



NEITHER FEAR NOR FAVOUR, AFFECTION OR ILL WILL:

MODERNISATION OF CARE PROCEEDINGS AND THE USE AND VALUE OF INDEPENDENT SOCIAL WORK EXPERTISE TO SENIOR JUDGES

STAGE II – SEPTEMBER 2013

**Dr Julia Brophy
Judith Sidaway, Dr Jagbir Jhutti-Johal, Charlie Owen and
University of Oxford**

EXECUTIVE SUMMARY

Introduction

This is part two of an evaluation of the work of independent social work experts (ISWs) in care proceedings (stage I was published in April 2012). It takes forward findings from stage I exploring further the evidential base for views put to the Family Justice Review about the practice of courts. It examines the views, experiences and practices of a sample of senior judges in commissioning ISW assessments, placing these in the context of the timing, format and value of local authority assessments. Finally, judges' views about the implications of the modernisation programme for use of ISWs are explored - in the light of a need for earlier completion of cases, without loss of quality in assessments, and with regard to issues of fairness, justice and transparency in judicial decision making.

The study is based on interviews with 23 senior judges (20 DFJs, 3 Circuit Judges) in 20/43 county courts in England and Wales. Interviews were held between February and April 2013. They include representation from all circuits, and courts with small and high volume case loads (less than 115, 251 - 900 applications in 12 months). They hear applications from just over half of all local authorities in England (59%) and just over one third (36%) in Wales.

KEY FINDINGS

USE OF INDEPENDENT SOCIAL WORK EXPERTISE – VIEWS OF SENIOR JUDGES

1 Judges' views about frequency of use

- In the light of views about high use of ISWs at 2010, we sought judges' views about their practice: most said they were not 'frequent users' - estimates of 22-25% of case load suggested very similar usage to that found in a national random survey in 1999.
- A small group thought their use was 'frequent' - two to three orders a month, with use linked to local authorities known to be struggling.

- While there were indications of pockets of high use in the history of proceedings, there was no single 'cause'. For example, in periods where a 'no stone left unturned' attitude was *said* to dominate discourse, judges also experienced resource problems in local authorities with gaps in skills and evidence. Lack of judicial continuity played a part, as did the *very* early days of the Human Rights Act 1998 - but judges reported those days were long gone; they did not represent practices leading up to the FJR.

2 Judges' reasons for use of ISWs

- The main reasons for current use of ISWs is lack of an assessment, a poor quality/out of date otherwise limited assessment and where a local authority is unable to provide the skills to undertake the work – or cannot do so in the court's timescale.
- Breakdown of relationships between parents and a social worker was not a reason judges would countenance for use of an ISW – it could be a contributory factor but was rarely a free-standing reason - save in exceptional circumstances.
- Less common were cases where a LA had 'closed its mind' to a carer, where several candidates required consistency in assessor, or where an existing assessment was compromised, or biased, or lacked transparency. These were *not* routine cases but circumstances, even for judges who rarely used ISWs, which would justify use.
- Just under a third of judges identified changes to the role of guardians as contributing to use of ISWs; guardians were also identified as a party to most instructions.
- When considering use, caveats usually applied, (i) the ISW must be able to dedicate time and report quicker than the LA could while maintaining quality and (ii) the ISW should be a 'tried and trusted' expert with the confidence of the court and the LA.
- Main reasons for use in kinship assessments were broadly the same: lack of resources within the LA and inability to complete work in the timescale. Breakdown of relationships could be a *contributory* factor; it was not a 'freestanding' reason.

3 Local authority involvement in joint instructions and judicial decision making

- Most judges said LA involvement in instructions was active, usually the outcome of collegiate endeavours. There was little evidence of 'shoehorning' of local authorities – who were not slow in opposing an application if they felt that was appropriate.
- There was however limited evidence of a pragmatic approach where the LA had concerns about whether existing evidence would withstand examination.
- A desire by local authorities to share assessment costs was not identified as a driving force in their involvement in joint instructions.
- Some judges had noticed a decline in LA involvement in instructions (post 2011) but most had not; judges said that was because issues have always been robustly debated and local authority involvement 'active and appropriate'.

4 Reasoned adjudication or rubber stamp?

- Almost all judges had refused applications for an ISW: they do not regard themselves as a 'rubber stamp' in the face of an agreed application: almost all reported 'need' had to be established regardless of party views.
- Pressure of work and substantial reading materials mean judges are dependent on experienced child care advocates but judges said advocates were usually well aware of their approach to experts *per se* - that meant need had to be established.

- Some judges raised concerns about the impact of the new regime and a 26 week deadline. It was argued changes should not result in a ‘knee-jerk’ or ‘macho’ reaction by courts without proper exploration of the needs of the case within a framework that considers fairness and justice for children and parents.

5 The impact of human rights issues

- Human rights are not a key driver in applications or decisions to order an ISW report. Almost all judges said such arguments are out-dated by some years. Such issues were rarely engaged in court and *always* as an 'add on' or 'make weight' argument.

6 ‘Borderline’ cases and decisions to instruct an ISW

- Such cases were rare, judges had granted leave - but with caveats. First, in complex cases issues can be subtle but with substantial implications for children and where ‘broad brush’ assessments may be limited. Second, judges have usually only countenanced use where a balancing exercise indicated potential value, where questions were identified and where the report would not cause delay.
- While such cases are rare most judges would not rule out exercising discretion in such circumstances; scrutiny may be ‘fierce’ but the same issues are likely to apply.
- Several judges cautioned about the benefits of hindsight and some rhetoric in this area. There were concerns that certain arguments may result in a blanket refusal and some ‘shooting from the hip’ by courts where timetables rather than careful scrutiny of need and potential value, may determine approaches.

7 Judicial views about the quality of ISW reports

- Just over half of the judges said the quality of ISW reports was good or excellent - reports described as ‘outstanding’, ‘excellent’ and ‘exceptional’ and without exception. Other judges said reports were good but with instances of variability; three judges identified a report that had not met their expectations.
- Reports were said to be analytical, reasoned, independent and comprehensive, built on sufficient time with parents/others for a robust assessment.

8 The expertise of ISWs

- Judges reported most of the ISWs they commissioned were highly experienced practitioners with specialist skills, highly articulate, with effective and detailed knowledge of public law, child development and the needs of the court.
- They were described as practitioners at the ‘top of their field’, able to provide ‘experience, expertise and wisdom’. As a ‘tried and trusted’ expert they were mostly seen as of substantial value to courts and other parties.

9 The value of ISW assessments for courts

- ISWs were seen as providing specialist skills and expertise which a local authority could not provide and for the most part producing reports which are comprehensive meet the court’s timescale and enable judges to move forward with confidence.
- In exceptional circumstances (where local authority evidence is compromised, biased or lacks transparency) ISWs can engage highly disaffected parents/potential carers.

10 Impact of an ISW report on cases: planning, placement and contact issues

- With one exception almost all judges reported cases where an ISW assessment had changed the ‘direction of thinking’ and the order or placement proposed for a child.

- Circumstances included parenting capacity for a child with a physical disability, sexual abuse and risks to siblings, parenting in diverse cultural/religious contexts, parenting with a learning disability, and intergenerational abuse in families.
- Changes in thinking and planning for children some of which were heading for adoption included placement with another parent and with extended family members, and plans for Special Guardianship Orders changed to placement for adoption.
- Judges also reported an ISW could shorten cases and reduce litigated issues. This was especially so when the ISW was 'tried and trusted' by the local authority.

11 Limitations and problems in using ISWs

- Most judges said delay was not a factor associated with ISWs. Most have usually only agreed a 'late' application if the report could meet an existing deadline. Few would countenance an adjournment – save in very exceptional circumstances.
- There was some concern about the impact of timescales on the quality and value of ISW reports; this requires monitoring. Judges said timing was important but it was not the sole factor, other factors were relevant in exercising judicial discretion in this field.
- Undermining of social workers per se was not seen by most judges as a limitation or result of using ISWs. This is a complex area but some judges indicated the source of public confidence in social workers, where this is an issue, is likely to lie elsewhere.

12 Barriers or problems to earlier instruction of ISWs

- Judges identified three concerns: (i) impact on the quality and comprehensiveness of reports where an ISW has not seen all the evidence (ii) difficulties in engagement of parents before threshold and care plans are clear and, (iii) difficulties for extended family members/potential carers where similar sequencing issues apply.

LOCAL AUTHORITY INSPECTIONS

13 Ofsted and CSSIW - completion rates for core assessment in 35 days

- Data for the 90 'feeder' LAs demonstrate that in 44%, 80% of assessments were completed in 35 days, in 56% it was between 70 - 79%, in 29% it was below 70%.

14 Ofsted and CSSIW Inspections - 'quality and timeliness' of core assessments

- In a random sub-sample of 60/90 LAs, 58% was judged to be 'variable'; 18% were 'improving'; 5% were 'good', 5% 'unacceptably poor':

15 Ofsted grading: 'quality of practice' or 'quality of provision'

- In a sub sample of 52 'feeder' authorities, 58% were graded 'adequate' (grade 3), 31% 'good' (2) and 8% 'inadequate' (4).

THE PUBLIC LAW OUTLINE (PLO)

16 Courts operating the PLO and applicants meeting filing requirements

- Most judges operate or try to operate the PLO but many pointed out that case management practices are one part of dealing with delay; effective work by courts depends on timely, high quality evidence: the two are inextricably linked.
- Few judges reported a local authority as consistently compliant with providing the checklist documents at PLO stage 1.
- Judges with a single/very small number of 'feeder' authorities tended to report better experiences but some with several authorities had 'better' and 'poor' performers.

LOCAL AUTHORITY ASSESSMENTS FOR COURTS

17 Format, quality and utility to the court

- With notable exceptions, judges indicate that so far as proceedings are concerned, the core assessment record generated by electronic ICSs is '*not fit for purpose*'.
- This raises several policy questions, not least of which is whether that record was ever intended to be filed in proceedings. That requires urgent attention.
- Relatively few judges said the core assessment was a key document at PLO stage I; even fewer routinely received it. Most judges had either 'given up' on this document some time ago – or did not think it was necessary at the start of proceedings.
- Some DFJs had taken steps (many pre-dating the reports of Munro and the FJR) to assist local authorities in improving the quality of assessments.

18 Changes over time in the timeliness and quality of core assessments

- A small number of judges felt there had been some improvement in assessments but overall most saw little improvement post the Munro Report and recommendations.
- There were also pockets of concern about some social workers' understanding of legal framework and thus the requirements of courts. This has implications for training including a *compulsory* component in training on child care law for those wishing to work in this field, recruitment and retention of senior level social workers, in-house support for newly qualified social workers, and increased use of dedicated pre-proceedings assessment teams.
- Given the immediate needs of the FJMP an expansion of mentoring systems utilising the skills of experienced, court literate senior social workers such as ISWs would also meet the needs of both courts and local authorities, supporting colleagues in children's services where knowledge, experience and thus confidence is lacking.

19 Integrated Children's Systems (ICS)

- Ofsted and CSSIW reports identified some problems with some systems: these are exacerbated for some courts not least because of the variety of systems used and thus the range of electronically generated reports filed.
- Any restructuring and reshaping of social work practices with families (following recommendations of the Munro Report 2011) and improvements in the timing of reports for courts (under the PLO 2013) are likely to be constrained by IT systems.
- There appears to have been a lack of policy attention to documents for work under Part III of the CA 1989 and those required under Part IV. Attention to this interface was absent from the work of Munro (2011), from the development of ICS(s), and from Working Together to Safeguard Children (2013).

THE FAMILY JUSTICE MODERNISATION PROGRAMME

20 A view from senior judges

- Most judges said the days are long gone – save in exceptional circumstances - when an ISW might be used as a 'double check' issues or 'add weight' to a social worker's conclusion. Some judges did not recognise the picture of their work put to the FJR.
- Several judges raised concerns about some decisions they are expected to make. Key concerns are keeping vulnerable parents on an equal footing with other parties and the position of extended family members as potential carers for children. Therefore practices require careful and independent monitoring.

- Some judges expressed concerns that LAs are subject to less scrutiny of their work by guardians than in previous times; that the latter have less time per case and some were reported as less experienced than previously. With notable exceptions, judges said many experienced guardians on which courts have relied are now ISWs.
- Some judges said changes would not impact on their use of ISWs as the latter were rarely used; several more reiterated they had always undertaken a robust assessment of 'need' practice was thus in line with changes and would not alter.
- Whether judges were more or less likely to use ISWs, or that practice would remain unchanged, the circumstances where they would use an ISW were the same:
 - where a local authority lacks the necessary skills or time
 - to undertake work faster than a local authority was able
 - in complex cases such as those with multigenerational abuse
 - where an assessment is compromised, biased, or lacks transparency
 - Where several potential carers require assessment.
- Judges recognised the problems facing the FJS and for careful use of *all* experts. Practices are likely to be tempered, in the interests of children and justice, by a need never to close all doors in seeking the best solution for a child. Where necessary ISWs work to tighter deadlines and judges adapt case management practices.
- Judges addressed tensions between completion rates and doing what was best for a child: obtaining permanence for a child quickly is important but so is also making the right decision for a child and thus obtaining timely, analytical, forensically driven reports on which the court can move forward with confidence and speed.

21 In summary: myths, practices and ways forward

- Findings demonstrate multiple reasons for use of ISWs. Evaluation of ISW reports indicated they fill in gaps in LA evidence, add expertise and skills and do not cause routine delay. Overall, senior judges' views and experiences support those findings: they ordered ISW reports where the evidence was necessary and where a local authority could not provide the expertise and/or time; that practice predates the 26 week deadline for completion.
- To a lesser extent judges also use ISWs in cases of multigenerational abuse and risk, where several carers require assessment, and where existing evidence is compromised, or biased or lacks transparency.
- There is evidence of collegiate work among all professions: tensions between local authority social workers and ISWs were not inherent, a 'tried and trusted' ISW was reported as of value to courts and to local authorities and guardians trying to obtain robust assessments within deadlines but with resource limitations.
- The study also raises some questions about levels of training, expertise and support for some social workers. Where these are newly qualified/second year practitioners without training in the legal framework, they are highly vulnerable in the legal arena. Mentoring schemes utilising ISWs may assist LAs in the immediate/medium term.
- Foremost for courts is that children, and just and fair proceedings, cannot wait. Immediate availability of high quality and timely assessments is imperative if timescales are to take precedence. Avenues must remain open to courts, guardians and local authorities to obtain the best evidence; no option should be immune from question or bypassed in that exercise.