare of children* (HMSO 2013).

provision for the development of local protocols for assessment¹¹⁹ but stipulates that a ‘good assessment’¹²⁰ should investigate the three domains making up the triangular *Assessment Framework*,¹²¹ which effectively reproduces its predecessor.¹²² It also requires that work with children and families be conducted in accordance with specified principles.¹²³ These include involving children and families, being child centred and being informed by evidence. These are not new. In addition, the guidance given is similar to that in the earlier version of *Working Together* and the same sort of flowcharts are provided to help professionals decide what steps to take depending on the outcome of each stage of an assessment. The same processes, such as the setting up of a child protection conference and the drafting of a child protection plan are specified.

The document does also include what might be thought to be aspirational goals such as ‘high quality’ assessments,¹²⁴ reaching a judgment about the nature and level of needs and risks,¹²⁵ understanding children’s needs and the impact on them of parental behaviour,¹²⁶ timeliness¹²⁷ and rigor in assessing and monitoring children to ‘ensure they are adequately safeguarded’.¹²⁸ The way in which these aims are described is vague. In this respect it echoes the Munro Report and the Government response to it; notions of ‘timeliness’, ‘quality’ and ‘effectiveness’ are mentioned as aims without any indication of how these aims are to be achieved. The main concrete policy initiatives that emerge from these documents are that measures should be taken to improve social work training and that the bureaucratisation of social work should be dismantled; social work expertise and local practices should be the basis upon which decisions are to be made.

¹¹⁹ Ibid para 62.

¹²⁰ Ibid para 33.

¹²¹ Ibid para 34.

¹²² DoH, DfEE and Home Office *Framework for the Assessment of Children in Need and their Families* (TSO 2000).

¹²³ DfE *Working Together to Safeguard Children. A guide to inter-agency working to safeguard and promote the welfare of children* (HMSO 2013), para 32.

¹²⁴ Ibid para 32.

¹²⁵ Ibid para 34.

¹²⁶ Ibid para 37.

¹²⁷ Ibid para 54.

¹²⁸ Ibid para 30.

Munro has been criticised¹²⁹ for producing ‘[t]hree manuals of rhetoric, which, infuriatingly, tell us where we are in great detail but do not offer the path to a better child protection system’. She has failed to give any guidance on where thresholds for intervention should be set and her insistence on localism, say her critics, means there could be a ‘postcode lottery’, with different thresholds being adopted in different areas. It has been pointed out that she does not explain what measures work with unco-operative parents; the examples she gives of programmes which she says offer effective intervention rely on parental co-operation. In addition, the long term impact of the types of interventions to which she refers is unproven.

i) *Social work’s ‘impossible’ task*

It is perhaps unrealistic to expect the detailed guidance which Munro’s critics say is lacking. The vagueness of the Munro Review and the new *Working Together* mask the unpalatable fact that there is often no way of knowing what the right decision is in the context of child protection. Michael King¹³⁰ has argued that the task of social workers is ‘impossible’ except in cases, for example, where children’s lives or health are clearly in danger. The task is impossible because social workers are expected to predict the future and to anticipate the likely consequences for children of future events.¹³¹ What is more, their understanding of the situations they deal with, as well as their decisions, rely on available conceptual frameworks and values that may change in the future; different types of harm to children are always being ‘discovered’. In addition, not only is it not possible to accurately identify or predict abuse, it is not always apparent what ‘works’ in terms of intervention. ‘In the final analysis’, says King, ‘subsequent events, the effects on the child’s development of the social work and legal intervention, are probably the only way of knowing whether the decision was right or wrong’.¹³²

¹²⁹ Perdeep Gill and Julie Sheppard, ‘Munro Debate: A critical take on the review and Professor Munro’s reply’ 13 June 2011 Community Care <http://www.communitycare.co.uk/articles/13/06/2011/117002/munro-debate-a-critical-take-on-the-review-and-professor-munros-reply.htm> (accessed 27 February 2013).

¹³⁰ Michael King ‘Law’s Healing of Children’s Hearings: The Paradox Moves North’ (1995) *J of Social Policy* 315.

¹³¹ *Ibid* 319.

¹³² *Ibid* 319-20.

So failures are inevitable. As a Department of Health publication, *Child Abuse: A Study of Inquiry Reports 1980–1989*, acknowledged:

It is not possible confidently to predict who will be an abuser, for the potential for abuse is widespread and often triggered by the particular conjunction of circumstances which is unpredictable. Almost anyone with whom the professionals work could be an abuser, and when an incident ‘breaks’ it is also easy to look back with the confidence of hindsight and to see cues that were missed, small mistakes and tell tale signs.¹³³

An examination of 40 serious case reviews involving cases where children died or were seriously injured came to similar conclusions. Of the cases studied, only one was classified as ‘highly predictable’ and three were ‘highly preventable’.¹³⁴ The authors observed that the predictive value of known indicators of abuse is limited.¹³⁵ The likelihood of abuse depends on an ‘interplay of a range of factors’ and it is not possible to determine the significance of particular features or characteristics.¹³⁶

Another study, conducted by Masson *et al* and based on data derived from court files from 2004, bears testimony to the difficulty of predicting sudden deteriorations in children’s conditions. Forty two per cent of cases were ‘unplanned crisis interventions’.¹³⁷ In the majority of cases the families were known to social services and there had been some social services involvement in the past. Nevertheless social workers had not been able to foresee the events that occurred.

Yet despite what we know about the imponderables that beset child protection work, social work holds itself out, and must continue to hold itself out, as a profession that is able to protect children. As a result, it cannot abdicate from the task it has taken on and which society assumes it can, and should, carry out effectively. It is expected that

¹³³ DoH, *Child Abuse: A Study of Inquiry Reports 1980–1989* (HMSO 1991) 63; See, also, Lynn Davis, ‘Invisible Gorillas and Child Protection’ [2012] Fam Law 686.

¹³⁴ Ruth Sinclair and Roger Bullock, *Learning from Past Experience. A Review of Serious case Reviews* (DoH 2002) 46, 96.

¹³⁵ *Ibid* 17-18.

¹³⁶ *Ibid* 18.

¹³⁷ Judith Masson, Julia Pearce and Kay Bader with Olivia Joyner, Jillian Marsden and David Westlake, *Care Profiling Study*. Ministry of Justice Research Series 4/08 (Ministry of Justice 2008) 25.

social workers have the knowledge to assess risks. Child abuse is assumed to be identifiable and preventable.

In Luhmann's¹³⁸ terms, the damage or loss caused by child abuse is a foreseeable risk rather than an unforeseeable danger. Risks, he says, are losses that social processes attribute to decisions, while 'dangers are defined as those losses which are seen as occurring independently of decisions'.¹³⁹ The process of the 'production of risk' is the process by which the factors that are seen as contributing to future loss become knowable, and once known, as controllable through decisions.¹⁴⁰

The difficulty is that, because the social work profession is perceived to have, and presents itself as having, the knowledge necessary to avoid the loss or damage caused by abuse, when a child known to social workers dies or is harmed, that event is attributed to bad decision-making or 'error'.¹⁴¹ As the many child abuse enquiries have shown, the loss is seen as the fault of the social workers concerned. However, neither the social work profession nor the law can countenance the possibility that the knowledge base upon which child protection rests is not sound. At the very least, it is assumed that the knowledge base can be made sound.

Law relies on the 'science' of social work to validate its decisions while at the same time, by relying on it, law reinforces the perception that there is a reliable body of knowledge which can serve as the basis for good decision-making. The law gives the impression that the right decision is always possible: 'Even if the particular expert is unsound, reliable expertise is nevertheless believed to exist'.¹⁴² As Ashenden¹⁴³ suggests, to acknowledge that there is a deficit in the social work knowledge base would be to call into question the legitimacy of intervention in the family by child protection agencies. So, where social workers or experts are found wanting, this

¹³⁸ Niklas Luhmann, *Risk: A Sociological Theory* (de Gruyter 1993) cited in Michael King and Felicity Kaganas, 'The Risks and Dangers of Experts in Court' (1998) *Current Legal Issues* 221, 238.

¹³⁹ Michael King and Felicity Kaganas, 'The Risks and Dangers of Experts in Court' (1998) *Current Legal Issues* 221, 238.

¹⁴⁰ *Ibid.*

¹⁴¹ See eg David Howitt, *Child Abuse Errors. When Good Intentions Go Wrong* (Rutgers University Press 1993).

¹⁴² *Ibid* 239.

¹⁴³ Samantha Ashenden, *Governing Child Sexual Abuse: Negotiating the Boundaries of Public and Private, Law and Science* (Routledge 2004) 164.

generally does not lead to questions about whether it is possible to identify and predict risk. Instead, the consequence is that there are calls for more research and for the development of better predictive techniques. In the case of inquiries, 'better' experts have been summoned to evaluate the expertise and professionalism of the experts and professionals who were deemed to have failed. The fact that there are 'better' experts can be seen as offering the promise of more 'reliable' expertise. In this way, says Ashenden, the legitimacy of the system is preserved.

King observes:

The paradox for social work's self-image as the preventer of child abuse, therefore, stems on the one side from the impossibility of performing this task in any reliable 'scientific' manner, given these inherent problems of harm identification and prediction. On the other side lies the inconceivability of admitting the task is indeed impossible, for to do so would threaten the very existence of this social identity and be likely to cause immeasurable damage to general social morale (to say nothing of the morale of social workers), such are the collective anxieties in our society produced by the prospect of children being damaged and corrupted by those adults charged with their care and welfare.¹⁴⁴

ii) *Public education as a way of lowering expectations*

It is notable that the Munro Reports do indeed highlight the problems of assessing risk and of applying the knowledge that social workers have:

1.43 Professionals can make two types of error: they can over-estimate or underestimate the dangers facing a child or young person. Error cannot be eradicated and this review is conscious of how trying to reduce one type of error increases the other.

1.46 All of these areas of uncertainty make decisions about children and young people's safety and well-being very challenging. A well thought out decision may conclude that the probability of significant harm in the birth

¹⁴⁴ Michael King 'Law's Healing of Children's Hearings: The Paradox Moves North' (1995) *J of Social Policy* 315, 320.

family is low. However low probability events happen.... Public understanding that the death of a child may follow even when the quality of professional practice is high is therefore very important.¹⁴⁵

8.25.... It is a major challenge to all involved in child protection to make the system less 'risk averse' and more 'risk sensible'.¹⁴⁶

One fundamental change that is needed is for all to have realistic expectations of how well professionals can protect children and young people. The work involves uncertainty.... Too often, expectations have become unrealistic, demanding that professionals 'ensure' children's safety, strengthening the belief that if something bad happens 'some professional is to blame'.¹⁴⁷

The Munro Reports, then, acknowledge the inherent fallibility of social work and concede that unpredictable harm to children is inevitable. Munro does not claim that social work is perfectible. Instead she calls for public education to help people understand the uncertainty that surrounds child protection, so that there are lower expectations of social work and so that there will be less blame when things go wrong. However she is certainly not saying that social work lacks a reliable knowledge base or that the task of child protection is 'impossible'; to do so would render social work devoid of content and social workers' decisions no better than common sense. It would make the outcome of efforts at child protection no more predictable than a lottery.

What Munro is saying is that good practice will not necessarily avert disaster. Although the outcome may be a bad one, the decision might have been the 'right' one

¹⁴⁵ Professor Eileen Munro, *The Munro Review of Child Protection, First Report – Child Protection: A Systems Analysis* (DFE 2010) <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00548-2010> (accessed 27 February 2013). See also *ibid* para 1.42.

¹⁴⁶ Professor Eileen Munro, *The Munro Review of Child Protection. Final Report – A child-centred system* (Cm 8062, 2011) <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062> (accessed 27 February 2013).

¹⁴⁷ Professor Eileen Munro, *The Munro Review Of Child Protection. Progress report: Moving towards a child centred system* (DFE 2012). Executive Summary p 3. <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00063-2012> (accessed 27 February 2013).

in the context of what could be known about the family. In addition, there is throughout the Reports an insistence that social work practice can improve,¹⁴⁸ that better research will help and that children can be better protected. So even if the decision was the wrong one, there is the possibility of avoiding such wrong decisions in the future. ‘Social work’, says Munro, can and should be a ‘highly skilled job’ and social workers can be capable of helping families to overcome their problems.¹⁴⁹

iii) *Bureaucracy as an impediment to protecting children*

In Munro’s view, the main impediment to ‘better’ social work is the bureaucracy that has grown up within the system. As long as social workers have the time to get to know and form relationships¹⁵⁰ with families and as long as they can exercise their ‘creativity’, they will be able to make better decisions. And as long as they have adequate training, professional development¹⁵¹ and supervision, they will be ‘right’ more often.¹⁵²

There is, however, no evidence that this is the case. It can probably be assumed that social workers will be able to understand families better if they know the families concerned well, and they may be able to identify some types of harm more easily if they spend time with the child and family. The feedback from pilot studies reported by Tim Loughton, the then Under-Secretary of State for Children and Families, was

¹⁴⁸ See eg Professor Eileen Munro *The Munro Review of Child Protection - Interim Report: The Child’s Journey* (DFE 2011) para 4.13

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00010-2011> (accessed 27 February 2013).

¹⁴⁹ Professor Eileen Munro, *The Munro Review Of Child Protection. Progress report: Moving towards a child centred system* (DFE 2012) para 4.27

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00063-2012> (accessed 27 February 2013).

¹⁵⁰ See eg Professor Eileen Munro *The Munro Review of Child Protection - Interim Report: The Child’s Journey* (DFE 2011) para 3.29

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00010-2011> (accessed 27 February 2013).

¹⁵¹ *Ibid* para 4.13.

¹⁵² See Professor Eileen Munro, *The Munro Review Of Child Protection. Progress report: Moving towards a child centred system* (DFE 2012) para 4.2

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00063-2012> (accessed 27 February 2013). A College of Social Work has been established. See *ibid* para 4.10; DfE Tim Loughton Addresses Community Care Live, 16 May 2012 <http://www.education.gov.uk/inthenews/speeches/a00209139/community-care-live> (accessed 21 September 2012)

that flexibility was leading to better assessments.¹⁵³ But time and space to relate and reflect are not panaceas; there is still the chance in any individual case that the ‘wrong’ decision, at least in the sense that the outcome is a bad one, will be made. There is also still the chance that social workers will be deceived by the family,¹⁵⁴ that they will fail to make accurate predictions¹⁵⁵ or that they will fail to identify abuse.¹⁵⁶ Many of the problems highlighted in past inquiries can be repeated yet again: over-identification with parents, gullibility, and failure to communicate and co-ordinate with other agencies.¹⁵⁷ And it is not an excess of bureaucracy that creates these problems.

King maintains that criticisms of ‘managerialism’,¹⁵⁸ such as those that lament the eclipse of old-style compassion, are somewhat misplaced. Social work, he argues, has always been shaped by its environment. He concedes that the modern day managerial drive towards efficiency and the focus on procedure might lead social workers to believe that the ‘space for “helping” and “doing good” has disappeared’, that social work has ceased to attach sufficient importance to the values of altruism and caring that were considered to lie at its heart.¹⁵⁹ However, he says:

¹⁵³ DfE Tim Loughton Addresses Community Care Live, 16 May 2012

<http://www.education.gov.uk/inthenews/speeches/a00209139/community-care-live> (accessed 21 September 2012)

¹⁵⁴ See eg Professor Eileen Munro, *The Munro Review of Child Protection, First Report – Child Protection: A Systems Analysis* (DFE 2010) para 1.41

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00548-2010> (accessed 27 February 2013).

¹⁵⁵ See eg Professor Eileen Munro, *The Munro Review of Child Protection. Final Report – A child-centred system* (Cm 8062, 2011) para 1.13

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062> (accessed 27 February 2013).

¹⁵⁶ See eg Professor Eileen Munro, *The Munro Review of Child Protection. Final Report – A child-centred system* (Cm 8062, 2011) para 1.12

<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208062> (accessed 27 February 2013).

¹⁵⁷ Marian Brandon, Peter Sidebotham, Sue Bailey, Pippa Belderson, Carol Hawley, Catherine Ellis & Matthew Megson, *New learning from serious case reviews: a two year report for 2009-2011* (DfE 2012). Professionals were found to be too ready to accept unreasonable explanations for bruises. There was a sense of disconnection from the children and professionals did not pay attention to children’s emotional development or get to know the children (Executive Summary p 7)

¹⁵⁸ And what Munro calls bureaucracy. See, for references to the use of the term ‘managerialism’, Michael King, ‘Doing good for children- mission impossible?’ in Michael King, *A Better World for Children. Explorations in Morality and Authority* (Routledge 1997) 96, 98

¹⁵⁹ Michael King, ‘Doing good for children- mission impossible?’ in Michael King, *A Better World for Children. Explorations in Morality and Authority* (Routledge 1997) 105.

[I]t would be an illusion to suggest that a golden age of social work existed in earlier decades this [20th] century when helping intervention *really helped*, when therapeutic practices *really made people's lives better*.¹⁶⁰

It is not the case that removing some of the managerial constraints will free up social workers to apply some 'pure', lost form of social work. Social work has always been influenced by factors such as politics. And there is no suggestion that social work was 'better' in the past. Munro herself admits that there was no 'golden age'; every reform of social work has been in response to perceived deficiencies.¹⁶¹ She also concedes that, 'Freeing up social workers from bureaucracy is necessary but not sufficient to produce high quality practice'.¹⁶² Indeed, things may remain largely the same in some areas: defensive rule-bound practices might continue at a local level.¹⁶³ And Munro does not dispute that it is 'highly improbable that the relaxation of assessment timescales alone will significantly improve the quality of assessing and planning'.¹⁶⁴

Indeed while there will be a relaxation of some of the strictures created by managerialism, there may be new pressures to come for the social work profession. The Norgrove Interim Report criticised local authority workers for their inadequate preparation of cases which leads to 'duplication and delay'.¹⁶⁵ The Government has accordingly promised to work to 'to ensure that court preparation and presentation skills become an integral part of initial and continuing social work training'. In addition, the government wants 'high quality' work with families and children to ensure that, when cases come to court, 'they are supported by robust evidence and systematic work with the family'.¹⁶⁶

¹⁶⁰ Ibid 106. Emphasis in original.

¹⁶¹ See eg Professor Eileen Munro, *The Munro Review of Child Protection, First Report – Child Protection: A Systems Analysis* (DFE 2010) p 9
<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00548-2010>
(accessed 27 February 2013).

¹⁶² Professor Eileen Munro, *The Munro Review Of Child Protection. Progress report: Moving towards a child centred system* (DFE 2012) para 4. 2
<https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00063-2012>
(accessed 27 February 2013).

¹⁶³ Ibid paras 6.2, 6.8.

¹⁶⁴ Ibid para 2.26.

¹⁶⁵ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 4.217.

¹⁶⁶ Ministry of Justice and DfE, *The Government Response to the Family Justice Review, A System with Children and Families at its Heart* (Cm 8273 2012) paras 45, 47.

Social workers, then, will have to become more proficient at preparation for court. This will entail collecting information and evidence for the court. This in turn may lead to renewed protests that the relationship between client and social worker is being neglected in favour of surveillance and evidence collection, that there is a focus on behaviour rather than its cause, that flexibility and creativity are again being limited. All this brings to mind the complaints of Nigel Parton in earlier years that collecting information for the purposes of judging risk meant that social work practice became superficial: ‘Depth explanations drawing on psychological and sociological theories were superseded by surface considerations,’ leaving little room for understanding.¹⁶⁷

So the removal of bureaucratic rules will not necessarily make for better decisions. And what is more it will make social workers more vulnerable to criticism.¹⁶⁸ The bureaucratic framework now decried by Munro was constructed in order to guide social workers so that they were less likely to make ‘mistakes’, to ensure that full records were kept of events and also to provide evidence of their adherence to approved practice. The procedural constraints have probably provided some protection for social workers whose cases go badly: at least a decision can be defensible, even if wrong, provided the correct procedures are followed.¹⁶⁹ Once stripped of the cover provided by procedure, social workers’ failures to make the ‘right’ decisions will be laid bare and attributed to their shortcomings.

E. Assessing the changes

Will the changes give rise to a leaner, more efficient court process and freer, more innovative and effective social work practice? Will both become better at protecting children and securing their welfare? Possibly.

¹⁶⁷ Nigel Parton, ‘Changes in the Form of Knowledge in Social Work: From the “Social” to the “Informational”?’ (2008) *Brit J of Social Work* 253, 259-60.

¹⁶⁸ See, for practitioners’ perceptions of themselves as being vulnerable to criticism, Sonya N Stanford, ‘Constructing Moral Responses to Risk: A Framework for Hopeful Social Work Practice’ (2011) *Brit J of Social Work* 1514, 1518.

¹⁶⁹ Nigel Parton, 1997) ‘Child Protection and Family Support. Current Debates and Future Prospects’ in Nigel Parton (ed), *Child Protection and Family Support. Tensions, Contradictions and Possibilities* (Routledge 1997)

i) *The Courts*

As far as the courts are concerned, the changes will lead to greater speed and less information. Whether this will benefit vulnerable children is not self-evident. The Family Justice Review, while confidently arguing that delay harms children and that speedy decisions best serve their interests, also concluded: ‘Quicker decisions may well be no worse than slower decisions and they have the great merit of having taken less time’.¹⁷⁰ While it is undoubtedly true that quicker decisions take less time, it is notable that the panel did not profess to have any clear evidence that quicker decisions ‘may be no worse’.¹⁷¹

It is also open to question whether the courts will accept this view in many cases. While it is possible that courts will follow the new policy of swift intervention and may do so too rigidly, there is also the possibility that they may well declare complex cases to be exceptions to the 26 week rule on the grounds that they need more evidence, more assessments, more information and more certainty. The assertions of the Family Justice Review that many children fare well in care may not persuade the court in any particular case that it should not delay sending a child there.

Courts may also find it difficult to rely on local authority social workers whom they do not trust, rather than authorise or consent to independent experts; it appears that such experts do indeed often provide fresh information. Judges run risks if they do not seek expert opinion; future loss to the child by being removed inappropriately or left with an abusive family could be attributed to the judge’s failure to make the right decision.¹⁷² Courts are undoubtedly aware that they could be vulnerable to criticism. Once the possibility of expert knowledge has been recognised, one cannot turn the clock back. Once risks are thought to be identifiable and preventable, ‘it is extremely difficult, if not impossible, to reverse the process and declare that what was previously believed to be a decision-avoidable loss should now be seen as a matter of chance or the result of totally uncontrollable events’.¹⁷³

¹⁷⁰ David Norgrove, *Family Justice Review. Interim Report* (Ministry of Justice 2011) para 4.145.

¹⁷¹ The possibility of making feedback available on their decisions is being mooted, however (David Norgrove, *Family Justice Review. Final Report* (Ministry of Justice 2011) para 2.205).

¹⁷² Michael King and Felicity Kaganas, ‘The Risks and Dangers of Experts in Court’ (1998) *Current Legal Issues* 221, 240-41.

¹⁷³ *Ibid* 241.

ii) *Social Work*

It is worth pointing out that the changes in relation to social work practice do not appear to be as radical as they are claimed to be. Also, Munro admits that, ‘The recommendations in this report will not solve all the complex problems inherent to child protection’.¹⁷⁴ Yet she does argue that all her recommendations taken together will make things better. And she expresses the hope that the media and the public will become more ready to accept that child abuse and even child deaths are inevitable in the face of the complexity and uncertainty that surrounds child protection.

This is already beginning to seem optimistic. In particular, social work practice and individual social workers are vulnerable to the ebb and flow of politics. In the past, child protection practice has had to respond to outrage in politics and the media following child abuse scandals in different ways. Sometimes the blood tie has been downgraded. Sometimes it has been prioritised. Now, within politics there has emerged a growing consensus that local authority children’s services are not acting decisively or quickly enough to remove children from abusive or neglectful parents. There appears to be a clear shift in favour of coercive intervention and permanency. And this shift is beginning to shape what is perceived to be the ‘right’ way of protecting children. Social workers who do not heed this will be vulnerable.

In recent months there have been numerous statements criticising social work practice and it is incompetence, rather than uncertainty and complexity, that is identified as the problem; social workers are simply not making the ‘right’ decisions.

For Michael Gove, Secretary of State for Education, there is little doubt as to what would be the ‘right’ way to deal with child protection cases. He has lost no time in lambasting social workers, claiming that they put parents’ interests before those of children, that they leave children in homes blighted by neglect, and that they expose children to ‘criminal mistreatment’. He says that when there is a decision to intervene, it comes too late, that children are returned home to be ‘exposed to danger’ again, that it takes too long for children to be placed, and that prospective adopters are badly treated. Social workers are misguided because of the ‘optimism bias’; they believe

¹⁷⁴ Professor Eileen Munro, *The Munro Review of Child Protection. Final Report – A child-centred system* (Cm 8062, 2011) para 1.29.

wrongly that families can change if they are given support and they are desensitised to squalor. They should see as a danger sign a ‘sequence of males in a relationship with vulnerable women’ and they should remove children from substance abusing parents. In short, he contends that children should be removed faster and in more cases:

Too many local authorities are failing to meet acceptable standards for child safeguarding.....

I firmly believe more children should be taken into care more quickly, and that too many children are allowed to stay too long with parents whose behaviour is unacceptable.¹⁷⁵

I want social workers to be more assertive with dysfunctional parents, courts to be less indulgent of poor parents, and the care system to expand to deal with the consequences.

I know there are passionate voices on the other side of the debate.

They express sincere concerns about children being separated from loving parents in stable and secure families and heart-breaking battles to bring those children home.

I don't deny that such cases exist. But there is no evidence that they are anything other than a truly tiny number.

Whereas there is mounting evidence that all too many children are left at risk and in squalor - physical and moral - for far too long.¹⁷⁶

The Education Committee has clearly come out in favour of coercive intervention and permanency.¹⁷⁷ The Committee recommends that Ministers should raise public awareness of the benefits of being taken into care.¹⁷⁸ It also supports the Government's policy to speed up adoption and increase the numbers of children adopted.¹⁷⁹ The Committee states that care should be considered as a viable option at

¹⁷⁵ See also The Edlington Case. A Review by Lord Carlile of Berriew (DFE 2012) www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00124-2012. (accessed 30 Nov 2012). Lord Carlile refers to the disquiet evoked by the ‘lengths to which the system acts’ to uphold the principle that children are best raised by their parents. He suggest that in some circumstances the burden should be on the parents to convince the court that their child should not be removed (para 53). See also paras 69 and 129.

¹⁷⁶ M Gove, ‘The Failure of Child Protection and the Need for a Fresh Start’ (2012) <http://www.education.gov.uk/inthenews/speeches/a00217075/gove-speech-on-child-protection-> (accessed 29 November 2012)

¹⁷⁷ House of Commons Education Committee, Fourth Report of Session 2012-13, *Children First: The Child Protection System in England* (HC 137 2012) para 207.

¹⁷⁸ *Ibid* Conclusions and Recommendations para 38.

¹⁷⁹ *Ibid* Conclusions and Recommendations para 39.

an earlier stage for many children;¹⁸⁰ the evidence before the Committee indicated that social workers are delaying because they are too optimistic about parents' capacity to change.¹⁸¹ The Committee states that 'earlier protection and the safeguarding of the long-term needs of the child' are necessary; children are left in neglectful situations too long.¹⁸² If necessary, Government must act to ensure that Local Authorities respond quickly enough to problems of neglect.¹⁸³

There has been little sympathy for social workers who have been found wanting in the past. For example, Lord Laming,¹⁸⁴ in his report after the death of Peter Connelly (then known only as Baby P) said:

It would be unreasonable to expect that the sudden and unpredictable outburst by an adult towards a child can be prevented. But that is entirely different from the failure to protect a child or young person already identified as being in danger of deliberate harm. The death of a child in these circumstances is a reproach to us all.

There seems little reason to believe there will be sympathy in the future. Michael Gove argues that to better protect children, we need to recruit 'high quality' social workers whose judgment can be trusted. And, he says, there should be greater transparency in holding those who fail responsible:¹⁸⁵ 'Where there is clear evidence of failure or incompetence, individuals and organisations need to be held to account'.¹⁸⁶

It is clear that neither understanding of uncertainty nor tolerance of 'failure' are likely to be forthcoming if social workers do not act quickly to remove children from their families. And it is probably not only politicians who will criticise social workers for making the 'wrong' decision. The public and media will be likely to react much as they have done in the past to child deaths.

¹⁸⁰ Ibid para 208.

¹⁸¹ Ibid para 207.

¹⁸² Ibid para 66.

¹⁸³ Ibid para 67.

¹⁸⁴ The Lord Laming, *The Protection of Children in England: A Progress Report* (HC 330 2009) 3.

¹⁸⁵ M Gove, 'The Failure of Child Protection and the Need for a Fresh Start' (2012)

<http://www.education.gov.uk/inthenews/speeches/a00217075/gove-speech-on-child-protection->
(accessed 29 November 2012)

¹⁸⁶ M Gove, Letter from the Education Secretary on the publication of the Edlington SCR (2012)
<http://www.education.gov.uk/in%20the%20news/a00205952/>

F. Conclusion

The Government, in its quest to reduce costs and as part of its effort to be seen to be ‘doing something’ about child abuse, has led the way in reconstructing notions of welfare in the context of child protection. Government policy, the Family Justice Review, the Children and Families Bill and the research for the use of professionals have all focused on delay as the primary obstacle to better decisions for vulnerable children. However, while it seems likely that decisions might be made differently, more cheaply and faster, there is no evidence that they will necessarily be ‘better’. Indeed, the construction of delay as the main impediment to better protection may mean that the courts will focus on this at the expense of other factors affecting children’s welfare.¹⁸⁷ There is also the possibility that judges will call in aid ‘assumptions’ about the benefit of speed to help them make decisions.

And it is not only children but also the professionals who may be adversely affected by the changes. The drive to speed up decisions and to limit the independent expertise available to the courts will most likely increase judges’ dependence on local authority social work expertise as well as their own. Social work expertise is meant to develop and become more reliable once freed from the shackles of bureaucracy. However the uncertainties and imponderables that are inherent in child protection are not and cannot be affected by the proposed changes. What will change is that social workers will be stripped of the some of the protective layers provided by procedural rules that were created specifically to guide them and on which they could rely to defend their decision-making processes. Instead of being met with more understanding when things turn out badly, they may find themselves more exposed to criticism. In addition, social workers, although they will have been freed from some constraints, will be affected by others, including resources, workload and the expectation that they will be more proficient at court craft. It is not certain that they will have significantly more time to spend with families and nor is it certain that more time will lead to significantly better decisions.

¹⁸⁷ See, for a discussion of a first instance decision based partly on considerations of time, *Re W (Children: Domestic Violence)* [2012] EWCA Civ 528. See, for a critique of the 26 week limit, ‘26 week time-limit for care proceedings is “impracticable”, Justice Committee told’ December 2012 Family Law Week 9. Cf ‘London pilot shows early success in speeding up care proceedings’ December 2012 Family Law Week 4.

There will always be cases where children are harmed despite the best efforts of the social workers concerned. And while Munro and the Government say that instances of harm should be accepted as inevitable, this is not the way politicians like Michael Gove seem to be thinking. It is assumed that there is the knowledge base within social work that makes it possible to protect children. So, if things go wrong, someone must be held to account. What is almost inevitable is that the next child death will be blamed on Local Authority deficiencies or individual social workers' incompetence. Conversely, it is also possible, given a Cleveland-type event and a consequent change in the political climate, that local authorities, social workers and courts will be criticised for making the wrong decisions and for being too ready to place children in care. It is not only children who are vulnerable if the 'wrong' decisions are made. It is also the courts and the professionals who are.

