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Achieving positive change for children? Reducing the length of child protection proceedings: lessons from England and Wales

Abstract

Court decisions are required to remove children, compulsorily, from their families, and approve permanent care arrangements which restrict or terminate parents' rights. The children involved are mostly young, have experienced serious abuse or neglect and may require permanent placement away from their parent(s) for their remaining childhoods. In England and Wales, justice to parents has dominated the rhetoric about these proceedings; this has resulted in lengthy proceedings, long periods of uncertainty for children and reduced placement options. In order to reduce delays reforms in England and Wales have set a time limit for the completion of care proceedings. The Children and Families Act 2014 limits proceedings to 26 weeks; approximately 60% of care proceedings are now completed within this period. This paper will discuss the impact of these reforms on decision-making for children, questioning whether they achieve both good decisions for children and justice for families. It uses the findings of an ESRC-funded Study: Establishing outcomes of care proceedings for children before and after care proceedings reform (2015-2018).

Keywords

Child protection; court proceedings; law reform; justice; outcomes

Introduction: Child Protection Proceedings in England and Wales

In England and Wales, as in many other countries, Court decisions are required to remove children, compulsorily, from their families, and to approve care arrangements which restrict or terminate parents' rights. These applications are brought to the Family Court by local authorities, which have legal responsibilities for family support, child protection and the provision of substitute care. Care proceedings are generally seen as 'a last resort' (Hunt, et al., 1999); the threshold for intervention, actual or likely 'significant harm' to the child is high. Support, including substitute care can be provided without court orders where parents agree, and there is a formal 'pre-proceedings process' designed to divert cases from proceedings where it is safe to do so (DfE, 2014; Masson, et al., 2013). Where cases are brought to the court the aim is to achieve permanency for the child through: care by one or both parents; placement in the wider family, usually with carers who are 'special

guardians' and have almost complete responsibility for the child for the rest of childhood; long term foster care; or adoption. Adoption does not require parental consent but is only sanctioned where no alternative arrangement can meet the child's welfare needs (Adoption and Children Act 2002; *Re B*, 2013). Approximately 4,700 children were adopted from care in England in 2016 (DfE, 2016).

Care proceedings are highly juridified: cases are heard by specialist judges or magistrates; children are represented by specialist solicitors and a social work guardian from Cafcass (the children and family court advisory and support service); most parents are represented by specialist lawyers; and local authorities have dedicated teams of lawyers (Pearce et al., 2011). The system is largely adversarial although the children's guardian has a dual role -providing instructions for the child's lawyer and advising the court about the child's welfare (Law Society 2010). Until the latest reforms the course of the proceedings was largely determined by the parties and their lawyers. Costs to the taxpayer are high; legal aid for parents and children in around 12,000 cases, cost almost £400 million in 2015-16 (Legal Aid Agency, 2016), and local authority legal costs are additional to this. This and the time it takes to make decisions for children have long been matters of concern. The average length of proceedings reached a peak of almost 60 weeks in 2012.

The problem of delay and care proceedings reform

The prevailing culture was that cases 'take as long as they need to take', low trust of local authorities and concern to avoid care (based on erroneous beliefs that outcomes for children were poor) (Family Justice Review, 2011). One consequence of this was the practice of assessment under court supervision by independent social workers or psychologists, irrespective of any previous work by local authority social workers (Masson et al., 2013). Lengthy proceedings, which provided parents opportunities to demonstrate change were seen advantageous by lawyers and the courts because they offered a possibility of family reunification (Pearce et al., 2011). Parents rarely made and sustained life changes, enabling them to care adequately. In contrast, lengthy proceedings were disadvantageous for children. Whilst proceedings continue, children, the majority of whom are under the age of five years when proceedings are brought (Masson et al., 2008), experience separations, placement changes, often linked to (failed) attempts at reunification (Farmer et al., 2011) and uncertainty about future arrangements. Also, increasing age and the number of placements before the final order is made reduce the chance that future placements will be successful (Brown and Ward, 2012; Selwyn et al., 2014). Not only do adults and children experience time differently (Goldstein, Freud and Solnit, 1973), its passing during care proceedings impacts differently on them.

Concerns about the length of care proceedings led to a series of attempts to reduce this by requiring more preparatory work before applications were made, strengthening judicial case management and streamlining proceedings, particularly reducing the number of interim hearings and the use of experts (President of the Family Division et al., 2003; Judiciary, 2008, Ministry of Justice, 2010; DCSF, 2008). These were unsuccessful (Masson, 2015). In 2010, the government established the Family Justice Review to assess how the system was operating in terms of guiding principles for family justice and to make recommendations about the management of the family justice system and the promotion of informed settlement (Family Justice Review, 2011, Annex A). The Review proposed legislation to impose a 26-week time limit for care proceedings and restrict the use of experts; and stronger case management by judges with a focus on the child's needs and timescale (112, 126).

The 26-week time limit for care proceedings was controversial; local authorities supported this but some NGOs, expert witnesses and lawyers were highly critical. It was considered unfeasible and unenforceable unless additional resources were provided to the courts and cafcass (Justice Committee, 2012, para 73). Delays would simply be shifted from the proceedings to before the application or after the final order (Ipsos Mori, 2014). A 26-week timescale was arbitrary, undermining the court's ability to achieve decisions in children's best interests and likely to result in poor decisions (All Parliamentary Group, 2012). Particularly, a shorter timescale could make it harder for members of the extended family to offer care (Justice Committee, 2012b, para 31). Expert witnesses gained the support of judges for their case that expert evidence assisted decision-making and therefore time should be allowed for this (Brophy et al., 2013).

Three local authorities set up a project with cafcass and one court to test the feasibility of 26-week time limit by applying it to all new applications, April 2012-March 2013. The Triborough Project demonstrated that the length of proceedings could be reduced substantially by keeping to a timetable and reducing the reliance on external experts. The decisions were comparable to those made previously in longer proceedings, and there were no delays in either making applications or in placing children after them. All the professionals involved agreed that cases had been decided fairly but the pace of work was 'relentless' (Beckett et al., 2013, 2014, 2016).

The Government accepted the Family Justice Review proposals; they were enacted in the Children and Families Act 2014 (CFA 2014) and implemented in April 2014. The implementation was well supported; there was new procedural guidance (termed the Public Law Outline, PLO), training (particularly for judges and social workers), and a national pilot of the scheme from the summer of 2013. The length of proceedings began to fall; by the time the Act came into force the average duration of cases was 26 weeks in many areas. It appeared that, despite negative views, it was

possible to conclude cases much more quickly, and within a period which was more appropriate to the children whose future care the court was directing.

Time limits in other jurisdictions

England and Wales is not the only jurisdiction where concern about drift and delay in planning for children has resulted in legislation to impose time limits. Provisions have targeted state agencies and the courts with the aim of securing permanent arrangements for children more quickly. In the USA, the Adoption and Safe Families Act 1997 (ASFA) limits the time allowed for family re-unification, by requiring the state to apply to the court to terminate parental rights where children have spent 15 of the previous 22 months in foster care, effectively making children available for adoption sooner. It also incentivizes adoption with allowances to adopters, including kin carers, and with federal subsidies to states for each child adopted. In Victoria, Australia, amendments to the Children Youth and Families Act 2005, introduced in 2016 aim to avoid drift and improve stability for children by limiting the length of temporary court orders. Particularly, courts cannot make family reunification orders to last longer than 12 months, and must make orders for permanent care for children who are not returned home.

Each of these reforms imposed time limits so that decision-making is more in keeping with the developmental needs of the many very young children who become subject to child protection proceedings. Whilst adoption is explicitly an aim of the U.S legislation, ASFA also promotes kin care and continues to require time limited attempts at reunification in all but the most serious cases of abuse. In Victoria, the emphasis on achieving permanency more quickly and ending the court involvement for children who cannot return home involves changing the orders available and the ways they are used. In contrast, in England and Wales there was no intention to change the orders the courts made, only the time they took to do so.

All these reforms have faced similar criticisms for prioritizing children over parents and accusations that they work against the birth family in favour of state-selected carers, and against particular communities (Karnes, 2015; LIV, 2016; Justice Committee, 2012b). The enactment of reforms has not brought acceptance. Reforms to prioritize children's interests and children's timescales remain controversial.

The research

The findings on the operation of the 26-week time limit for care proceedings come from a study, funded by the ESRC, and conducted with colleagues at the Universities of Bristol and East Anglia. The

study uses a natural experiment approach, comparing the process and orders made for a random sample of cases brought in 2009-10, S1, with a random sample of cases brought by the same 6 local authorities in 2014-15, S2. There were 170 cases and 290 children in S1 and 203 cases and 326 children in S2. Data about the parents and children, their involvement with children's services, the care proceedings and the orders made was extracted from documents prepared for, or issued from, the proceedings, held either by the local authority legal department (S1) or electronically in the cafcass e-case file (S2). Not all the same information was collected for both samples. S1 originally formed part of a study on the pre-proceedings process and included more detailed information local authority pre-court preparation. The focus on restricting the use of experts under the PLO led the researchers to collect detailed information about assessments by experts in S2, which were not collected for S1. The data were analysed using SPSS v23, on a case basis to explore the court process, and by child in relation to the placements and orders made.

A further part of the study involves linking these data with data on children's care carers extracted from the administrative databases kept by the Department for Education; examining the social care case files for a subsample of the children; and interviewing professionals from the 6 areas about policy and practice changes. Brief details on the study can be found at <http://gtr.rcuk.ac.uk/projects?ref=ES/M008541/1>

Research findings

Completing care proceedings within 26 weeks

Reducing the length of court proceedings necessitates changes in both culture and practice. All involved have to accept that completing proceedings within the timeframe is important, and to work accordingly. Co-operative working is essential because delay from one professional or agency precludes others from completing their work on time. For example, written evidence, reports and assessments must be available to all the parties so they can prepare their response in advance of any hearing. If the necessary information is not available, the hearing will have to be adjourned, wasting the time of the court, the parties and their lawyers, and necessitating a further hearing. Whilst this may seem obvious, delays had previously been seen as inevitable with the result that missing deadlines was common.

Proceedings in S2 lasted, on average, half the time of those in S1. The average duration in S2 was 26.6 weeks compared with 52 weeks in S1. The data makes it possible to look at the various factors which contributed the length of cases, some examples are discussed below. Overall, the reform had succeeded in reducing the time taken to complete cases but concerns remained as to whether

delays were occurring instead before or after care proceedings, that is in making applications or in securing placements for children after the case concluded (Ipsos Mori 2014).

Pre-proceedings

In most cases which result in care proceedings, the family is known to children's social care for a substantial period before proceedings are considered. Before an application is made, the local authority lawyer must confirm that the case meets the threshold for intervention and a manager must agree that court proceedings are appropriate. Unless the level of risk requires 'immediate application to court' local authorities are expected to try to engage parents in a semi-formal pre-proceedings process (DfE 2014). Parents are informed of the authority's concerns by letter and invited to a meeting to discuss these. The letter entitles parents to legal aid so they can be supported and advised by their own lawyer at the meeting. The meeting aims to secure parental co-operation and improve the children's care so that care proceedings can be avoided. This usually means parents accepting social work support and/ or attending programmes but may involve agreeing to the child moving to live with relatives or foster carers. Approximately a third of cases are diverted from court action following a pre-proceedings meeting (Masson et al., 2013; Broadhurst et al., 2013).

The pre-proceedings period is used both to work with parents to avoid proceedings and to gather evidence necessary if the case is taken to court. Parents are usually expected to sign a written agreement outlining what is expected of them (in terms of using services and meeting with the social worker etc.) and what the local authority will provide. There is a risk that the case will drift at this stage. This was apparent in S1 where, on average, the pre-proceedings process extended for 20 weeks. Following this finding, new guidance explicitly stated that cases in the pre-proceedings process should be reviewed, court applications should be made where there was insufficient progress after 6 weeks, and that the process should not extend beyond 6 months (DfE, 2014). In S2, there was a statistically significant reduction in the duration of the pre-proceedings process; the average time between the decision to start pre-proceedings and the application to court was 13 weeks ($p=0.011$). The new time-conscious culture had reduced not increased the duration of the pre-proceedings process.

Once the local authority concludes that proceedings are necessary it must prepare its application, setting out in the history of involvement with the family, its assessments of the child's needs and its proposed care plan. On receipt of the application the court appoints the children's guardian.

Appointment of the children's guardian

A children's guardian has to be appointed promptly so he or she can review the local authority case and provide a preliminary analysis for the court of the child's needs and the family's ability to meet them. This must be ready for the first hearing so that the judge can determine what further evidence is required, and whether orders are required for the child's temporary care. Delayed appointment of the children's guardian was a common problem in Sample 1: the average time to appointment was 7 weeks, against a formal limit of 48 hours; there were late appointments in 48% of cases. Delays occurred because guardians were fully committed on other cases and could not accept further allocations. In response to criticism and to improve the use of available resources, Cafcass adopted a new approach, 'proportionate working', that is reducing the work done on individual cases to 'a safe minimum' (Cafcass 2013) so that staff were available to take on cases when applications were made. This approach was also heavily criticised as 'not child focused' (Justice Committee 2012, para 199). It was revised but the principle of immediate appointment and limited work remains. Under the PLO children's guardians focus on providing initial and final analyses for the court rather than developing a relationship with (young) children. The guardian's initial assessment for the first hearing may be oral because of the limited time. Guardians assess the initial care plan, advise the court of the need for further expert assessments and provide an assessment of the care plan, in writing, for the final hearing. This approach has almost eliminated delays in guardian appointments, despite an increase in the number of cases. In S2, the average time to appointment was just over 2 days. With late appointments made in only 8% of cases. Effectively, delay had ceased to be used as a device for rationing guardian time, instead guardians do less work than previously on each case.

Assessment and experts for care proceedings

Before the PLO there was substantial reliance on external experts in care proceedings; 90% of cases in a 2004 study had expert evidence, with an average of more than two experts in these cases (Masson et al., 2008). The use of experts was identified as contributing factor for delay: cases had to wait for busy experts' availability, and then it took time to complete assessments and prepare reports. Indeed, obtaining a court order for an expert appointment was used strategically by parents' lawyers to give their clients a chance of being assessed more positively, and the time to change their home life (Masson, 2010). The Family Justice Review recommended better preparation, with expert assessments being completed before the application was made, and a reduction in the use of experts during proceedings by courts recognising and using the expertise of the child's social worker and Cafcass guardian. Both these measures impact on parents; parents would have less influence over who assessed them and have little time to make changes during proceedings.

Legislation (CFA 2014) restricted the appointment of experts to cases where this was 'necessary to decide the case justly' and the court rules included stricter procedures, making these applications more burdensome for lawyers.

Data on the use of experts were not collected for S1. In S2, a third of cases had no expert during proceedings, effectively tripling the rate found in the 2004 study. Another third had one expert, a fifth had two with the remaining cases having up to eight experts, in addition to the evidence from the local authority social worker and children's guardian. The most common experts appointed were psychologists or psychiatrists to assess parental substance abuse; of the 121 cases with expert appointments in proceedings, 71 involved this. There were 51 cases where experts assessed parenting capacity or parent/ child relationships, one third of these assessments were undertaken by independent social workers and the rest by psychologists or child and adolescent psychiatrists. In addition, DNA tests were undertaken to clarify the child's parentage in a quarter of cases and in two-fifths of cases the court ordered hair-strand or other tests for parental substance misuse.

The use of experts was clearly related to case duration, with cases with no experts in proceedings being completed in 22 weeks, those with one expert in almost 27 weeks, and those with 2 or more experts in 31 weeks. The differences between these groups of cases was statistically significant ($p < 0.03$).

The court also ordered assessments of relatives who put themselves forward as carers for children. Where the local authority identified potential kin carers, for example by arranging a family group conference (Burford and Hudson 2000; Connolly and Masson, 2014), they sought to make arrangements for their assessment before the proceedings. The pre-proceedings process was used to discuss the possibility of children living with relatives so that care proceedings could be avoided. Such arrangements were usually for care by a grandparent, and might be intended to be long-term. Court proceedings were brought to formalise arrangements even where a suitable relative was willing to care, particularly where parents were ambivalent or the local authority wanted court approval for it. In these cases, either children were made subject to care orders and placed with relatives approved as foster carers, or relatives were made the child's special guardians (a legal arrangement that is intended to be permanent).

Relatives also came forward during the proceedings, sometimes very late in the process, particularly if the plan for the child was adoption. These carers had to be assessed. The usual practice was for the court to order a viability assessment and, if this was satisfactory, a full assessment. These assessments can be undertaken by local authority staff or by independent social workers with the choice generally depending on the ability of the local authority to complete the work in the time

available but some relatives challenged unfavourable local authority assessments and sought an 'independent' assessment. Courts were unwilling to refuse these assessments which offered the possibility of children remaining within their families.

Over a third of cases in Sample 2 involved viability assessments of kin before the proceedings were started, with 11% of cases having two or more such assessments. Full kin assessments were completed in 10 cases before the proceedings. Viability assessments were ordered before the last few weeks of the proceedings in nearly 60% of cases, with a total of 152, and up to seven assessments in a single case. Full assessments were known to have been ordered in 82 cases at this stage, with eight cases having two full assessments and three cases having three. There were 15 viability and 21 full assessments ordered late in the proceedings, allowing little time for this work and/ or resulting in a delay to the final hearing. It was common for relatives to withdraw after positive assessments; negative assessments were challenged less frequently.

There has been criticism that insufficient time is allowed for kin assessments, the quality/ depth of the work undertaken, and courts being too willing to approve relative carers, despite weak or negative assessments (RiP, 2015, 2015b). The concern is that the rush to approve relative carers will result in more placements breaking down, adding to children's harm. Although the judges have worried that justice is being sacrificed on the altar of speed' (*Re NL*, 2014), concern in social work is about speed risking the child's long-term wellbeing. There is a need to ensure that potential carers are identified and assessed much earlier in the proceedings, but whilst parents are reluctant to inform relatives, relatives hesitate to offer care and courts continue to order assessments of those who only appear at the last moment this is unlikely to happen.

A third of the children placed with relative carers under special guardianship had never lived with them before the final order was made. Although these placements had all been assessed, there had been no opportunity for the social worker or children's guardian to observe whether the child settled in with their relative carer before the court gave the carer responsibility for the child. The average time taken for assessments in these cases was 10 weeks. A more protective arrangement for these cases involves the court to making a care order with the local authority approving the relative to foster, but this requires the relative to agree and to meet the exacting standards for local authority carers. Standards for carers seeking special guardianship are less exacting; nor does making a special guardianship order require the local authority to agree, or the court to trust the local authority's assessment.

Early completion

The PLO procedure allows (and encourages) completion at the Issues Resolution Hearing (IRH) where there is no outstanding dispute between the parties. The IRH, which should occur in week 20-22 of the proceedings, is intended to clarify which issues remained disputed, so that the final hearing (witnesses, time required, etc.) can be properly planned. Cases which conclude at the IRH take, on average, 6 weeks less than those which end at the final hearing (21 weeks v 27 weeks, $p < 0.0001$). However, case completion at IRH varied markedly between the 6 areas of the study suggesting variations in lawyers' willingness to advise, and judge's encouragement of, the parties to reach agreement.

Another practice intended to reduce case duration is judicial continuity – having the same judge for the whole case (Judiciary 2012), which was not a consideration in the organisation of these proceedings before the PLO but was a feature of practice in Australia, which members of the Family Justice Review found attractive (Family Justice Review 2011). Judicial continuity has resulted in speedier decisions (by 3 weeks; 25 v 28 weeks, $p = 0.24$) but was only achieved in a third of cases in Sample 2.

Court Orders

The PLO certainly succeeded in speeding up decision-making in child protection cases, both by reducing drift in pre-proceedings and reducing the duration of the court process. Practice now recognises that 'delay really matters' (Family Justice Review 2011, para 2.9) but it is equally important that the court reaches the right decision for the child. Here the evidence is more equivocal.

There is a saying, 'You can have it done right or you can have it on Thursday' – the implication being that doing work correctly will take longer than has been allowed. It is, of course, difficult to tell whether the right decision has been made for any child – one does not know how any alternative would have panned out. All decisions in family court proceedings involve an element of prediction: will the parents continue to abstain from abusing substances? Will the kin carer build a good relationship with the child? Will the local authority find suitable carers? However, if further proceedings become necessary it is possible to tell that decisions have not turned out positively. A study by Selwyn and colleagues of all adoptions since 2001, and residence orders (ROs) and special guardianship orders (SGOs) since 2005 identified much higher breakdown rates (necessitating children's return to care) for ROs and SGOs than adoptions. Whereas the breakdown rate after 12 years was 3.2% for adoptions, it was almost 5.6% over 5 years for SGOs and 25% over 6 years for ROs (Selwyn et al., 2014). Following up the care of the children in the study (for 4-5 years for S1 and for 1-2 years for S2) will provide a further assessment of the decisions made in the study proceedings.

Until these data are analysed discussion of the decisions is limited to a comparison of the orders made in the two samples.

If the law remains constant over time, the orders made by the courts should be the same. On this basis, the orders made for the children in each of the two samples could reasonably be expected to be very similar. The cases were chosen randomly from the same local authorities, and were themselves comparable on very many measures (age, ethnicity, parent's problems, children's services involvement etc). Moreover, a comparison of the orders made for S1 with the findings of two earlier studies (Hunt et al., 1999; Masson et al., 2008) showed close similarity, with around 60% of the children being made the subjects of a care order, or a care order with an adoption plan, see figure 1.

[Insert figure 1 about here]

It is debatable whether the law relating to decisions in care proceedings has remained the same. This area of law is based on statute, chiefly the Children Act 1989 and the Adoption and Children Act 2002. There have been no fundamental changes to these laws between 2009 and 2015; the requirements for care, supervision, placement and adoption orders have not changed (Lowe and Douglas, 2015) nor have the senior courts created new precedents through case decisions, (*Re R*, 2014; Adoption Leadership Board, 2014). However, statements, 'guidance' from the President of the Family Division in *Re B-S* (2013), which do not have the force of law (McCarthy 2012) appear to have changed the climate in the courts, making local authorities more hesitant about planning adoption, judges and magistrates more reluctant to make placement and care orders, and increasing the numbers of appeals against or applications to revoke, such orders (DfE 2016; Adoption Leadership Board 2017).

In contrast with the earlier findings, there were marked differences in the orders made following the shorter proceedings in S2 (see figure 1). Overall, there was a reduction in 'high tariff' orders like placement (adoption track) and care orders, and an increase in 'lower tariff' orders, chiefly supervision orders, residence orders (renamed child arrangements orders by the CFA 2014) and SGOs. The proportion of children with an adoption plan declined from 26% to 15% and with a care order from 36% to 29%, with a corresponding increase in supervision orders from 11% to 19%. Whereas the use of SGOs, 12%, was almost identical in each sample, S2 had another 12% SGOs accompanied by a supervision order for six or 12 months. The courts were making more orders for children to live with relatives permanently although they thought that the local authority needed to remain involved. The use of supervision orders with SGOs varied by area but two key features of cases seemed to lead to this practice: a carer who had no experience of caring for the child or a poor

relationship between a parent and the carer, with a real risk that contact between parent and child would be problematic. Whether a short-term supervision order is sufficient to resolve such difficulties remains to be seen at follow-up.

Conclusions

Of course, these orders may turn out to work well for the children concerned, in which case one might worry about the justice of court decisions since the 1990s, given that the orders made in these earlier decisions were very different. However, a number of factors raise questions about this new pattern of orders. First, the higher breakdown rates of ROs and SGOs found by Selwyn and colleagues might lead to questions about why more SGOs are being made, especially with a SO attached. Secondly, the orders in S1 were made at the end of longer proceedings with more assessments. The courts in S1 had more evidence about the parents' (in)ability to care from repeated assessments by external experts and parents' failure to make or sustain change over the year of the proceedings (plus a longer period of pre-proceedings). It seems that courts hearing S2 cases may have been less convinced by assessments from social workers and guardians than the experts they had appointed previously, and more willing to give parents another chance when the proceedings had lasted only 6 months, by making a supervision order. Put another way, shorter proceedings with less evidence from external experts have made making interventionist orders more difficult for judges.

Shorter proceedings benefit children if harm from neglect ends more quickly, and speedier decisions provide them with a permanent home (whether with a parent, relative, foster carer or adopter) sooner. Shorter proceedings do not benefit children whose proceedings end with the wrong order. Even if a more appropriate order is made subsequently, they experience larger doses of harm and repeated uncertainty, and will be older so both the options for placement and chances of placement success are reduced (Selwyn et al., 2014). The architects of the reform neither planned nor expected that different orders would result. This unintended consequence reflects the negative views of the reform expressed by lawyers, and illustrates how hard it can be to re-orient child protection away from parents' interests and to children's rights.

Law reformers considering similar changes need to prepare for (and possibly prevent) such unintended consequences for their own systems.

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Figure 1: Final Orders in care proceedings in 4 studies

