Child Care Law Reporting Project

Report of a research study commissioned by the

Department of Children and Youth Affairs

An Examination of Lengthy, Contested And Complex Child Protection Cases In the District Court

Executive Summary

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March 2018

This is the Executive Summary of
a report published by the
Child Care Law Reporting Project
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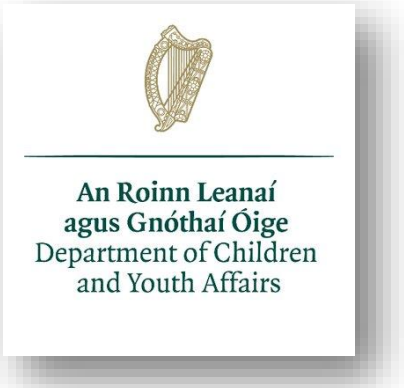

Executive Summary

Introduction

Ten lengthy and complex cases were examined for this report, and 40 interviews were conducted with key participants in these and similar cases. They brought to bear their experience of a wide range of child protection cases, including some extremely lengthy and contested ones.

The lengthy and complex cases examined in the report, and the interviews with the professionals involved, cast light not only on these specific cases, but on complex cases in general and indeed all child care proceedings. They illustrate the difficulties in reconciling the system of law and court practice with the process involved in child protection.

The law requires precision and detailed analysis of facts within the framework of legislation and case-law, based on an assumption of competent and rational actors, while social work relies on relationships as well as training, using experience and judgment to consider past facts and likely future outcomes, sometimes involving actors with limited capacity. When these different approaches are combined with limited judicial resources, lengthy court lists and lack of case-management support on the one hand, and heavy case-loads, lack of back-up services and poor inter-State agency cooperation on the other, serious problems are inevitable.

This study shows that issues including the early identification of complicating issues in a case, careful preparation of cases by the CFA for court, the need for coordination between different State agencies involved in the welfare and protection of children and the conduct of cases by the District Court, all require attention by the various State agencies.

1. Common features of complex cases

The cases examined here share certain features. These include allegations of very serious harm to a child or children, involving the likelihood of a criminal investigation; lack of coordination between State agencies concerning the allegations made; the involvement of a substantial number of expert witnesses; the requirement that there be professional assessments of the children and sometimes also of the parents; delays in obtaining such assessments; and disputes between experts as to the findings of the assessments.

Of the ten cases examined, the longest ran for 52 days in court over a period of nearly three years. Adjournments were common; for example, there were 22 adjournments in one case. Multiple witnesses were called to give evidence, including

expert witnesses from outside the jurisdiction; in one case there were 24 witnesses and in another there were 13 expert witnesses heard. The numbers of lawyers involved was high, with up to 10 lawyers in some cases.

Seven of the prolonged cases, and all except one of those that took over a year, were heard outside Dublin, with six of them heard by moveable judges.

The Final Report (2015) of the first phase of the Child Care Law Reporting Project highlighted inconsistencies between different parts of the country in the numbers of applications brought and in the outcome of these applications. This second phase has confirmed this finding of inconsistency, both in the practice of the CFA and in the courts. Some parts of the country are more likely to see very lengthy cases than others, though in this report the areas in which these cases were heard are not being identified because of the danger of thus identifying the families. According to the Final Report of the CCLRP, however, it is clear that where there is a single judge consistently hearing child care cases on dedicated child care days, very lengthy and multiply-adjourned cases are rare.

It must be acknowledged that reducing the time spent on complex child protection cases can prove difficult, and there is no magic bullet, as has been the experience in other jurisdictions. There is no single reason why some cases have run for very many days spread over many months and in some cases years, and there is no single answer that could reduce the time, the stress for all concerned and the uncertainty for the children. This research indicates, however, that difficulties often start with the preparation of the case and continue with the manner in which it proceeds.

This study shows that issues including the early identification of complicating issues in a case, careful preparation of cases by the CFA for court, the need for coordination between different State agencies involved in the welfare and protection of children and the conduct of cases by the District Court, all require attention by the various State agencies.

The new “Signs of Safety” programme in the CFA offers opportunities to engage in a different manner with families where the children are thought to be at risk, and may facilitate identifying cases likely to become more complex, but this programme is as yet in its infancy in Ireland.

Table 1 below summarises the main features of the cases covered in the report:

Table 1: Main Features of Complex and Lengthy Cases

	Case A	Case B	Case C	Case D	Case E	Case F	Case G	Case H	Case J†	Case K†
Application	Care Orders until 18 for 2 very young children	Care Orders for 4 children	Care Order until 18 for 1 child	Care orders until 18 for 7 children	Care Orders till 18 for 8 children	Care Orders until 18 for 5 children	Care Order until 18 for 1 girl	Care Orders for 5 children	Care Orders for 2 children	Care Orders for 4 children
Main grounds	Non-accidental injury of infant	Emotional and physical abuse, domestic violence	Grave danger of serious sexual abuse	Alleged sexual abuse; domestic violence	Alleged physical, sexual abuse; neglect	Physical and sexual abuse; neglect	Physical and sexual abuse; neglect	Neglect, sexual abuse	Neglect, sexual abuse	Neglect, sexual abuse
Location	Rural town	Dublin	Rural town	Rural town	Rural town	Rural town	Dublin	Rural town	Dublin	Rural town
Respondents	Married parents	Married parents	Married parents*	Married parents	Married parents	Cohabiting	Mother	Cohabiting parents	Cohabiting parents	Married parents
CO hearing (months)	6	4	4	18	27	31	7	7 D.Ct. 3 C.Ct.	33	26 to date
Days' hearing	17	11	23	19	45	31	14	67 D.Ct. 47 C.Ct	52	51
Adjournments	5	5	1	22	22	18	3	10 in D.Ct. 2 in C.Ct.	Multiple, total unknown	Multiple, total unknown
Section 23 application	No	No	No	No	No	No	Yes	Yes	Yes	No
Outcome	CO refused; 1-year CO granted (Resolutions)	COs until 18 granted	CO until 18 granted	COs until 18 (3), CO 1 year (4) , later to 18	COs until 18 granted	CO until 18 granted	CO until 18 granted	Granted, upheld on appeal	Application withdrawn by CFA	Further 4 weeks in 2018
Number of witnesses	18	7	9	8	6	8	10	23 (CFA) 1 (parents)	Unknown	Unknown
Expert witnesses	13	1	4	2	0	3	2	7	Unknown	1 (so far)
Lawyers	9	5	6	7	6	6	6	6	10	10‡
Written judgment	Yes	Yes	Yes	No	No	No	Yes	Yes (C.Ct.)	Awaited	Not over

2. Preparation of the case

According to a number of social workers and guardians *ad litem*, there can be a lack of clarity about the reasons for a care order rather than a supervision order being sought and about the threshold required to prove its necessity to the court. This spills over into uncertainty about the evidence needed to demonstrate that this threshold has been reached and about the identification of witnesses, both social worker and expert, that need to be called to support this evidence, all of which should be done before a case is listed for hearing.

Where cases are routinely heard by the same judge who is very clear on what he or she requires it is much easier for the social workers and their legal team to focus on the threshold and the evidence needed to support it. For logistical reasons within the court system not all child care cases are heard by a regular judge on dedicated child care days, leading to uncertainty and inconsistency in the presentation of cases.

3. Social worker training and policy implementation

Perceived inadequacy of social worker training in a range of areas was identified by a large number of interviewees. Specific training deficits related to the assessment of sex abuse symptoms and allegations; knowledge of the law involved in care proceedings, including the thresholds required for the various orders provided for in the Act, the constitutional protection of the family, the requirement that an intervention be proportionate and the right to fair procedures; and an ability to analyse all the information collected about a family and present it in a way that balances positive and negative aspects of the family, avoiding unnecessary repetition. Further training in these areas would give social workers more confidence about appearing in court, lessen the time spent in cross-examination and reduce stress.

The pressure of work on social workers, with heavy case-loads and sometimes a high turnover, and the lack of priority given to adequate training and preparation for court, undoubtedly explain some of the shortcomings in the presentation of cases by the CFA and contributes to the stress experienced by social workers.

4. Guardians *ad litem*

There is a lack of clarity in existing legislation about the role of guardians *ad litem*, who were appointed in all the cases examined in the report and gave evidence on both the views of the child or children involved and on their opinion of the best interests of the child, including in some instances recommending interventions and therapies that were not being contemplated or provided by the Child and Family Agency.

The Department of Children and Youth Affairs is already engaged in reforming the guardian *ad litem* service, which exists within a legislative and regulatory vacuum, as revealed in this report by the varying views of the GALs themselves as to their role. The General Scheme of the Child Care (Amendment) Bill 2018, providing for a national guardian *ad litem* service, has been published, stating that its purpose will be to enable and facilitate the child's views to be heard in proceedings (District, Circuit and High) under the Child Care Act 1991, to enhance the decision making capacity of the Courts regarding the child's views and best interests. The Bill has yet to be enacted, and further debate is likely.

5. Child sexual abuse

Child sex abuse is a highly complex area and its investigation is fraught with difficulty. A suspicion of abuse may be based on the child's behaviour, which can be open to multiple interpretations, or based on disclosures by the child. This should be followed up by a specialist interview. However, this does not always happen, due to the shortage of appropriately trained interviewers. In addition, they may come from either a therapeutic or a criminal justice perspective, which influences the manner in which the interview is conducted. Experts point out that therapeutic interviews, designed to enable a child to speak about abuse for the purpose of diagnosis and treatment, are often conducted on the assumption that the child has been abused, thus seriously impairing the evidential value of any disclosures. Investigative interviewers, on the other hand, may fall into the trap of a preconceived notion of what has happened to the child, so that the interview becomes focused on gathering confirmatory evidence, avoiding avenues which might produce negative or inconsistent evidence. Both approaches are likely to be robustly challenged in court.

The CCLRP reporters interviewed for this report and other interviewees stressed the geographical lottery involved in obtaining timely and robust assessments for child sex abuse, with some parts of the country having no access to any specialist assessments, either from social workers, Gardaí or specialist units, and where they have to rely on the assessment of social workers who acknowledged having inadequate training in this area. There are only 16 social workers trained to interview child victims of sexual abuse, according to the Garda Inspectorate.

The Child and Family Agency needs a clear national policy on child sex abuse allegations and how these are dealt with in the context of child protection proceedings. Because such allegations raise both criminal and child welfare issues, the Garda Síochána have an essential role in investigating the allegations. This will often include interviewing the child. However, because such interviews are for the purpose of gathering evidence for a prosecution, not establishing the context in which the abuse occurred, its impact on the child, the implications for the child's

future family life and the child's therapeutic needs, there need to be joint interviews with other appropriate professionals.

There is no consistent cooperation between the Gardaí and child protection services in relation to collecting evidence on child sex abuse. The existing protocol for joint interviewing between members of the Garda Síochána and social workers was in little evidence in the cases attended by the CCLRP. One of the results is multiple interviewing, leading to increased trauma for the child and the danger of the contamination of the evidence. The CCLRP saw trenchant criticism being voiced in court by experts from the UK and by judges of interviews both by members of the Garda Síochána and those working in specialist child sex abuse units.

These findings are echoed by the Garda Inspectorate in its 2017 report on the Garda response to child sexual abuse, released on February 27th 2018, in which it points out that many of the recommendations made in its report on the same subject in 2012 have yet to be implemented. The report paints a disturbing picture of inconsistency and delay, stating "there are still many inconsistencies in joint-working practices across Ireland and progress in driving improvements in joint-working arrangements has been slow." (Garda Inspectorate 2017, p62) The report adds: "Some of these areas will require the assistance of other agencies such as the HSE, which provides medical examination and therapeutic services for child victims," and in the cases attended by the CCLRP and examined above one of the features observed was difficulty and delay in obtaining assistance from HSE-run child sexual abuse units. This author endorses the statement from the Garda Inspectorate, "No one government department or agency can deliver all of the change necessary to improve the services delivered to victims and survivors of abuse." (ibid, p63)

A national unit or regional units within the CFA of social workers specially trained to assess child sex abuse, who could liaise with the Gardaí and specialist services and who could go to an area when allegations of serious sexual abuse arise to assist the local team, would contribute to greater consistency and more timely therapeutic interventions for the children.

This report endorses the recommendations made by the Garda Inspectorate in its 2018 publication, *Responding to Child Sexual Abuse.*

6. Assessments

Where children have suffered severe neglect impacting on their health and development, where they have experienced trauma or suffered sexual abuse (itself traumatic), the nature of the impact needs to be assessed and presented to the court. This does not always happen in a timely fashion, or sometimes at all. In certain cases, the capacity of the parents to parent the child also needs to be

assessed professionally, in the context of the parent's general cognitive capacity and cultural background. Time and again we saw delays in obtaining appropriate assessments, including cognitive assessments for the parents, without which parenting capacity assessments will not be fair and will not be able to address deficits.

There is a lack of consistency in conducting parenting capacity assessments, some of which are carried out by psychologists, with others conducted by social workers. Delays in psychological and other reports on children, with consequent delays in accessing appropriate therapies, are endemic. Such delays cause cases to be adjourned while the assessments are awaited, leaving both children and parents in the limbo of interim care, and can give rise to disputes in court between GALs and the CFA about the appropriate services for the children at the centre of the proceedings in advance of a decision on their long-term care.

As the CCLRP stated in its *Final Report 2015*, and as has been pointed out by the CFA itself, the delays in obtaining such assessments are often not the fault of the CFA, which does not have the appropriate professional services, but is dependent on those of another agency, the Health Service Executive (HSE) or on private practitioners. Lengthy delays are the inevitable result. Resourcing appropriate services for vulnerable children and their families in such crises needs to be prioritised.

7. Experts

Assessments are conducted by specialists in areas such as paediatrics, psychiatry and psychology and sub-specialisms in these disciplines. The appointment of such experts by the court does not follow a set procedure. Experts can be recommended by the CFA or the GAL in the case, and that might become a source of contention either between them or between one of them and the respondents. They can also be appointed in the middle of the case because an issue arises which the court decides requires specialist advice.

There is no consistent practice of identifying appropriate experts early in the preparation of a case, informing the respondents of their identity and area of expertise, establishing if the respondents will commission their own experts and, if so, arranging for them to meet and distil their evidence into what is agreed and what will be contested. This contrasts not only with the practice in other jurisdictions, but with practice in the higher courts in this jurisdiction.

8. Evidential issues

Two types of evidence in child sex abuse cases are particularly contentious: expert evidence and hearsay evidence. Expert evidence includes assessments of the credibility of sex abuse allegations and the impact of the alleged abuse on the child, as referred to above, but can also include physical evidence of abuse. An agreed procedure for the court's appointment of appropriate experts, the management of their evidence so that they share their assessments and present agreed evidence where possible, giving oral evidence on the areas of difference of opinion, would greatly expedite proceedings.

Hearsay evidence has bedevilled most of the cases involving child sex abuse, though the presence of hearsay evidence is by no means limited to such cases. In all the cases we attended, allegations of sex abuse were only part of a wider case where either neglect or domestic violence was alleged and usually prompted the initial concerns of the social work department. This is in the nature of such cases – if a child makes a disclosure of having been sexually abused, it is very likely he or she will make it to a trusted person with whom the child feels safe. This will often be a foster carer, who will then report the disclosure to a social worker. The question then arises as to how to bring this information to court.

Very few lawyers want to bring children to court to face cross-examination about their allegation of having been sexually abused. This is explicitly acknowledged by the Children Act 1997, which provides for hearsay evidence from children to be brought to court by third parties or via video-link. Sections 23, 24 and 25 of that Act spell out the considerations that the court must take into account in permitting hearsay evidence to be admitted, the weight to be given to it, and the right of those challenging it to challenge the credibility of the child. The Act does not specify who can convey the hearsay evidence to the court, and this can then become a matter of dispute.

It is imperative that there be a coherent national approach by the courts to Sections 23 and 24 of the Children Act. This will be provided for in legislation if the recommendation of the Law Reform Commission regarding the admission of hearsay evidence from children is legislated for. In the meantime it would be very helpful if the courts found a way, perhaps through a Case Stated to the High Court, for guidance to be provided to all District Courts so that the issue is not constantly re-litigated.

9. Problematic organisation of the courts

A District Court judge hearing one of the cases described in the report posed the question as to whether the District Court was the best place to hear very complex

cases, and this question has also been raised by reporters, GALs and lawyers. The sheer volume of cases processed by the District Court is indicative of the challenges certain cases can pose. In Dublin Metropolitan District Court, three judges are assigned on a fulltime basis to hearing child care law, and they have built up a huge amount of expertise. In certain other cities, notably Cork and Limerick, where the District Court has more than one sitting judge, one is allocated to child care cases and two days a week set aside to hear them. Again, the judges here have been able to build up expertise and can also allocate time to hear cases that may extend or prove complex. Even in some smaller towns where specific days are allocated to child care the cases can often be managed by the sitting judge, especially if he or she insists on tight case management.

The volume of cases heard in each district also plays a role, but under the legislation governing the District Courts they are courts of "limited and local jurisdiction". "Local" means that they may only hear cases involving parties within their allocated area. Cases from a very busy area cannot be heard by a neighbouring court under less pressure.

It seems anomalous that "limited" jurisdiction includes matters as grave as removing children from their families for the entirety of their lives, sometimes following a hearing which includes evidence alleging serious criminal offences, but this is what is provided for by law. In addition, each allocated District Court judge operates autonomously, so a Practice Direction issued in Dublin cannot be imposed elsewhere. The combination of limiting the District Court to a local jurisdiction, and forcing all child protection proceedings into this court, can lead to serious difficulties in the management of complex cases. Where there are very busy District Courts and no allocated child care days the sitting judge can, and usually does, seek the assistance of a "moveable" judge from the unallocated panel of District judges. It cannot be coincidental that the majority of the lengthy cases examined in this study were heard by moveable judges.

The District Court is under-resourced for the responsibility involved in child protection cases. There are not enough judges and they lack sufficient support services. Case management requires administrative support, and the District Court is the poor relation of the courts system in this regard. This is a false economy, as the vast amounts of court time taken up by the cases described above demonstrate.

A Practice Direction drawn up by the President of the District Court, or a modified version of it, is used in Dublin and some other areas, but not in all, and it does assist in the management of cases. However, practitioners acknowledged that even where it is in use it does not always fully operate. That Practice Direction is currently being revised by the President of the District Court, in consultation with practitioners and the CFA, and should lead to greatly improved case management where it is used.

The establishment of a Family Court has been discussed for at least two decades. The heads of a Bill have been promised in the coming months. They are likely to contain proposals to have a division within the existing court system with judges who would acquire expertise in family law and hear family law cases, including child care law, for a specified period. They are also likely to provide for different levels of court, with some matters being dealt with at District Court level, while more serious or complex matters would be dealt with by the Circuit and High Court.

Even without the establishment of a Family Court division, which is likely to be some years away, there is much to be done. In the neighbouring jurisdictions of Northern Ireland and England and Wales, child care cases are triaged at District Court level and the court decides on jurisdiction over the specific case, sending the more complex ones to a higher level. Already in our District Courts this happens in relation to criminal cases – judges regularly decline jurisdiction in criminal cases and send them to the Circuit Court.

A similar provision in relation to child care, permitting the District Court to decline jurisdiction and send cases to the High Court, which already hears certain cases under the Child Care Act, as amended, would give greater flexibility to the District Court. If combined with modifying the legislation on the geographical jurisdiction of the court so that cases were no longer limited to the court District in which the family live, it could reduce the number of complex cases heard by this court and ensure that such cases were always heard by an appropriate court, whether one of the specialist District courts in a major city, or by the High Court.

Careful preparation of cases by the CFA, a universal case management system, with deadlines for the production of reports and affidavits, the narrowing of the issues to those in dispute, the winnowing of witnesses so that only necessary evidence is given, meetings between experts so that they could present agreed evidence separately from what was disputed, would all help.

For the CFA, the development of a national legal strategy so that there is a single approach to issues like the calling of foster carers, the disclosure of all reports and documents, the appointment of experts and the admission of hearsay evidence, would give some predictability to cases and permit better case management. The allocation of adequate resources to the preparation of cases for court and the prioritisation of training for social workers in the law surrounding State intervention in child welfare and protection and the giving of evidence would also help greatly reduce the time spent in court by social workers and the resources consumed by lengthy and complex court proceedings.

10. Education and training of legal professionals

There have been a number of references made to the training of judges in relation to child protection. Already the current President of the District Court, through the Judicial Studies Institute, holds regular seminars on aspects of child protection, though attendance is not compulsory. The newly published Heads of the Judicial Council Bill provides for the ongoing education of judges, and Head 12 specifically mentions education in Information Technology and Sentencing (see the Heads of Bill at https://goo.gl/6shbju). It would be very useful if the final version of this Bill also included a reference to child protection and welfare.

Reference was also made by interviewees to the need for more specialist training for lawyers working in the area. The establishment of a panel of lawyers who specialise in private family law relating to children and in child protection, children's rights and children before the courts on criminal-related matters, would contribute to the consolidation of a body of legal expertise.

In general, better preparation of cases, more focused reports delivered in a timely manner, a nationwide specialist service for assessing and dealing with child sex abuse, operating to the best international standards and that would serve both the criminal and child protection courts, rigorous case management and specialisation in the courts would all go a long way towards ensuring that complex cases were dealt with as speedily as possible, to the benefit of children and their families, and indeed of the professionals working with them.

11. Summary of recommendations

While this report was commissioned by the Department of Children and Youth Affairs, child protection proceedings involve the interaction of the child care system with the courts and the justice system, and solutions to the problems in child care proceedings involve them both. The problems in this interaction cannot be solved by the Department or the CFA alone. Government policy in relation to resourcing the judiciary and the courts, the priority given to services in other Government departments which bear on vulnerable children, along with legislation, policy and practice in child care and the courts, will all play a major role.

1. Child Care Act 1991

The Child Care Act is currently under review by the Department of Children and Youth Affairs. It is hoped that this report will assist in that review. In addition, the author is making a separate submission to the Department of Children and Youth Affairs, in response to its call for submissions.

2. Government Action

1. Consideration should be given to the appointment of a sufficient number of District judges to ensure that child care cases can be prioritised, with dedicated child care days, in all areas;

2. Consideration should also be given to the provision of resources to the District Court to enable District Court judges institute a national system of case management for child care cases.

3. All State agencies involved in providing assessments of children and parents in care proceedings should be adequately resourced so that that can provide them in a timely manner.

3. The Child and Family Agency/Tusla should consider:

1. The development of a strategy to identify early cases with potentially complicating features, so that they can be referred to an appropriate senior level within the CFA and the necessary resources brought to bear on them;

2. The development of a unified national legal strategy in child protection cases, covering such areas as the preparation of such cases for court, the identification of appropriate experts, the approach to the exchange of reports and documents, the approach to the issue of hearsay evidence, including the role of foster carers in proceedings where hearsay evidence from children arises, and including consideration of asking a District Court to state a case to the High Court that would lay down guidelines on the hearsay matter;

3. The establishment of a specialism within the CFA to deal with child sex abuse, which, along with other appropriate agencies, could establish multi-agency centres available to assist all CFA areas when allegations of child sex abuse are made in the context of child protection proceedings;

4. The development, in cooperation with the Garda Siochana and the HSE, of a national child sex abuse assessment and intervention practice, following the recommendations in the Garda Inspectorate 2017 report *Responding to Child Sexual Abuse*;

5. The rolling out of a national training and implementation programme for social workers that would strengthen their analytic ability and cover areas such as the legal principles underlying the law on child protection, the thresholds required for various forms of State intervention and the giving of evidence in court;

6. The review of practice in the preparation of child protection cases to ensure that successive reports and reports from different social workers are not

repetitive, that they are presented to respondents' legal representatives in a timely way, and that the agreed facts in the reports are distinguished from those in dispute.

4. The Department of Justice and Equality should consider:

1. The prioritisation of the publication and enactment of legislation for a Family Court, with different levels of jurisdiction depending on complexity, to deal with all aspects of private and public child and family law;

2. Consideration of an amendment to the Courts of Justice Act 1922 to permit child protection cases be considered by District Courts outside the immediate area of residence of the family concerned;

3. Consideration of legislation providing for District judges to decline jurisdiction in complex child care cases, and refer them to a higher court;

4. Consideration of including a reference in the forthcoming Judicial Council Bill to the need for the education of relevant judges in child protection;

5. Consideration of the immediate enactment of the recommendation of the Law Reform Commission report on the Law of Evidence in relation to hearsay evidence from children.

5. The courts should consider:

1. The establishment of dedicated child care days, heard by the same judge, in all District Court areas or in regions, if the geographical jurisdiction is modified;

2. The development of a case management template for all District Court areas, covering deadlines for the production and exchange of documents, the order of witnesses, cooperation between the parties on narrowing the issues, meetings between expert witnesses to establish areas of agreement and isolate the issues in dispute and such other relevant matters as decided by the District Court;

3. The provision of additional administrative resources to the District Court to assist in the rolling out of case management policy and practice;

4. Where child care cases are the subject of judicial reviews or cases are stated to the High Court, this court should consider prioritising such cases in its lists, so that these proceedings do not hold up the child care proceedings.

6. Legal Practitioners

1. The professional bodies should consider the establishment of a panel of specialist child care legal practitioners and assist in providing appropriate training.