CAFCASS RESPONSE TO THE REPORT OF THE PRIVATE LAW WORKING GROUP

1. Cafcass has been an active member of the President's working groups set up to look at practices, processes and opportunities for improvement in and around the family justice system in public and private law matters. We have contributed our data, practice insights and learning from our work with more than 130,000 children involved in family proceedings each year. This response to the Private Law Working Group interim proposals has benefited from collaboration with our colleagues in Cafcass Cymru, with who we have also produced a joint statement on issues common to private and public law.

2. Cafcass continues to support the key principles of the current Child Arrangements Programme (CAP) which is designed to assist families to reach safe agreements without court assistance where possible; but for the court to support swift resolution of disputes through a court where this is not possible. The twin challenges identified in the working group's report are first to design a revised process for how these principles can be delivered in ways that work for children, their families and the professionals involved; and then to be more rigorous in ensuring that this is what happens in practice.

3. We are pleased to see that the report recognises the case for some fundamental change given the rising numbers of families coming (and returning) to the family courts, which are simultaneously handling chronically high numbers of public law cases. To be effective, that change needs integrated support for separating families in the community prior to and alongside a less adversarial and more inquisitorial court process for those who need it. These arguments have been made before, and the evidence for them – from the experiences of children, families and professionals as well as from research and data - is growing. The long-term impacts on children of unresolved parental conflict are well documented and the impacts can be felt in future generations.

4. We believe system change at this time is both necessary and possible given the strong agreement and commitment we have seen from the wide range of professionals involved in the review process. It is now essential to put in in place a sustained and properly funded programme of work to better align court proceedings with wider support services for families in dispute over family arrangements, drawing on the work of the full range of agencies and government departments already involved in family services. We owe it to those children who are currently bearing the costs not to put this in the 'too difficult' or 'too expensive' box. As set out in our new Strategy, Cafcass is committed playing its part in system leadership. We will work with the judiciary, the courts, local authorities and others – and most importantly with children and families themselves - to make positive change happen.

We have commented in line with the consultation questions below, referencing the relevant recommendation in brackets.

Voice of the Child

5. We support the need to strengthen the presence of the child's world in the eyes of parents and within the court environment, and to continue to develop ways of achieving this. Within the current process we agree with maintaining the current practice of not directly seeking children's wishes and feelings prior to a first hearing. This ensures a balanced and proportionate approach that considers – on the basis of a review of the application and the

initial safeguarding assessment undertaken by Cafcass/Cymru - whether a professionally-assisted voice for children is needed, and what the focus should be. It also helps minimise the risk of the negative impacts on children of court proceedings which are well documented by the Family Justice Young People's Board **[Rec 2]**.

6. However, we would now like to work with partners to consider whether and how a more child-focused approach, in which children's wishes and feelings can be more directly evidenced earlier in the process, including in Mediation Information and Assessment Meetings and through the information supplied in the C100 application. The introduction of a triage stage potentially allows for consideration of whether, how and when children's participation could be facilitated prior to the first hearing. This should be subject to Cafcass/Cymru safeguarding advice and would need to be properly resourced.

a) Non-Court Dispute Resolution: Support for Separating Families Alliance (SSFA)

7. We agree that investment in integrated community based and specialist services is important to support a public health approach to family conflict, which helps to solve family problems before they escalate, and reduces the impact on children. We believe the services required go beyond typical legal or dispute resolution services – the language of 'dispute resolution' is not helpful in our view - and need to involve domestic abuse services, drug and alcohol services and mental health services too. In particular, there is a need to ensure there are effective trauma-informed therapeutic interventions for children and for (ex) families to improve 'co-parenting' (effective interactions between parents no longer living together) and to strengthen dynamics in reconstituted families. Additionally, we would like to see the alliance include organisations and services that support the diversity needs of children and families including BAME, LBGT, and disabilities. This is likely to require more effective links between children's mental health services and the family justice system **[Rec 1].**

8. We believe non-court services should both act as an alternative to, and operate alongside, the court process for cases that cannot be resolved safely outside of court. We therefore agree that Local Family Justice Boards (LFJBs) do need to form a key role in the local alliances, but we question whether they are currently the right 'owners.' Cafcass managers chair about one third of the 44 LFJBs across the country and in our assessment, local boards currently have neither the resources nor all the local relationships, and commissioning infrastructure needed to lead on local alliances. It would also be important to establish a national programme board or similar to ensure local delivery is consistent with an agreed national framework **[Recs 3 and 5].**

9. Cafcass stands ready to play a leadership role in the development of an alliance and is working with the Nuffield Foundation to design an event to bring relevant partners together, to agree the design principles for an approach that would offer separating families the right help at the right time, so that the Family Court is no longer the default option where parents cannot agree.

10. We think children and families should be actively involved in co-producing the design and delivery of services that will meet their needs, including the most appropriate name. Whatever the alliance is called, we believe that positive co-parenting as a guiding principle is essential. The emerging evidence base and developments in technology mean there is a wider range of ways in which parents can have meaningful involvement in their children's lives beyond the traditional concepts of 'spend time with' and 'live with.' The key focus

should be on the quality of interactions (including the co-parenting relationship) not on the quantum of parenting time **[Rec 4].**

11. We see the benefits of improved integration between the services we commission and those provided by others. This was evidenced in our closer working with mediators as part of the 'Support with Making Child Arrangements' pilot in Manchester during 2018, which found that parents who received a combination of the Separated Parents Information Programme (SPIP) and mediation were more likely to reach a full agreement.

12. We support the proposal to develop and test the approach – including at local level - but do not think that system change can be achieved only through local piloting. Following the initial scoping event, we would like to work with partners, under the auspices of the Family Justice Board, on a coordinated national long-term strategy over 5-10 years, overseen by a delivery board and guided by a clear framework of principles, standards and outcomes.

13. It is essential to find a way to offer more sustained investment, and to build on existing statutory infrastructure and learning from existing programmes. The Troubled Families Programme (Ministry of Housing, Communities and Local Government) 'Early Help Hubs' and the Reducing Parental Conflict Programme (Department for Work and Pensions) are important building blocks of the alliance infrastructure, however both programmes face an uncertain future. Other recent proposed legislative changes and initiatives are shining a welcome spotlight on the damaging impact of parental conflict and the need for early intervention (e.g. the No Fault Divorce Bill and Domestic Abuse Bill); it is important that these initiatives are joined up to ensure consistent messaging **[Recs 5 and 7].**

b) Revitalising the Mediation Information and Assessment Meeting (MIAM)

14. We agree with reframing the MIAM as a positive offer, focusing on children's needs rather than parental disputes right from the outset, and with the proposals to strengthen MIAM gatekeeping. However, it will also be important to address the concerns many 'respondents' to private law applications may have about MIAMs, including how allegations of domestic abuse will be handled, if take-up is to be improved. The Family Mediation Standards Board should be involved in the reframing of MIAMs, drawing on their knowledge and expertise, and in ensuring the mediation workforce is appropriately trained, developed and that practice is rigorously monitored **[Recs 8/9/13].**

15. We agree that time should be given to ensure effective screening of risks such as domestic abuse allegations and that it is essential that separate individual MIAM meetings can be offered. It may be premature to remove entirely the option of joint MIAMS: mediators should retain sufficient flexibility to tailor their service to the circumstances. We think it is essential that judges and court staff are prepared to enforce the MIAM requirement and that training should be offered to ensure this is done effectively. It is an urgent priority that the existing rules on the MIAM are restated and swift action taken to ensure they are enforced.

16. We agree it would be valuable, with the Family Mediation Council's assistance, to conduct a trial by which parenting agreements concluded in mediation become open documents. Should the parents go on to apply to court, the open documents will need to be available to Cafcass to help inform our triage process; this sharing of information should form part of the trial**.** Specifically, we recommend the inclusion of the parenting plan in mediation, as trialled in Cafcass' Support with Making Child Arrangements pilot, as this would provide

parents with a tangible child focussed document of arrangements and a resource to take away and use. Consideration will need to be given to ensure the parenting agreements from mediation do not become a 'weapon' for parties to use in court, given that these are not legally binding documents, and the family's circumstances may have changed since the mediation took place **[Rec 12].**

c) Gatekeeping and triage

17. Effective gatekeeping by courts is essential but it is not consistently applied, although there is some excellent practice which could be better shared across gatekeeping teams. More basic aspects of gatekeeping – such as checking that the information provided on the application is complete and accurate – must be strengthened so that applications do not need to be returned by Cafcass back to the courts **[Recs 10/11/13/14].**

18. We endorse the proposal to trial a new process that would distinguish between gatekeeping and triage as a means of promoting swifter and more focused progression of cases at each stage, proportionate to risk. We hope that families can be involved in the redesign, and any changes must be clearly communicated to parties, including Litigants in Person. A more simplified flow chart setting this out, with clear explanations of the different stages would be helpful. In developing the proposals, consideration should be given to the need for a mechanism by which parties can appeal any decisions made at triage **[Rec 15].**

19. Receiving safeguarding information in a timely way will be essential to the triaging process, and the Private Law Working Group should find ways to tackle the current delays caused by incomplete safeguarding information from third parties. We agree that the revised CAP should spell out the expectations on the police, local authorities and other third parties to provide information to Cafcass/ Cafcass Cymru for their safeguarding enquiries in a timely way. However, third party agencies need to be consulted on the feasibility of revised timescales, especially if compliance mechanisms are to be strengthened. Cafcass/ Cafcass Cymru is currently subject to sanctions if we do not produce the safeguarding letter but the same does not apply to third party agencies **[Rec 16].**

20. The current CAP, states the purpose of the safeguarding letter is to inform the court of possible risks of harm to the child, confined to matters of safety. The interim report suggests that it should be expanded. To clarify, it is the *purpose* of the safeguarding letter, not its *length,* that will be expanded. Our Family Court Advisers already undertake an initial assessment of the immediate risks to children. The implication of the change is that the safeguarding letter will in addition provide more focused analysis with clearer recommendations about which 'track' and associated next steps are in the child's interests. In low risk cases the report may be shorter **[Rec 17]**.

21. Recommendations made by Cafcass Family Court Advisers may include attendance at a Separated Parents Information Programme (SPIP), referral to a service provided under the Support for Separating Families Alliance, and/or the allocation to a track (with reasons), to help inform the triage process. We would welcome wording changes to make this clearer in the revised CAP. It will also be an opportunity for Cafcass to reinforce messages around positive co-parenting and the importance of the parents focussing on the needs of the child. It is important to acknowledge in the revised CAP, that if the safeguarding information is incomplete, and/or Cafcass/ Cafcass Cymru have not been able to speak with parties (for reasons such as incorrect information being filled in on the

c100), we will not have enough information to make recommendations on how the case should progress, which will delay the process.

22. We agree in principle that Cafcass/Cafcass Cymru does not need to be directly involved in the triage meeting, but will instead make recommendations through the safeguarding letter, and be available to the 'triage' judge (by telephone or skype) for clarification of issues raised in the safeguarding letter. However, this will need testing as it will involve some re-design of our procedures and how they dovetail with those of other agencies **[Rec 20]**. We also need to assess and guard against the risk of over-reliance on Cafcass' already stretched resources. Clear guidance to judges around in what circumstances this would be appropriate would be helpful.

d) Tracks

23. We endorse the principle that cases should be allocated to different tracks based on an integrated assessment of the circumstances and risks of the case. Track 1 being for cases without safeguarding issues; track 2 for more complex cases (often with safeguarding issues); track 3 for 'returning' cases (including enforcement cases) **[Rec 18]**.

24. We welcome the introduction of a judge led triage meeting to review this information and ensure that the case starts with the right child-focused approach. Some key issues which will need to be worked through are:
    - how to bring together the different sources of information into an integrated assessment;
    - the need for inter-disciplinary agreement on the appropriate risk thresholds or other criteria for allocating cases to tracks;
    - the mechanism and basis by which parties can appeal any decisions made at triage;
    - the dynamic nature of risk, and the need to allow for cases to switch tracks or access different support tailored to need;
    - whether the proposed timing of 4-6 weeks is realistic, it should be about getting it right for children and their families, rather than necessarily having to do it quickly;
    - the need to factor in the possibility of incomplete safeguarding information in the safeguarding letter;
    - the need for a thorough appraisal, development and testing of the proposed changes to ensure the potential benefits are realised and to identify and manage any unintended consequences **[Recs 18 and 20].**

25. On judge-led conciliation **[Recs 21-24],** we support the recommendations in principle for cases with a real prospect of resolution through conciliation being listed for conciliation, and those which need a judicial determination advancing straight through a case management process rather than automatic FHDRA in all cases. The identification of suitable cases will be key, as will ensuring time is freed up in court lists to allow time for in-court conciliation to take place. Subject to resource being available, we would be keen to explore:
    - how Cafcass can support additional training for the judiciary on conciliation techniques and advise on listing of conciliation cases to ensure a collaborative approach.
    - the wider roll-out of 'at court' mediation delivered by trained mediators, particularly for track 1 cases, although this may be more realistic in larger court centres, although there are cost implications.
    - how Cafcass could offer a more integrated model with mediators, drawing on learning from the 'Support with Making Child Arrangements' Manchester pilot.

26. Further scoping and analysis are needed to understand the likely numbers in each track and whether there is a need for any specialist training of our private law staff to support the different tracks. An important part of any pilot will be to understand whether it is feasible for Cafcass and the courts to deliver multiple tracks; and whether it does indeed lead to a swifter process and better outcomes for children and families. A robust triage process from the outset will be critical, as will ensuring cases are able to easily change tracks as and when new risk issues arise.

e) Separating Parents Information Programme (SPIP)

27. The proposal to consider the use of s11A of the Children Act, 1989 to order SPIP/WT4C earlier and prior to a first hearing is consistent with the feedback we get from parties (and providers) about how to make best use of the SPIP programme. This approach is key to promoting positive co-parenting from the outset and we are using behavioural insight approaches to develop ways of making SPIPs available earlier, including through digital approaches. Like Cafcass Cymru, we are concerned that the proposed timescales may not be realistic. If triage takes place 4-6 weeks after issue and the expectation is that track 1 cases will be completed within 8-10 weeks, this is likely to leave insufficient time for parents to attend the course prior to a hearing. Locally, we are working with Sheffield City Council who will be allowing SPIPs to be delivered pre-court, as part of their package of interventions funded by the DWP Reducing Parental Conflict Programme. Cafcass plan to work in partnership to provide SPIP training resources to the council. This provides an opportunity to place SPIP in a pre-court framework and to test the outcomes of SPIPs provided at an earlier stage **[Rec 19]**.

28. We would like to consider other ways in which SPIPs can be made available earlier, for example by mediators being able to refer to them as an outcome from MIAMs. As the commissioner of SPIPs, Cafcass would need to be provided with sufficient budget to meet the additional costs of SPIPs – for increases in demand in the current model as well as any additional demand which results from making them available earlier. We believe there may be ways of further reducing the unit costs of SPIPs and making them better tailored, based on the assessment of risk in a case, through the development of a more modular approach and incorporating components that could be offered digitally **[Rec 19]**.

f) Returning cases/enforcement

29. We agree with the recommendation that the c79 is taken out of circulation and that all applications (including applications for enforcement) are made on a c100. A single re-designed form might be easier for Litigants in Person to use and may help to neutralise the nature of the application. We agree that the form needs to be adapted to request more specific information about the previous proceedings, work will be needed on the design of the form, especially for when a digital solution is found **[Recs 25 and 26].**

30. We agree in principle that getting back in front of a judge as soon as possible (preferably the same judge as the previous case), may be the most important priority over fresh safeguarding checks, unless there are clear indications which suggests such checks are necessary (either as an initial safeguarding assessment or as a full welfare report). However, this needs further assessment and testing out in practice so that we can consistently identify and understand the characteristics of returning cases and design an

approach which will avoid any unintended consequences of setting the default against fresh safeguarding checks **[Recs 27 and 28].**

31. With regards to the proposal for the Cafcass Positive Parenting Programme (CPPP) to be ordered as an activity in returning cases, this is now out of the pilot phase and is being embedded as an intervention in suitable cases nationally. It can be ordered by courts at an early point in proceedings if the CPPP suitability criteria are met, which includes cases where there have been repeated returns to court. We therefore do not anticipate that an adaption of the model needs to be considered for returning cases **[para 120d].**

g) Other comments on recommendations not covered elsewhere

32. **Sharing outcomes with children [para 121f]:** We agree with the proposal for a letter to be sent to the child explaining the outcome of the case, and/or an order framed in terms suitable for the child concerned, depending on their age and understanding. However, consideration needs to be given as to who would do this where Cafcass is not involved at the end of a case. If Cafcass were to be asked to take this role on, it would require co-operation from the courts to send Cafcass a copy of the final order without delay. This would additionally have benefits in helping to monitor outcomes, but the feasibility would need to be properly tested in practice.

33. **Domestic abuse [para 87-92]:** As outlined in the report, PD12J falls outside the remit of the Private Law Working Group. However, we believe it is important to highlight that we welcome the initiatives in the sector on strengthening practice in this area including: the proposed Domestic Abuse Bill, the MoJ spotlight review; and the Family Justice Council's Guidance on domestic abuse. We agree that the PLWG will need to take account of any changes in practice recommended following these initiatives. As a service, Cafcass has strengthened our links with organisations working with victims of domestic abuse and have valued the feedback they have shared with us. We will continue to play an active role in working with partners to ensure domestic abuse and its impact on children is identified early; that appropriate adjustments are made to court processes to protect survivors and their children; and that a range of suitable interventions are made available to children and families to support safe relationships.

34. **Aftercare [para 121 and 122]:** We agree in principle with the proposed range of 'after care' provision which judges should more actively contemplate. We would like to emphasise that the judge, rather than Cafcass/Cafcass Cymru, should have lead responsibility for monitoring. As set out in the report, there is currently no power for Cafcass/Cafcass Cymru to offer any parenting co-ordination service post-order.

35. More work needs to be done to better understand the use, effectiveness, and implications of Family Assistance Orders and Child Contact Monitoring Orders. Cafcass figures suggest use is currently low and varies across the country. It would be helpful to establish when and why courts make such orders for post-proceedings involvement, and how effective they are in maintaining court-ordered arrangements, before encouraging their use in the revised CAP. This could possibly be a research project for Cafcass, potentially in partnership with the Nuffield Family Justice Observatory. These orders are often not sustainable options, ideally, we would need to consider a variation on parenting coordination, possibly delivered/commissioned through an alliance.

36. **Digitisation [Rec 29]:** We agree with the proposals for digitisation of processes to help expediate the family court process for all. Delaying digitisation, has a substantial impact on the foregone benefits of a more streamlined, effective system which will reduce delays experienced by children and families. However, it is important that resources are invested into preparing the groundwork for digitisation and understanding the multiple dependencies within the system, before the benefits of digitisation can be realised. For example, the Cafcass digital c100 pilot, highlighted the need to tackle the time difference between Cafcass' receipt of the c100 and c6 receipt before digitisation could be effective.

37. **Piloting [Rec 30]:** Piloting the various changes is welcome, but we need to avoid separate testing of small-scale pilots or multiple variants. Significant further design work on the process will be required before we are ready to test a revised approach. As we learnt from the 'Support with Making Child Arrangements' Manchester Pilot, sufficient time and resource needs to be invested into the planning, co-ordination and evaluation of pilots, in order to protect business as usual, adapt models in response to early learning, and to build a robust evidence base before extending the model. Cafcass would be pleased to play a leadership role in this work drawing on its past experience.

38. **Rule 16.4 cases:** The number of cases where children become a party to proceedings, with the appointment of Cafcass Guardian, under Rule 16.4 have increased between 2015/16 and 2018/19, from 16,943 to 21,046. The rate of increase is higher than the underlying increase in private law applications involving children. More work needs to be done to understand the reasons behind the rise in these cases, which are often resource intensive and complex, and to consider whether further interventions or guidance are needed for this group. Cafcass can contribute learning from its Cafcass Positive Parenting Programme, which was piloted in rule 16.4 cases featuring harmful conflict.

39. **Cultural change:** We would like to see a system that is designed around its users rather than professionals. We hope that any reforms taken forward seek to simplify and clarify processes for those considering court so that they have realistic expectations of what can be achieved by the family court. This will be an important element in achieving the cultural change towards more collaborative ways of making arrangements that are in the best interests of children following separation, supported by inquisitorial rather than adversarial court processes.

Cafcass

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