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# **Developing Judgment**

## **The role of feedback for Judges in the Family Court**

**A research study  
for  
The Family Justice Council**

**by**

**Judith Masson  
Professor of Socio-legal Studies  
University of Bristol**

**June 2015**

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### **Disclaimer**

The views expressed in this report are those of the author and are not necessarily shared by the Family Justice Council.

Judith Masson,  
Bristol, June 2015.

# Developing judgment: the role of feedback for Judges in the Family Court

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## Developing Judgment: Executive Summary

### Aim

The project aimed to examine the current availability and use of feedback by judges handling public law children cases (care cases) in England and Wales; to discuss with judges and researchers the potential of feedback to improve judicial understanding and decision-making; and to explore judges' use of feedback in other jurisdictions.

### Feedback

In this study feedback is information about the operation or output of a system, which is used to control or change the way the system is operated. Four different types of feedback were identified:

- 1) information about what happened to the children in their cases: *individual stories*
- 2) feedback on their performance in court: *judicial performance*
- 3) information about the services children receive under court orders: *service compliance*
- 4) evidence from research studies or data analysis: *aggregate data*

A fifth type *process feedback*, information about the way cases progress through the court system is now provided to judges as part of the monitoring of the 26 week timescale for care proceedings.

### Method

Four focus groups were conducted to establish judges' experiences and views; interviews were conducted with 9 leading socio-legal or child care researchers to find out how information about children in the care system could be used to inform decision-making; and a literature review and more limited discussions with researchers were used to explore the use of feedback by judges overseas. The study was funded by the Family Justice Council.

### Key findings

- **Judges** received little or no feedback on *individual stories*, *judicial performance* or *service compliance*. What they received largely depended on happenstance and was more likely to be positive than negative.
- The judges who took part in the study saw the unsystematic approach to feedback as problematic, and most wanted to receive more feedback than they did currently.
- These judges had limited knowledge of sources of *aggregate data* on the care system (research and analyses of administrative data) and were not well informed about outcomes for children of being brought up in care.
- The judges were uncertain how they could use feedback; they accepted that feedback could support personal development but were anxious that it could undermine their confidence or mean that decisions were not taken on the evidence.
- **Researchers** had very different views on the utility of feedback.
- Researchers considered aggregate data to be a possible source of feedback on system functioning, including children's outcomes; individual cases could make issues real but not form the basis for understanding systems – decisions could be right but turn out badly.
- Interpretation of facts required a frame of reference; for judges deciding care cases this should be informed by research on the care system.

- Judges should not fill gaps in their frame of reference with assumptions and beliefs not based on research (or the law). Professionals' evidence should not be downplayed in favour of personal assumptions.
- At any point outcomes for children were only provisional assessments. Timing for obtaining feedback should be determined by reference to children's milestones or be focused on the decision/ intervention.
- Not all research was of equal worth; research evidence required careful interpretation.
- **Other jurisdictions** used a variety of mechanisms to provide different types of feedback to judges.
- Key factors in judges' wish to have feedback and the types of feedback available were: the selection and training of judges; the judges' work context and the court culture; the statutory regime; what data was collected and analysed within the family justice system.
- Provision for any type of feedback for judges was limited but judges in some parts of Australia and USA had more types of feedback available to them than judges in England and Wales.
- Court improvement projects in the USA showed the most promise for developing feedback for judges, courts and agencies within the family justice system.
- **Feedback for judges in England and Wales** was limited in terms of the range of sources and the types of feedback available, compared with many of the other jurisdictions reviewed.

### **The development of feedback for judges**

Feedback should be an integral part of judges' training and professional development. Resources should not be expended on providing knowledge about what had happened in individual cases but on helping judges to fill in the gaps in their frame of reference for decision-making and enhancing their skills in the courtroom. Judicial independence means that judges should take responsibility for identifying how feedback could help them be better judges, including reducing unwarranted variation in court experiences and decision-making. Better data about the operation of the family justice system including data on orders by reference to the applications for them, and the number and outcome of appeals would help judges reflect on their own practice and increase transparency.

Five potential means of providing feedback for judges are worthy of further consideration:

- 1) Feedback through observation and discussion. Judges should observe other judges conducting cases, be observed, discuss their observations and reflect on their own practice
- 2) Feedback through Interdisciplinary case discussions. Judges should meet with other professionals for multidisciplinary/ multi-agency discussions of closed cases;
- 3) Court user surveys. Court user surveys should include court-users' perspectives on their experience in the court room; judges should discuss and reflect on these findings;
- 4) Making better use of existing data and research studies in judicial training; and
- 5) Developing new data on the operation court system, for example to include the outcomes by reference to applications and orders, not just timeliness.

A research-based guide on the care system should be provided to all judges to increase their understanding of care services and outcomes, and, children's care experiences of them.

# Developing judgment: the role of feedback for Judges in the Family Court

## Introduction

‘One research area that seems to be singularly lacking is the lack of follow up of the consequences of legal decisions in individual cases. Adjudicators often have little idea of what actually happens as a result of the orders they make, and there is virtually no data currently available. It may be significant that recently our attention has been drawn to this matter by several High Court judges.’ (Murch and Hooper 1992, 105-6)

‘I often think that the judge receives far too little information as to developments after judgment both on a statistical plain and in relation to individual cases. Could we not gradually acquire experience and even wisdom derived from evidence as to how the solution for which we opted served the welfare of children.’ (Thorpe 1993, 326)

These statements, written more than twenty years ago by an experienced researcher and a judge of the Family Division highlighted the absence of feedback for judges on how cases are decided and the consequences of those decisions in individual cases. Both the researcher and judge shared the view that such feedback would be beneficial: understanding derived from this feedback would add to judges’ knowledge and experience and enable them to make wiser decisions.

As far as the provision of feedback for judges in England and Wales little has changed in the intervening years. Other areas of professional practice present a very different picture: the system of Cochrane Reviews has transformed medicine with evidence-based practice (Cochrane collaboration n.d.) providing doctors with reliable, research-based information about treatment effectiveness; local authority children’s services are now measured and evaluated using aggregated data of each child’s placement, health and education etc (DfE published annually; ALB 2014); there is active encouragement in social work for using research evidence to develop evidence-informed practice (Munro 2011); the development of socio-legal studies means that far more is known about the way the family justice system operates; and in all areas of education feedback is provided and expected to support learning.

### *Feedback*

Feedback is defined as:

‘(1) The return of a portion of the output of a process or system to the input, especially when used to maintain performance or to control a system or process. ...

(2) The return of information about the result of a process or activity... (3) The process by which a system...is modulated, controlled, or changed by the product, output, or response it produces.' (thefreedictionary.com)

Feedback can be simply be the return of information about results or outcomes but may be intended, or operate, to change future action. Giving feedback is a common feature of modern education, training and professional development. In this context, it is far more than providing information: feedback is intended to develop skills by assisting the recipient to reflect on their performance, to identify what worked well and to consider alternative approaches for the future:

'Ultimately, feedback is about communication. The skills are generic: active listening; asking a balance of open, reflective, facilitating, and closed questions; challenging; and summarising. Giving feedback is not just to provide a judgment or evaluation. It is to provide insight.' (King 1999)

### *The study and research questions*

This small, qualitative study used focus groups with judges, interviews with researchers and practitioners and a literature review to explore whether and how feedback was made available to, and used by, judges; the potential for feedback as a means of improving judicial practice; and the limitations or barriers to the provision of feedback to judges. It sought to answer the following research questions:

- 1) a) What (if any) feedback did judges who decide public law children cases receive?  
b) and what feedback did they want?
- 2) How did they think receiving feedback would help them to decide cases?
- 3) What feedback did researchers think would improve judicial understanding?
- 4) What do other jurisdictions do in terms of providing feedback for judges?

The practice context of the study was public law children cases, that is, decisions involving the care of children away from their birth families. These decisions can have life-long consequences; they are considered by judges to be the most serious and demanding, which they make.

In this study, the definition and focus of feedback was left open with the participating judges. In discussion, judges identified three different areas of feedback: -1) *individual stories*: information about what happened to the children in their cases; 2) *judicial performance*: feedback on their performance in court; and 3) *service compliance*: information about the performances of the services children receive as a result of court orders. Discussions with researchers and practitioners focused on the use of *individual stories* and 4) *aggregate data*: evidence from research studies or data analysis, so as to obtain their views on these as potential sources of feedback and their limitations. The study considered all four types of feedback with judges discussing whether they wanted it and how they thought they would use it in their decision-making. Most were in favour of having feedback on cases and services, giving a range of reasons and purposes. Judges' views about feedback on performance were more guarded, reflecting concerns about appraisal systems



and the introduction of monitoring of the judiciary. Only a few judges were interested in *aggregate data*, which most did not see as assisting them to make individual decisions on the evidence.

### *Judging children's cases*

Judges in family cases about children have responsibilities that other judges do not have: they are making decisions about individual children's future well-being. This requires more than assessing evidence about past events and applying the law. Decisions are forward-looking; alternative orders, which underpin arrangements for children's care have to be evaluated and the reasons for orders rejected or selected explained fully (*Re B-S* [2013] EWCA Civ 1143). These decisions are made on the basis of evidence about the child's needs and the capacity of parents, or others, to meet them; legal practice focuses very largely on each case individually. *Cases are decided on their own facts*, and this means that the decision-maker applies their understanding to the material presented in evidence.

In our tradition, judges are not expected to have their own knowledge of how children fare in different arrangements, or to draw on their experience of the outcomes of past cases when deciding the current one. Of course, judges draw on their wisdom and experience to evaluate evidence but their focus on the individual distinguishes them from other professionals, who are now expected to use learning from past cases in their professional decision-making. For example, much of medical education is designed to develop doctors' knowledge and skills to diagnose and treat on the basis of what they or other doctors have observed, including evidence from peer-reviewed research, which is collated and assessed for this purpose in Cochrane Reviews (Cochrane community n.d.). Social work is developing evidence-informed practice (Lawrence *et al.* 2010). In her Review on Child Protection, Eileen Munro made the case for reflective learning rather than prescription as a way of raising practice standards, and 'the importance of social workers' use of research evidence to help them make the right decisions' (Munro 2011, para 10). Judges may have the benefit of professional and expert witnesses' use of research but must depend on cross examination and children's guardian's evaluation to clarify and assess proposals for a child's care.

### *Making use of feedback*

The definition of feedback (above) identifies an active process through which feedback impacts on behaviour, controlling or changing it. Individuals and systems have to learn from feedback messages. Reflective learning is not something that can be expected to happen automatically. Many professional systems, including social work and clinical psychology include opportunities beyond annual appraisal for professional supervision for practitioners' development. This is not simply a discussion of issues on which the practitioner seeks help, supervisors should offer challenge to ensure matters have been thoroughly considered in the context of case the history and research evidence. Although some judges may discuss cases informally to seek ideas or reduce anxieties, such practice is very different from a structured feedback system designed for reflective learning. For feedback to be of value in

the family justice system, judges must be prepared to receive it, learn from it and act differently. Feedback becomes an additional source for judges, adding to (and diluting the effect of) case facts, the opinions of experts and legal precedents. Unless practice changes to accommodate this, providing feedback will serve little purpose, and resources committed to this would be wasted. Thus the introduction of feedback into the family justice system challenges the traditional approach of deciding cases on their own facts.

## Background

Feedback to judges on case outcome has been a recurring issue in Family Justice in England and Wales: the judiciary have been reported as needing to learn from it (Murch and Hooper 1992; Hunt and Macleod 1999) and wanting it (Murch and Hooper 1992; Harwin *et al.* 2003) but very little has been done to collect data on the outcomes of judicial decisions concerning children and families, to discuss how judges might use such information, or to consider the education and training necessary for this to happen effectively. Indeed, Murch and Hooper, writing in 1992, reported hearing that 'judges and magistrates would only be hindered in their difficult tasks if they received bad news about the results of their decision-making' (cited by Hunt and Macleod 1999). Some of the judges who participated in the focus groups for this study expressed similar views. Nevertheless, Murch and Hooper argued that family justice should be underpinned by:

Practice-related studies to produce feedback to practitioners about their intervention in the lives of children and families who come within the ambit of the family justice system so that the quality of justice can be improved and criteria set to establish best practice.' (p 103)

The feedback from such studies would not only be relevant to social work staff and their employing organisations but also to expert witnesses and the judiciary.

The Judicial College (formerly, the Judicial Studies Board) does introduce judges to *child care knowledge*, a range of information about practice including such as research findings on (for example) child development, kinship placement and adoption breakdown. This *child care knowledge* is provided by researchers and sometimes by experienced practitioners giving presentations using *aggregate data* and/ or (case studies) *individual stories*. However, there is no systematic way of informing individual judges about *individual stories*, that is what happened to the children whose cases they decided, or judges in general of *aggregate data* on outcomes of cases decided in a particular way or place. Indeed, the production of research evidence on child protection and child care has given comparatively little attention to the legal dimension, for example studies of looked after children do not sufficiently distinguish those subject to court orders and whether final orders have been made. Judges are not trained to find and read social science research findings and remain reliant on witnesses and counsel to identify, explain and interpret relevant material. In contrast,

following the introduction of the PLO 2013 and the Children and Families Act 2014, very considerable attention is now given to monitoring the timeliness of decision-making and providing judges with *process feedback* on aspects of case management such as adjournments and the use of experts.

Judges' lack of experience of research information and ambivalence about its use has been a factor in the very limited development of a research focus which includes legal issues in studies of child care practice and summaries of research for judges. Whereas the Department for Education has long had a programme of commissioning research relevant to local authority children's services, little has been done to identify findings relevant to the judiciary, let alone to commission research to inform judges' child welfare decision-making. There have been notable exceptions, particularly the research undertaken on the operation of the Children Act 1989 in the 1990s (Social Services Inspectorate 1998; Hunt and Macleod 1999; Harwin *et al.* 2003). Hunt and Macleod (1999) followed up their study of care proceedings (Hunt, Macleod and Thomas 1999) to establish the current circumstances of the 133 children involved, particularly the extent to which the court orders were implemented by local authorities and complied with by parents. Similarly, Harwin *et al.* (2003) examined a sample of 100 children to establish the extent to which their care plans for the court were implemented, and the factors which influenced fulfilment or non-fulfilment. Both these studies were intended to offer feedback to judges. They each provided *aggregate data on service compliance* and children's outcomes 18-24 months after the care proceedings finished. Hunt and Macleod also included (anonymised) *individual stories* which typified the various patterns they had identified. These studies were conducted at a time when there was growing scepticism in the courts about local authority co-operation with court care plans, and a suggestion that the courts should reclaim the power to monitor care plans after a final order had been made (Poyser 1998; Cabinet Office 2000). Subsequently, the House of Lords reaffirmed that there was no role for judicial supervision of the implementation of care plans (*Re S* [2002] UKHL 10). However, these ideas, which have their roots in the old wardship jurisdiction, continue to have resonance with judges (see Findings 1, below).

Despite the insights provided on the challenges of implementing care plans, these studies did not lead to greater emphasis on any forms of feedback for judges, to the development of a systematic means of collecting information on outcomes, or more dissemination of research findings to the judiciary. Nor were views that local authorities disregard care plans displaced by accurate and more nuanced findings that this research provided.

More recently, calls for more data and more feedback have been repeated in the *Review of the Child Care Proceedings System*, by the Family Justice Council, in the *Family Justice Review*, and by Ryder J in his *Report on Modernising Family Justice* but none of these considered how feedback could or would be used by judges. Rather, it appears that feedback was assumed to be a good thing. The *Desk Research for the Care Proceedings System Review* (DCA 2006) identified many data gaps relating care proceedings, which

undermined the ability to know how the system was working. The Review (DfES and DCA 2006) recommended a programme of work to standardise data collection 'in order to facilitate monitoring of potential improvements as well as outcomes for children and families.' (para 7.2) Although this appeared to suggest the creation of *aggregate data*, the subject of that data was not clearly specified. Was the intention to provide better information on system *outputs*, i.e. the orders made, to collect data on *outcomes* i.e. what happened to children and families who had been involved in the family courts, or to link and collate outputs to outcomes? There was no discussion of how this information might be used within the court system although it appeared that local authorities and cafcass were expected to learn from it (DCA 2006, 68-70).

The Family Justice Council both in its written evidence to the Family Justice Review and at its 2011 Dartington Conference identified a lack of both information and mechanisms to improve practice. Judges did not have access to research (*aggregate data*) on the effectiveness of interventions generally, nor to any structured feedback on *individual stories*, the outcomes of their cases (Newton 2011). The Council proposed the development of systems for feedback for those working in the Family Justice System. One suggestion was the use of interdisciplinary case reviews along the lines of clinical audit and peer review in the health service to examine the handling of individual cases. Through this process, *individual stories* could provide the basis for collective improvement of performance.

The *Family Justice Review*, recognised the importance of maintaining judicial independence and noted the limited opportunities within the existing system for judges to obtain any feedback on their decisions. Only in the rare cases where there was an appeal did judges receive an assessment of their decision-making (2011). The Review distinguished between systems aimed at improving the consistency of court process and research to establish the impact of the family justice system on outcomes for children and families. It saw these as interrelated, with learning and continuous improvement within the system depending on both. In its Final Report the review panel re-iterated the importance of developing a learning culture within the family justice system, applying to all who worked within it, including the judiciary. Feedback on performance, including both timely decision-making (*process feedback*) and the outcomes of decisions was essential. It should not be limited to *individual stories* but include *aggregate data* and provide a foundation for learning and improvement:

'Review after review of child protection has emphasised the importance of sharing information between agencies and practitioners....Progress is hampered by the lack of performance data but even where it does exist it is not routinely shared or used effectively to inform discussion about how practice can be improved. This extends to more qualitative discussion and feedback at an individual level...In a different sense this also applies to judges and magistrates who rarely know what happens to the families about whom they have taken decisions. ...the absence of feedback mechanism leaves judges and magistrates

without any way to learn about the effectiveness of their decision-making, beyond an appeal on a point of law. There is a crying need for a culture where feedback is given and accepted in the right spirit.’ (2011, 2.202-5)

The Review recommended a pilot project to provide reports on outcomes to judges and magistrates (with a suggested interval of one and three years), the circulation of reports on adoption disruptions and regular sharing of statistical information, to include information from Independent Reporting Officers (IROs). It also recommended local interdisciplinary reviews of court cases to identify areas for change of practice. These should not be seen as a threat to judicial independence and were not assessments of individual performance but intended ‘to foster an environment of continuous learning and improvement’, develop best practice and share the lessons learned. As an alternative, if these recommendations proved unacceptable, it proposed a form of judicial peer review. (2011, paras 2.206-9).

Ryder J’s *Report on the Modernisation of Family Justice* (Judiciary 2012) was the family judiciary’s response to the *Family Justice Review*. It aimed to secure a single Family Court ‘with a culture characterised by strong judicial leadership and management and evidence-based good practice’ (p.1). The Report supported the Review’s recommendation for feedback on outcomes with the suggestion that there should be a feasibility study, which should also include examining the role of the IRO ‘to consider whether their duties and responsibilities to scrutinise the implementation of care plans and refer cases back to court are adequate...’ (para 35). The report also recommended that all judges should receive ‘training materials on messages from research and child development’ (para 46).

Many of the proposals of the Review and the Report have been implemented in the Family Court. Case management and timely decision-making are now monitored and *process feedback* is given to judge. Designated Family Judges have responsibility to ‘review court performance statistics with the judiciary and court staff...and provide mentoring support’ for other judges (Judiciary n.d.). The Ministry of Justice now publishes a *Family Justice Knowledge Hub Research Bulletin* disseminating research relevant to family justice professionals. However, there has been no progress on providing wider feedback on case outcomes, developing interdisciplinary discussion or providing statistics other than those related to case processing.

Recent research funded by the Department for Education provides examples of high quality research which could inform judicial decisions in public law cases. Work by Selwyn and colleagues, using the Looked after Children (LAC) database, has provided an evidence base on the breakdown of adoption after court orders have been finalised. This study identified the number and rate of breakdowns, the age of children when breakdown occurred and at the time of the adoption placement, and made comparisons with other types of order. It provides strong evidence of the importance of early placement for children’s adjustment and the success of adoption (Selwyn *et al.* 2014) and has been disseminated to some judges at Judicial College Training. Similarly, Wade and colleagues’ study of Special Guardianship has added to knowledge about the use and success of those orders (Wade *et al.* 2014).

Farmer and Lutman's research on longer term outcomes of neglect (Farmer and Lutman 2012) and on re-unification (Farmer *et al.* 2011) are also relevant, particularly findings on the high levels of breakdown of court approved plans to return children to families who have previously neglected them, and the suggestion that this is partly due to over optimism about outcome by expert witnesses and courts. There is also further evidence of the implementation and subsequent breakdown of court-approved care plans (Beckett *et al.* 2013), which underlines the contingent nature of decision-making in care proceedings.

Summaries of both the adoption and special guardianship studies are available from the Department for Education. However, neither was included in the *Family Justice Research Bulletin*, where the public child law research featured focuses on process rather than on outcomes for children. This suggests that the mechanism for dissemination of research in family justice is currently too limited even to provide information relevant for feedback on outcomes.

#### *Future research*

The ESRC has agreed to fund, from September 2015, a new project to explore the use of data collected by local authorities on children in the care system, in need or in (state) education to find out about outcomes of children subject to care proceedings. The *Establishing outcomes for children of care proceedings before and after care proceedings reforms Study*, led by Professor Judith Masson of Bristol University and Professor Jonathan Dickens of the University of East Anglia will identify and track longer term outcomes for children using administrative and case file data and explore the possibility of doing this routinely. Early findings from this study will be available in 2017. The work for the Family Justice Council, reported here, provided the impetus to develop this project. The Department for Education also commissioned a small scale feasibility study from the Child Well-being Research Centre at Loughborough University to explore approaches to developing 'a more robust outcomes framework for the family justice system', including but not limited to public law cases. A Working Paper made initial suggestions for discussion by academics, family justice professionals, and the judiciary (CWRC 2014). Nuffield Foundation is also developing its programme to focus on outcomes, rather than process, the stream of family justice research it has funded in recent years. It held a seminar to discuss the use of research to support decision-making in family justice, including in the courts in June 2014.

The Family Justice Council's interest in providing feedback to judges provided an opportunity to obtain funding to support limited research in this area. Previous proposals, outlined above, have focused on what judges could learn from feedback, how this would improve decisions and what should be done in response. The approach here is less directive: it focuses on what judges want in terms of feedback and how they think it would assist them, and researchers' views about feedback on case outcomes. These findings are placed in the wider context of practice relating to judicial and court feedback in other jurisdictions and learning from research on children's social care.

## Method

The research undertaken for this small study involved focus groups with family judges, a brief literature review, to establish interest in or experience of providing feedback to judges and interviews or informal discussion with informants, who were legal or social work researchers in family justice in the UK or overseas. Ethical approval for the Study was obtained from the Research Ethics Committee of Bristol University, School of Law. Permission to hold focus groups with judges was given by the President of the Family Division and the course directors of the relevant Judicial College seminars. All interviewees and focus group members consented to the recording their views.

### *1) Focus groups with judges*

In order to establish judges' views on feedback in care proceedings cases, four focus groups, each lasting approximately an hour, were conducted at Judicial College seminars in June 2012 and January 2013. This arrangement enabled focus groups to be constructed with judges from different courts with minimal demands on judicial time. On each occasion the opportunity to participate in a focus group was introduced to all attendees at the end of a plenary session; volunteers were then sought during the afternoon break for focus groups at the end of the working day. Each focus group was led by an experienced socio-legal researcher with specialist knowledge of care proceedings. They were conducted under Chatham House rules, audio recorded, fully transcribed and analysed with the aid of the qualitative research software package Nvivo10.

Twenty-eight judges agreed to participate, 16 women and 12 men. The participating judges were Designated Family Judges (4), circuit judges (9), District Judges (9,) including two from the Principal Registry, one District Judge (Magistrates' Court) and Recorders (6). They had been judges deciding care proceedings for between 3 and 22 years.

The wider context for the focus groups was the reform of family justice. The Family Justice Review, which reported in November 2011, made major recommendations for care proceedings reform, particularly in relation to the length of proceedings, the use of experts and the judicial role in relation to approval of the care plan. In response, the Family Justice Modernisation programme was designed to change judicial practice, particularly by securing continuity in the handling of cases and more effective case management. Both sets of reforms were discussed formally and informally within the Judicial College seminars. Other topics discussed at the seminars are also likely to have been at the forefront of the judges' minds during the focus groups. For example, concern about children's views was likely to have been heightened by the showing of a DVD where young people spoke about the way their views had been sought during proceedings. Indeed, one judge specifically mentioned the DVD during the focus group.

Judges were invited to take part in focus groups on 'feedback to judges'; the introduction to the focus group did not give a definition or examples of 'feedback' so as to facilitate open

discussion of the various ways participants understood and interpreted the term. It was clear that to these judges:

*feedback is not just a 'one thing or nothing'. It's actually lots of feedback which can be used for lots of different purposes. (J1 FG2)*

Feedback was discussed both in terms of individual cases and *aggregate data*: samples of children, cases or local authorities, which could be provided through specific research or using administrative data. Being a judge involved making decisions about individual children; most judges had little knowledge of published information on samples of cases or the looked after children population, and some were quite unsure about how *this aggregate data* could be useful to them. The participating judges expressed a range of views about the types of feedback they wanted (or did not want) and the use they would make of it.

## *2) Interviews with researchers*

Semi-structured interviews, lasting approximately an hour, were conducted with researchers (9) who have undertaken research on outcomes for children, relevant to the family justice system. These interviews were audio recorded (with permission) and fully transcribed. Again NVivo10 was used to assist analysis.

Three interviewees came from a socio-legal background and six from a social science background. Five of the researchers worked in England and Wales and five in Australia / New Zealand, with one dividing their career between England and Australia. The names of those interviewed are included in the appendix. Interviews focused on what respondents considered judges needed to know about outcomes, their experience in disseminating research to practitioners and issues they identified in learning from research. Interviews with lawyers additionally covered legal issues relating to the use of research evidence and views about courts having a role in monitoring decisions. Discussions with those working in Australia and New Zealand were also used to develop understanding of practice in those countries to support the literature review. This material was supplemented by briefer discussions, (see below).

## *3) Practice in other jurisdictions*

Practice in other jurisdictions (Australia, Germany, Ireland, Israel, Netherlands, New Zealand, Norway, Sweden and USA) was established through discussions with 15 academic and practising lawyers and researchers, and a review of the literature (in English) on care proceedings law and practice. In federal systems (Australia and USA) there was no attempt to obtain comprehensive information about all the separate states. A few examples were identified of the use of research to find out more about the way the court system was operating, and in some it was clear how this 'feedback' had resulted in changes to judicial practice.



The practitioners and researcher informants were either already known to the author through her international networks or met through two seminar series she engaged in while undertaking the study. These seminar series were organised through a Leverhulme International Network on New Families and New Governance (2012-2015), which involved academics from mainland Europe, Australia and USA, and a European Science Foundation seminar on care proceedings in Europe, held at University of Cork in August 2014. Discussions were held face to face and/or by email. They focused on mechanisms available in the relevant country through which judges could get feedback on their decisions, particularly on outcomes for children. Informants' assistance was also sought to identify useful sources and clarify points of uncertainty.

Overall, parts 2 and 3 of the study sketch the current terrain rather than provide a detailed map of practice outside England and Wales.

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## Findings 1: Views of Family Judges in England and Wales

*[It is] very strange to be doing something every day as part of your time work and not knowing whether it's doing any good or even, dare I say, is it making things worse? So there is a need for feedback.... I don't think anyone could logically argue that it's right to be doing something and not having any idea what the effect is ... you can hope but without feedback you don't actually know what you're achieving.(J1 FG2)*

### Current sources of feedback for judges

As will be seen from the detailed discussion below, judges identified different matters on which they wanted feedback: - *Individual stories*: outcomes for children and for parents; *service compliance* the accuracy of assessments; local authority performance, particularly the implementation of care plans; and *judicial performance*: their own performance as judges. In all these areas the judges' focus was on individual cases. In each focus group, discussion of samples and research findings, *aggregate data* only developed after this was introduced by the researcher.

At the time the focus groups were conducted, no type of feedback was routinely provided for judges hearing care proceedings, nor was the performance of these judges appraised. Individual judicial decisions might be subject to appeal; the Court of Appeal rarely commented specifically on the judge's conduct of the hearing or written judgment. Appeals and criticism of judicial performance have become more common in the wake of *Re B-S* (see, for example, *Re P* [2014] EWCA Civ 888; *Re N-D* [2014] EWCA Civ 1226; *Re Q* [2014] EWCA Civ 918) but remain exceptional in a jurisdiction where over 10,000 cases are heard annually. Appeal decisions may provide feedback to the judges concerned; they have a wider function of providing guidance to judges, litigants and their legal representatives. This feedback is contained in the individual judgment; there is no published *aggregate data* on the issues raised in appeals, the proportion of appeals upheld or the outcome of cases remitted for rehearing.

The Modernisation of Family Justice programme has resulted in the introduction of a new case management system (CMS) and the provision of *process feedback* to judges. This change occurred after the focus groups were conducted. In each court area, the overall performance of the Family Court in terms of case volume and timely decision-making is now regularly monitored by the Family Justice Board and local family justice boards. Designated Family Judges have new responsibilities 'to work with judges in their court area to meet their responsibilities for conduct and timely completion of cases in accordance with current guidelines' (Judiciary n.d., para 9a). Such work involves the provision of *process feedback* to other judges and magistrates' legal advisers about such matters numbers of adjournments

and the length of cases, with the aim of achieving more timely case completion, for example by reducing adjournments. It requires more than simple information if it is to be effective in developing judicial case management practice (King 1999).

#### *Feedback on cases – individual stories*

In response to a general question about their experiences of getting feedback, judges in each focus group gave examples of how they currently obtained feedback on outcome, which cases they got to hear about and cases where this had happened. Most of these examples related to outcomes for children and affirmed their original decision. Making adoption orders and performing adoption ceremonies was identified as providing positive feedback to the judge who had made the placement order:

*Certainly I find that the rare cases where there's been some continuity in terms that when the adoption celebration is due to happen, somebody notes that you made the Placement Order, and you're then asked to conduct that, and those are the Red Letter days and certainly that's very important because it's the conclusion to the case and it's always a happy note. (J5 FG4)*

However, such opportunities for feedback were limited to cases where the plan was adoption, to judges who made final orders in the adoption jurisdiction *and* where the adoption application was made in the same court. It was selective and limited: granting an adoption order confirmed that the plan for the child's placement had been implemented but not how the children fared as they grew up. Although welcome, such feedback did not meet all judges' needs for information about outcomes:

*I do most of the adoptions in my court ... I'd still like to know, maybe 2 or 3 years down the line, that the children are still with their new parents. (J3 FG3)*

Another judge acknowledged that the information obtained tended to be positive: *We don't tend to get negative feedback (J2 FG4)*, reflecting that judges heard less about decisions that had turned out badly for children. One reason for this may be a greater willingness amongst professionals to share good news with judges.

Receiving feedback was usually a matter of chance; opportunities to get feedback were uncommon and rather haphazard:

*I know I did an adoption case for a child of 7 .... It was purely chance or through my list office who recognised I'd made the original decision and so it came back to me. But I wouldn't have known otherwise. (J5 FG2)*

Decisions about allocation - whether the judge was allocated the adoption proceedings for a case where they had made a placement order or dealt with subsequent care proceedings

relating to a family; and who acted in the case - whether a particular practitioner (lawyer or children's guardian) appeared before them - could create opportunities to find out what had happened to a child or their parents. Some judges sought information but this too usually depended on chance meetings:

*I ask the Guardians - I sat on a case at the Registry for several days and I removed some teenagers and I asked the Guardian on that case when I saw them 2 years later, what happened (J4 FG3)*

*I often think subsequently 'Oh it's six months - I wonder if that child has been placed' - because I have no way of knowing except [if] I happen to run into a Guardian and I can say, 'What happened?' (J1 FG3)*

The examples given of feedback about cases could amount simply to hearing *the story* (J1 FG1) like *reading the end of a novel* but might also be a catalyst for reflection (see below).

#### *Feedback on performance*

Judicial performance covered a range of practices relating to managing hearings: the judge's demeanour, patience, skills in dealing with distressed or angry parents, clarity of communication etc. but did not extend to whether decisions were legally correct. Opportunities for feedback on performance were felt to be even more limited. Recorders, part-time judges who continue in practice thought that their contact with other practitioners gave more opportunities to find out about previous cases but even they got no feedback on their performance, and this was in marked contrast to the feedback they had had in practice:

*It's actually one of the real skews of our job. In the sense that when I was a solicitor in practice doing Guardian work, care proceedings for parents, I knew if I was good or bad because (a) the Guardians wouldn't keep instructing me and (b) the clients didn't instruct me and they didn't send their mates to me and that was it. As a judge, nobody gives you any feedback. Your colleagues don't because they don't see what you do - well mine certainly don't. And none of the applicants tell you what they think of you, so we actually get no feedback. (J4 FG3)*

*As a barrister, I tend to get a lot of feedback either from my instructing solicitors or from my client who will tell me I've done a bloody lousy job or whatever, and your colleagues - there are lots of different ways, as a practitioner, that you will get some confirmation or otherwise about the work that you have done and also about the outcome of the case.... you're likely to get some feedback from your solicitor. But when I sit as a judge I feel just completely isolated (J3 FG4)*

For a new judge at least, previous colleagues at the Bar might provide informal feedback on performance:

*I'm a new CJ and I would like to know... how I'm doing - and you only hear if you happen to bump into a member of your old chambers.... on an informal basis.... members of your old chambers will say, 'Ooh, I gather that you're talking too much', or 'You're interrupting a lot.' And I actually think that would be jolly good to know, whether people think ... and that's only ever going to be on an informal basis. So I would like some form of feedback, I think. I don't know whether that will continue, but I think that's because I'm new. (J4 FG4)*

The Designated Family Judge was expected to use CMS to provide feedback on judicial performance, in terms case management and timely decision making but would not have information for a holistic appraisal of judicial performance.

*J3: We get none and even if there's an appeal ...– actually how you behaved in court, how you were with people, how you were with the applicant, how you were prepared ...*

*J8: I entirely agree with you. By the end of a year or two sitting at [location], I said, 'Nobody is telling me how I'm doing.' I went to my FDLJ [Family Division Liaison Judge], he said, 'Yes – no one is complaining, so you're not doing too badly!' [Laughing] And it's about as negative as that.*

*J4 The Court of Appeal aren't going to let you know if you talk too much or you interrupt too much – they'll just say, you didn't quite get it right, or it was the right decision got about in the wrong way. (FG4)*

#### *Perceived inadequacy of the current system*

These judges saw the current unsystematic approach as problematic, and most wanted to receive more feedback than they did currently:

*That happens anyway. You get a bit of feedback on some cases and you don't get feedback on others, so it happens anyway, this distortion, and I think the more feedback you get, the more informed you're going to be. (J1 FG4)*

The judges also recognised that more systematic provision of feedback would need to be resourced, and that meant that it was not enough to satisfy their curiosity it had to contribute to their understanding and work as judges.

#### **The content and purpose of feedback**

Whilst most of the examples given of receiving feedback related to *individual stories*, the outcome for children (or occasionally parents) in individual cases, the judges identified a range of other matters on which they wanted feedback, including: *judicial performance*; the accuracy of assessments; *service compliance*, local authority performance, particularly the implementation of care plans; and the way the system was operating more generally. They discussed feedback both in terms of individual cases and of samples of children, cases or

local authorities. They interpreted 'getting feedback' in different ways, most narrowly as *knowing the end of the story*, extending to the provision information which would enable judges to have better idea about whether the *care system was working*. They identified different purposes for different areas of feedback, ranging from a simple update on aspects of outcome, through increasing the judge's knowledge of local authority practice to facilitating professional and *personal development*.

(i) Feedback about judicial decisions and outcomes for children

Judges did not have a common view about either what feedback should be made available to them or how it should be used but most appeared to accept that knowing more (about individual cases, practice or the system) would be helpful for them:

*[W]hen I sit as a judge I feel just completely isolated from any form of feedback, either the outcome of the case – whether the care plan was adhered to, whether the children are placed – or indeed the job that I've done. Are people satisfied with the ... have I done it well? Have I got some aspects of it right? Well, you could say, well, you just have to have the confidence to go ahead and do it regardless. But actually it would be quite nice to know objectively from somebody whether you were doing it right. (J3 FG4)*

Almost all the judges expressed interest in knowing what had become of children whose future care they had determined but some questioned whether their *curiosity* justified any formal feedback mechanism, and whether information about outcomes for individuals would improve their decision-making:

*But the feedback...is about me having it at one level either to satisfy curiosity – and you have to query whether that is a legitimate end – I don't know – or it's a means of me actually learning and getting better, or somebody who is above my level being able to manage what's going on. And that seems to be helpful. (J1FG2)*

*And to some extent, we all want feedback really from a personal perspective – I keep saying this – that you just want to know that the children have had the best opportunity in life that we've been able to afford them by making our decision – but what use it is then put to – I mean for us as judges it's just adding to our collective experience in life - and it is a natural human desire to know. But I'm not sure that beyond that ..... (J5 FG4)*

For this judge, feedback included objective information from *somebody* that they were performing their role *right*, other judges spoke of feedback helping *self-reflection*, adding to *experience* or *increasing confidence* in their own decision-making. The contrary view that receiving feedback might be undermining was also expressed:

[Some judges] *might not find it easy to cope with ...feedback about particular cases and might be rather upset by it and have sleepless nights about whether they've done the right thing.* (J1 FG4)

Some of the judges wanted feedback about what happened to the children in their cases but found it impossible to say what use they would or could make of such information. For these judges, deciding cases left them with a human need to know how things had turned out. Most judges had some sympathy for this view, acknowledging that the nature of decisions in public law children make great emotional demands, which reassuring information might assuage:

*It's natural that you would want – we make big decisions that could be life changing, and we never get any feedback on it and it's natural that you would want to know.* (J5 FG3)

*But I feel very different about [families] as a judge because the responsibility ... ultimately the decision is mine as the judge, and that's what makes the big difference and that's why - and it really is a genuinely human response. We all want to know that we're getting it right. In fact, we want to know if we got it wrong because we can learn from that as well.* (J7 FG3)

Whether or not judges considered that information on outcome would assist them, they only wanted to know outcome for a few, specific cases. They felt they would be *overwhelmed* if they had updates on every case. But there were *standout* cases where they felt a special connection to, or responsibility for, the child or children; cases which were *difficult, finely balanced* or had engaged the judge in substantial hearings were more memorable and induced *human feelings* for the child, and concern to know whether their order had produced the positive outcome for the child that they had intended. The views reflect a human side of judging where some cases matter more but the issue of the uncertainty of outcomes and the wish for some reassurance were pervasive.

Information about outcomes in these cases had to be produced after a relatively short period so that judges were able to recall and reflect on their decision. A quarter of the judges suggested that they would want such feedback after six months but slightly more thought that this was too soon and a two year period would be better. Clearly, there is no optimum interval, appropriate to all judges and all cases: sufficient time must be allowed for the order/plan to be tested but not so long that the judge has little memory of the critical issues or the outcome reflects supervening factors rather than anything considered during the proceedings. The researchers had very different perspectives on when to measure outcomes, and largely rejected an approach which made assessments or provided feedback after a set period of time (see Findings 2, below),

### *Using feedback on outcome*

The constraints of the judge's role currently appear to allow no direct way of dealing with outcome information. Judicial responsibilities end with the final order and judgment; judges have no power to review cases, where orders have not turned out as they intended. Cases are decided on their own facts; the outcomes of a judge's previous cases cannot form part of their reasoning. Although at the start of the focus groups most judges were positive about obtaining individual case feedback, some became less certain following discussion of these matters with other judges, recognising the challenges such information presented and the potential of other material on outcomes to support their professional development.

*I think the personal growth point is a good one. I think in terms of making you a more rounded individual, giving you wider experience of life and how things work and don't work – I think is a really valuable thing to get out of it, but I struggle to see ... how feedback in relation to individual cases can be used beyond that. As I say, I think it's a good thing and I think judges would benefit from it, but I think – I would struggle to give it more specificity. (J2 FG3)*

The judges began to see feedback in the form of outcome information on individual cases as problematic because it might influence their decisions in later cases, leading them away from a focus on the evidence before them. Whereas judges were expected to bring their experience to their work, the outcome of their previous decisions was not a factor to be considered and might cloud their judgment:

*It might affect the way you make a decision. I'm not saying it would necessarily make it harder but you might suddenly think, well, the last 3 cases I've had, I know those children all went off the rails, I'd better not think about whatever.... I suppose theoretically that is what might happen ...you might have the problem: should I tell the other parties about 'this is in my mind'. (J4 FG2)*

This discussion led the judges in this focus group to conclude that feedback on individual cases was undesirable.

*We seem to be coming round to a position where we're saying that feedback is actually not going to serve any useful purpose at all.... I'm beginning to think that. In terms of individual cases, because we want to know the outcome of an individual case, it is, as J1 says, really curiosity – so it wouldn't justify the cost of obtaining the information. Otherwise it's down to managing individual judges – that's not really the sort of ... that wasn't the impression I had of the reason for the feedback gathering in the first place. (J2FG2)*

Such negative views of feedback on case outcomes were not expressed in the other three focus groups. However, the comment highlights potential difficulties with viewing the provision of feedback as a simple good, which will promote judges' development. At the very least the system will need to acknowledge that judicial wisdom is developed by



reflecting on experience, which can include *individual stories* about what happened after the order was made.

The author's perspective on this material is that group discussions would help to ensure that reflecting on case outcomes does not produce overly positive or negative views, inappropriately increasing or reducing judges' confidence in their capacity to make decisions. Adding the different perspectives of children's guardians, children's service managers and other relevant professionals, who have a broader experience of outcomes for children could enhance this. Such an approach would be similar to the case audit approach in health proposed by the Family Justice Council in evidence to the Family Justice Review.

#### (ii) Feedback on judicial performance

Judges noted (above) how little feedback they had on the way they conducted their court, their performance as judges. Views about having feedback on their courtroom performance ranged from, *'I'd love it'* (J7 FG4) to *'I definitely don't want my performance assessed.'* (J3 FG2) This judge's concern was the idea of assessment, that there might be standards imposed. Other judges were concerned not to have individual responsibility and discretion undermined: only the Court of Appeal could legitimately say that the exercise of judicial discretion was wrong. Alternative views were also expressed: feedback on performance provided an opportunity for reflection, learning and reassurance.

One possible source of feedback was lawyers who appeared before them, another was judicial colleagues. Views on relying on lawyers were divided: it could be *'very dangerous'* (J7 FG3) or *'the feedback I would really sit up and listen to'* (J8 FG3). Views here were tempered with concerns about the new expectations that judges comment on the performance of criminal advocates for the Quality Assurance Scheme for Advocates (Bar Standards Board *et al.* 2013). Fellow judges were more acceptable but there was concern about how this could work, on what basis feedback could be given and the responsibility where a judge's practice was considered inadequate. Three focus group members said that they had experience appraising Deputy District Judges, one commented that some of those who had been appraised were volunteering to be appraisers *'because they had got such a lot out of it.'* This is a widely recognised experience in other areas of practice observation (King 1999). Two judges suggested that knowing *'what the parents' experience of a trial was probably quite important'* (J5 FG3) but posed considerable difficulties given the decisions that were made (J7 FG3). This is undoubtedly the case but court user surveys are widely used (MoJ 2010, Family Court of Australia *et al.* 2011, KSO Research 2013). The survey of family courts in Australia (Family Court of Australia *et al.* 2011) provides information not only about the experiences of professional court users and litigants of court facilities, staff and waiting times but also in the court room, including for example, whether participants understood what happened and felt they were treated fairly.

Apart from the judges who were appraisers and those former solicitors who had been involved in appraisal schemes in their firms, the judges had no experience of appraisal;

some were uneasy about how and whether they would be assisted by feedback on their performance:

*It could be quite challenging actually to receive feedback on one's own individual performance. .... it will take an element of bravery, in effect, when you've been sitting for some time, to submit to an appraisal. However that was conducted, it would be quite challenging to go into that with an open mind without feeling defensive about the feedback you get, perhaps. (J6 FG4)*

Such anxieties are to be expected and highlight that the introduction of any scheme for providing feedback needs to go hand in hand with discussion about the use of feedback, and support for all family judges to learn from it, not just those who welcome the idea.

(iii) Feedback about assessments and local authority performance – *system compliance*

Another major focus of feedback on individual cases was to establish whether the local authority had implemented the care plan and or secured the services that children had been said to need. Here comments in all four focus groups reflected a lack of trust in local authorities to implement care plans, with some judges regretting the decision in *Re S* [2002] UKHL 10, which prevented them reviewing aspects of the care plan and calling local authorities to account:

*I would like to know whether the care plans that we approve are in fact implemented, so that if children have particular needs that have been identified and the LA tell me that they will be accommodated – how they're accommodated and what the impact on the children is. (J2 FG3)*

*What may be emerging in terms of us all being quite desperate for some feedback is the distrust of what we are being told from time to time by Social Services Officers as to the rates of placement. I think we're feeling that we're having to make a leap of faith sometimes in accepting some of this evidence. And that may be why we're sitting round this table emphasising feedback on individual cases to find out whether the LA was or was not right in what they told us. That may be the underlying problem here: sort of lack of faith in LA evidence. (J6 FG4)*

This point was echoed by a quarter of the judges, with some adding that having to provide feedback to judges would '*put the local authority on their toes.*' Some scepticism was expressed about the effectiveness of the IRO system and the ability of the local authority to provide the services which had been outlined in the care plan. In contrast, other judges were clear that overseeing the local authority *went against the grain of the current law*, and created *a parallel system* not in the legislation. One judge also noted that non implementation of the care plan might indicate that the [court] decision had been wrong:

*What I would like to see in terms of feedback in a care case is information...as to whether the care plan has been properly implemented and what the outcome has*

*been.... I think my point about implementation of the care plan encompasses finding out hopefully whether the decision was the right outcome. (J3 FG2)*

Finding out what had happened, whether predictions had been correct was also viewed as relevant in assessing the evidence of experts:

*I would want to test the information to enable me to test and assess the evidence that I have received from certain experts, including SWs as to what is going to happen in the case... to find out whether these predictions have come true. Because so much of the evidence we hear – we are looking into the future... (J3 FG1)*

#### *Using feedback on assessments and care plans*

Feedback on these aspects of cases was seen as serving two distinct purposes. First, finding out what happened next helped judges decide whether the information experts and local authorities provided could be relied on. Secondly, the obligation to provide feedback in the future promoted greater care and accuracy in reports for the court. However, samples based on the cases of a single judge would be too small and a non-random selection of cases could not allow accurate conclusions about reliability to be drawn.

Although there are clearly cases that could be better prepared, the research evidence suggests that and that considerable efforts are made to implement care plans (Hunt and Macleod 1999, Harwin *et al.* 2003, Beckett *et al.* 2013) and more, not less, care is taken in planning for children subject to proceedings or orders (Davies and Ward 2012). If judges are to gain insights about local authority practice they need to learn about outcomes from larger samples of cases. Judges will also need a broader understanding about the inferences that can be drawn from finding that a care plan has not been implemented. Non-implementation of the care plan may reflect the inappropriateness of the plan or order, changes to the child's needs or in the family's capacity to meet them. Planning for children necessarily involves risks and uncertainties; reviewing cases with hindsight can distort expectations creating unrealistic (high) expectations about what can be predicted.

Table 1, below, summarizes the judicial perspectives on the content and purpose of feedback

<b>Table 1: Summary judicial perspectives on content and purpose of feedback</b>			
<b>Type of feedback</b>	<b>purpose</b>	<b>reflection</b>	<b>possible consequences</b>
<b>individual stories</b>	<b>satisfy curiosity</b>	<b>self reflection</b>	<b>increased (or reduced) confidence</b>
<b>judicial performance</b>	<b>court user view</b>	<b>Could I do better?</b>	<b>reassurance or change</b>
<b>service compliance</b>	<b>Did LA provide services?</b>	<b>should plan have been approved?</b>	<b>increased or reduced trust</b>

### **Information about samples – *aggregate data***

Much of the discussion in each focus group centred on information about individual cases. On each occasion it was the facilitator who introduced the question of feedback derived from findings about samples of children or cases (*aggregate data*). Research evidence or data analyses such as those included in the Adoption Scorecards (ALB 2014) could provide information about the functioning of the system some judges wanted:

*What really happened to them – that’s the tail end of the story that we want to know. But there’s an extent to which my curiosity can be sated by having the result of really well-focused research studies into what happened to children, so I can see the percentages of children that this happens to, or that happens to, and the number of placements they go into and the success and everything, so I have a better sense of how successful my plan is likely to be. (J3 FG1)*

*I’m actually quite interested in systems.... I would be pleased to see more detail and reliable data as to what is happening in the system, broken down in a bit more detail.....I’m particularly interested in trying to move forward, seeing what best practice is, or what isn’t working, or what is working, or what the pitfalls actually are, from data that’s collected that’s reliable and detailed enough and is analysed enough. (J1 FG2)*

Others did not see how this type of information could help them as judges:

*As a judge, how does knowing the outcome for a group of children make a difference to me when I’m dealing with individual children and I have to take an individual approach to that particular case? (J2 FG2)*

The answer, given by another judge, was that such feedback from research was likely to be more reliable than information presented in argument on behalf of a party.

**Example: the use of research evidence in decision-making: the success of reunification**

Research evidence (Farmer *et al* 2011) can assist making the decision whether a child currently subject to an interim care order (or accommodated under s.20) should be returned home with no order, subject to a supervision order or remain subject to a care order (with or without a plan of rehabilitation). Reunification is a risk decision. Risk is higher where: rehabilitation has failed previously; where the parents' problems have not been resolved; where services to support rehabilitation are not provided or accepted; and where rehabilitation is unplanned.

Assessments of these factors are likely to be more reliable than focusing on the parents' commitment to contact during separation and their expressed wishes to have their child home. Indeed, the NSPCC has developed the *Taking Care* programme to provide and evaluate practice guidance based on the research evidence about successful and unsuccessful reunification (NSPCC 2015).

Key distinctions include the quality of the research and the accuracy of the interpretation of findings, matters which could be assured through a system of commissioning research summaries, similar to those for the Adoption Research Initiative (Ari) or provided by The Australian Institute of Family Studies (AIFS). Some judges acknowledged that having feedback on what happens to cases generally, *aggregate data*, could support better decision-making by judges just as it does by social workers (Munro 2011) and doctors (Cochrane Community). Judges wanted to know the outcomes of types of placement so that when they had to choose between alternatives they could know which *alternative is better* (J4 FG1). Whilst a research study cannot provide a definitive answer to what is the right order / placement type for an individual child, there is a growing body of knowledge which can, for example, highlight the risks of breakdown, the factors which predict breakdown and the supports or circumstances which mitigate it (see example above).

*Use of evidence based on samples*

The judges who participated in the focus groups were not familiar with research in children's social care or the data on looked after children, which is published regularly by the Department for Education. This is not a criticism but a reflection on their education and experience as lawyers. Only very few judges will have the necessary foundation for understanding complex and nuanced research evidence without assistance. The use of research findings to provide judges with feedback on aspects of the care proceedings system will require more than the provision of summary findings. Judges will need education and support to be able to place their cases within a wider context, identifying whether and to what extent comparisons are relevant. Although some conclusions from

research are obvious there may be alternative interpretations which can be more powerful or provide more triggers for insight. The limitations of the judges' current understanding was apparent from brief discussions of what they knew about the care provided for children who have been subject to care proceedings:

*I think we probably all know generally just from what we read in the newspapers, that the outcome for children in care generally is not good and J1 was just talking about the number of children who don't achieve higher education levels and also who end up in the criminal justice system. (J2 FG4)*

*J2: ...But there certainly has been research about the outcomes of children being placed in care not being very good.*

*J6: But is it any different from normal, if there is such a thing, family outcome in any event?*

*J1: Yeah, it's worse. (FG1)*

These views reflect frequently-rehearsed views about failure of the care (Select committee on Health 1997; Proudman and Trevena 2012) which take no account of two crucial factors: children's pre-care experiences and the heterogeneity of the care population. The circumstances which result in children being placed in care distinguish them from other children not in care, who are not suitable comparators. Children in the care system at age 16 have very different experiences of care; they include relatively few who have spent the majority of their lives in care and many 'late entrants' who have experienced long periods of poor parenting. Also, the care system aims to find permanent placements for children outside the system; the many successes of the care system are not in care at age 16 (Sinclair *et al* 2007).

### **Key points from the focus groups with judges**

Judges received little or no feedback on *individual stories, judicial performance or service compliance*. What they received largely depended on happenstance and is more often positive than negative. These judges saw the current unsystematic approach as problematic, and most wanted to receive more feedback than they did currently. Most judges were uncertain how they could use feedback from their cases; some were anxious that it might have a negative effect on their decision-making. Views on the purpose and function of case feedback ranged from satisfying curiosity and their human needs to encouraging reflection and personal development, in effect increasing judicial wisdom.

Judges were generally unaware of the large body of *aggregate data* on the operation of the care system. They had only very limited knowledge of the care system generally and some held unrealistically negative views about the system.

## **Findings 2: Researchers' views on feedback to judges on outcomes for children**

The discussions with judges revealed a narrow conception of feedback, which focused strongly on finding out what had happened to particular children a specific time after they had made the court order. Researchers, whose work focused on analysing and making sense of patterns of children's experiences in different settings, could be expected to have very different perspectives on defining outcomes and using feedback. They used their skills and experience not to make individual decisions but to identify and explain the factors and interactions that helped produce more positive outcomes, so that this knowledge could be used in service development and professional education. Their role required them to explore and capture meaning in fluid systems; their work on children's lives led to a longer-term perspective where change was continuous and inescapable. Interviews with researchers were intended to provide a counter to the judicial view, which highlighted its limitations and offered a broader vision for the use of feedback.

The nine researchers interviewed all had experience researching aspects of the family justice system and had a good understanding of the judge's role. With one exception, they rejected the use of individual case outcomes as a source of feedback:

*I've had judges not uncommonly say to me, it would be so good to get feedback, we never know after we have made our decisions and in a sense [providing such feedback] is a futile exercise .....I think it's a fool's errand to think that judges can get feedback and then evaluate how well they did because there are so many intervening events, say in 3, 4, 5 years.*

Basing views on a single case provided no indication about wider practice and failed to distinguish between a 'wrong decision' and a 'poor outcome.' Reconsidering a single decision with hindsight could not provide a firm foundation for assessment although a pattern of poor outcomes might allow this.

A single researcher spoke of the impact reflecting on the circumstances of individual children and families could have in encouraging reflection and learning:

*I think there's nothing more powerful than actually looking at a real case and seeing what happened to a real child, much more valuable than just looking at theoretical issues.*

But this person also favoured making more use of the available data on looked after children to increase judges' knowledge about the consequences of their decisions.

*I think one needs to be able to promote the view that [research] can set a context for making decisions, obviously you can't make decisions on an individual case on*

*anything but the facts in front of you, but you can interpret those facts according to what you understand and what usually happens to children and what doesn't usually happen.*

All considered that social science knowledge about the care system should be important to judges, but that it was contingent information, dealt in probabilities not certainties and revealed complexity and heterogeneity of the human condition:

*[T]he first one is that big issue of how you take social sciences evidence, ...where a lot of lawyers and judges say well it doesn't really help me all that much because I have to deal with this specific child and I've heard that comment quite a lot from judges in particular. ... the issue then is presenting the material in such a way ...[being] wary about being overly confident in what you can say about things. ... there's heterogeneity and in fact it's what you can learn about what's different for the subgroups ... that's more useful.*

Researchers did not accept that judges decided cases simply on the basis of the information placed before them. In order to interpret facts everyone draws on their frames of reference. Research evidence about the care system should form part of those frames of reference so as to displace assumptions and beliefs for example that growing up in care was a negative experience for children. Indeed, one researcher compared the notion that judges simply made decisions on the basis of facts as equivalent to the 'start again syndrome' (Brandon *et al.* 2010), which results in poor quality social work decisions.

#### *Outcomes and measures of outcome*

Outcomes for children could not be summarised in a single measure at a single time; there were different dimensions – placements might last but not be very good in terms of children's general well-being - and children's experiences changed over time:

*Outcomes are kind of provisional assessments and they're assessments that you may choose to make at different time points, so they are always provisional. Children and young people are always emerging and moving on, and changing, so thinking about when you assess is important... So there's issues about how you measure, where you measure, what you measure, so outcomes are quite fluid.*

Different measures and different timing provided different perspectives. For example, in relation to placement orders:

*So whether the placement order became an adoption order is one outcome, the 2<sup>nd</sup> outcome might be, was that placement a successful one? Did it stick? So ... stability. A 3<sup>rd</sup> outcome might be and is the child happy and developing? Those are 3 different types of outcome from one kind of placement.*

Despite substantial research very little is known about children who had entered care beyond adolescence. Much of the research on children in the care system was funded by



the Department for Education and did not consider those over age 18. The looked after children database, which was a key source for studies of the care system included only very limited information about those who had left care.

Court orders put children on a particular trajectory (remaining with/ returning to parents; kinship care; placement in care; or adoption planning) but pre-care experiences made a huge contribution to what happened subsequently. Research could help identify particular risk factors such as behavioural difficulties, and the support that might reduce them but there could be no expectation of a particular outcome for an individual child.

#### *When to consider outcomes*

Two different approaches were suggested for determining the best time to measure outcomes for children – a milestones approach and a decision-focused approach. Process-focused timeframes i.e. x months after the decision was made were easier to collect and might work better for adult memory but had no intrinsic value for children's welfare. The milestones approach considered the child's age and stage of development and sought to capture aspects of outcome in relation to that. Relating an outcome such as permanent placement to the child's developmental age gave an indication of the likely success of the placement. A decision-focused approach was more suitable for measuring the effect of interventions:

*So if you are looking at specific interventions, for example, you want to know what's the outcome of that intervention, what change does it bring about? If it's a short term intervention you might then want to do a short term follow up and assess the outcome within a few months. If you're thinking about a young person's life and progress through the care system you want to be looking at outcomes of various points in that process, and ultimately beyond.*

#### **Feedback, research and decision-making**

Interviews with researchers discussed the judicial approach to wanting feedback and how judges said they used the feedback they got about cases. As discussed above, many judges wanted to know that they had made the right decision for the children concerned. This was part of the rationale for wanting feedback on case outcomes, *individual stories*. Feedback that indicated that the decision had produced a positive result for the child provided reassurance: *It increases personal confidence as a judge* (J2 FG3). Judges particularly wanted reassurance where decisions were *finely balanced* or where they had *been quite bold, possibly gone against professional advice*:

*For instance where I've made what I might regard as a 'brave' decision – to leave them at home with their parents – I'd love to know whether or not that turned out to be the right decision. It might help me to make that 'brave' decision in the future - or not, as the case may be. (J1 FG3)*

The problem with this approach was highlighted by another participant in the same focus group:

*One has to be careful with how it's used personally. I think in terms of increasing general confidence it could be useful, but every case is individual and every case is decided on its facts and I think you'd have to be careful not to get into the mind-set that because I'm getting increasing numbers of cases where I've made the right decision I can be braver in a particular case. (J2 FG3)*

The researchers had additional reasons for rejecting the approach of the first judge. Although they recognised that judges would want to know that they had made the right decision for the children concerned they did not accept that the correctness of a decision could be determined simply by how it had turned out. Rather, they took a more procedural approach; decision-accuracy must be established at the time the decision is taken, not with hindsight: Did the decision-maker have the relevant information and skills? Had they used these to assess the case appropriately? This process necessarily involved judge using a frame of reference to consider the information, this should be informed by research. As social-scientists, the researchers did not accept that feedback on case outcomes, *individual stories*, could or should be the sole frame of reference.

Researchers too were critical of the idea that the (self) confidence or bravery of the judge in interpreting the facts and making the decision could reliably produce better decisions. Any assessment of a person's judgment skills requires at the very least a random sample of their decisions; small and selective samples of (positive) *individual stories* could only provide unreliable results. Judges needed to develop their frames of reference, and could do this through better knowledge and understanding of the care system, based on aggregate data. Where the evidence in a case did not point clearly to a decision but had to be weighed and analysed, the frame of reference for that analysis should be informed by research and not be based on beliefs and assumptions.

Any decision-making system which encouraged down playing professional evidence on the basis of the judge's self-confidence would not serve the interests of children generally. Variations in levels of confidence would result in different responses to the same facts, and lead to arbitrary decisions. Decisions would not be proportionate to the case circumstances but be determined by the judge's state of mind, making the system less transparent and less just.

#### *Use of research evidence by judges*

Although all the researchers were positive about judges having a better understanding of the working of the care system, children's experiences in care and outcomes for children subject to child protection proceedings, they were wary of judges having unmediated access to research material. Studies needed to reach a quality threshold, and research messages should be presented accurately. Not everything labelled as 'research' provided reliable evidence, and even where it did, findings could be misinterpreted.

## Summary and conclusion

Table 2 (below) compares researchers' and judges' views about feedback and outcomes for children. It highlights the very different perspectives they had on these issues. Whereas Judges were concerned to know *individual stories*, what had happened to the children, particularly those whose cases had touched them, researchers wanted to use *aggregate*

	Judges	researchers
<b>feedback type</b>	<b>individual stories</b>	<b>aggregate data</b>
<b>understanding of outcome</b>	<b>fixed/ binary</b>	<b>fluid and provisional</b>
<b>timing for outcome assessment</b>	<b>set time based adult memory</b>	<b>milestone or decision-focused</b>
<b>value of research evidence for decisions</b>	<b>?</b>	<b>provides frame of reference</b>

*data* to understand how children fared in the care system, and to identify the factors in children's experiences before and during care which were associated with good outcomes.

This difference should not be surprising: judges make decisions in individual cases and most of the researchers interviewed had experience with large datasets. Quantitative research had given the researchers a broader view – not only of the diversity of experiences of children in the care system but also across the life course. This was reflected in the view that outcomes were '*always provisional*' and concern that the point at which outcomes were assessed was chosen rationally. In contrast, judges' involvement with any case had a narrow time frame – the chronology before the application, the proceedings and the decision. Feedback about outcome extended this but the judge's main focus had to be their current cases. Judges wanted feedback on cases while they could still recall them and suggested time periods largely on this basis. Their focus on the evidence presented to them and their limited knowledge of empirical research made thinking about how *aggregate data* could help them challenging within the short space of the focus group. Researchers took it for granted that like other people, judges brought their experience to their decision-making,

and this frame of reference could and should be informed by knowledge from research. They expressed concern that otherwise the gaps would be filled with unwarranted assumptions and beliefs.

### **Findings 3: Practice in other Jurisdictions**

#### **Introduction**

Decision-making in children's cases is a matter of acute policy interest outside England and Wales. There have been Reviews or Inquiries on child protection and/or the courts that hear these cases in Australia (Cummins *et al.* 2012, Queensland Child Protection Inquiry 2013, Wood 2009) and New Zealand (Ministry of Justice New Zealand 2011). In the USA there is a federally funded Juvenile Court Improvement Programme. Grants from this programme may be used to promote continuous quality improvement with respect to such matters as: due process; timeliness and quality of court hearings; improved case tracking and analysis of child welfare cases; data collection, analysis and sharing; and training of legal and judicial personnel in child welfare cases, including interdisciplinary and inter-agency training (US Government n.d., US Department of Justice 2008).

Research has followed these developments: into the operation of Children's Courts in Australia (Clare *et al.* 2011, Fernandez *et al.* 2014, Sheehan and Borkowski 2014) and New Zealand (Cooke 2013). In the USA, state Juvenile courts publish reports on the improvements they have achieved (Flango *et al.* 2014) and newly available data has allowed analysis which links court practice with the demand for and duration of care (Courtney and Hook 2012). Even without external impetus, child protection proceedings have been the subject of recent research in Ireland (Burns *et al.* 2014, Coulter 2013, 2014) and Scandinavia (Forkby *et al.* 2013, Skivenes *et al.* 2015).

The challenges facing courts handling children's cases in these countries are similar although the issues of more acute concern differ. These issues will be familiar to anyone who has been concerned with reform in England and Wales over the last decade. Courts, like other public institutions are faced with increasing costs and limited resources, and political pressure to cut the time taken to decide children's cases and reduce variability within the system. Issues of costs and delay have been a major concern in Australia, New Zealand and USA, leading to redesign of services and processes with the aim of keeping cases out of court and improving court case management. Issues relating to public trust and confidence and the quality of justice have also been raised in these countries with concerns about the availability of expert advice for the courts, poor court facilities particularly in rural areas, the variability of decision-making and the over-representation of people from specific, communities – aboriginals in Australia, Maoris and Pacific Islanders in New Zealand and Black Americans in USA. In many jurisdictions courts have also faced more cases because of a rise in child protection referrals following increases substance misuse and other acute parenting problems, public concern and media outrage.

Courts play a more limited role in Scandinavian systems, with a higher proportion of placements in Finland and Sweden made by agreements which are not referred to a court (Gilbert *et al.* 2011, Masson and Svensson 2015). In Norway, County Boards make first instance decisions, with appeals heard in the administrative court. In Sweden, the local child

protection committee includes lay representatives who decide whether to seek an order in the administrative court (Forkby *et al.* 2013). Elsewhere, child protection cases are usually heard in the children's (juvenile) or family court. Children's courts generally have jurisdiction in both criminal and child protection matters (but not private law disputes between parents). Family courts include these cases as well; the New Zealand Family Court also deals with child offenders but the Australian Family Court is a federal court and so has no jurisdiction in public child law which is a matter of state law.

In all systems, judges make decisions about the removal of children from their parents and their placement with alternative carers on the basis that specific conditions such as ill-treatment, neglect, significant harm, have been proved and the alternative placement is in the child's best interests. So judges face common issue of making judgments about children's futures, on the basis of facts and assessments about their needs, parents' rights and capacities, and the suitability of care plans and relative carers. The support for judges to develop the necessary skills and insight vary substantially in the different jurisdictions as does the specific nature of their role and the expectations this places on them. Four key features which impact on the perceived need for, access to and use of feedback by judges are discussed here: selection and training; the judges' work context and the court culture; the statutory regime and the decisions judges have to make; and the availability of data on court processes and decisions, and those of the wider family justice system. Many other systems have more or better provision for feedback than England and Wales but the intentions of those who designed the court system are not always achieved in practice.

#### i) Selection and training

In civil law systems judges are likely to be recruited from university, train and start their legal career as judges, gaining experience and moving to more senior courts or to other areas of work. In common law systems, judges are mainly recruited from legal practice; in USA juvenile court judges may be elected to their position but will usually have practised as lawyers. Being a judge for child protection cases may be a long-term career as it is in England and Wales, or a short staging post in a career where other work has more status. Where effective appointments are short with little time to gain specialist knowledge the development of generic skills is more important; feedback on individual stories or aggregate data on the context for the decision is not seen as relevant by judges.

Selection from practice (possibly in another area of law) usually means more limited training. In New South Wales, magistrates (the judges who hear child protection cases) have an initial three month training period during which they are allocated less complex matters and encouraged to discuss these with experienced colleagues. After that they must attend 5 days of training each year (Wood Report 2008). Observation and discussion with occasional training events are the main methods of training in Australia and New Zealand, these help to develop skills, knowledge and insight (Sheehan and Borowski 2014). However, concerns have been expressed about the adequacy of training:

Stakeholders raised particular concerns about the adequacy of training of all professionals (judges, lawyers, psychologists, counsellors and mediators) working in the family court. In particular, it was suggested that more harm was caused to families where there was inadequate understanding of issues such as the impact of family violence, disability issues, mental health issues, child development, family dynamics and cultural competency and safety. (Ministry of Justice New Zealand 2011, para 42)

The Queensland Review recommended the use of ‘shared learning opportunities for professional development’ to improve practice among the judiciary through discussion. (QCPIC 2013). In Victoria, magistrates (professional judges) have proposed a specialist qualification for the Children’s Court (Sheehan and Borowski 2014).

Although specialist Children’s court judges/ magistrates exist in parts of Australia and New Zealand many cases are heard by general magistrates, who hear a wide range of cases and decide child protection cases only rarely. Similarly, a general jurisdiction is exercised by many of the judges hearing family cases in Ireland and administrative court judges in Norway and Sweden. Judges interviewed for a research project on child protection decision-making in Norway focused on legal sources; they saw their role as limited to legal decisions and expressed no interest in what happened subsequently, even if cases were appealed to the district court (Information provided by Marit Skivenes). Given the demands of their extensive jurisdiction, it is unsurprising that these judges focus on the law and are not interested in feedback about specific cases.

## ii) Work context and court culture

Most judges hearing child protection cases work alone but the work context makes an enormous difference. Judges may be specialists working a busy metropolitan court alongside other judges doing the same work, or generalists exercising a wide jurisdiction in a rural area where they are the only judge. Isolation removes judges from opportunities for collegial support, from discussion and advice, limiting informal learning. A point also relevant to part-time judges in England and Wales (Hodson 2015).

Not all courts hearing children’s cases are courts of record, written judgments may not be produced or may not be published. In such systems, the only guidance for judges is the (infrequent) judgments of appellate courts, which are performing a different function, often with more resource. In Ireland, judges hearing child protection cases at first instance have turned to summaries aimed at improving public understanding of court decisions (Coulter 2013, 2014) to find out how other judges deal with these cases. In parts of Australia, bench books (guides to practice for judges) are judges’ main source of information. It has been suggested that research summaries should be included in these (QCPIC 2013).

There are frequent comments in the Australian literature about the adversarialism of child protection hearings (Wood 2008, Fernandez 2014, Cummins 2012). The recent reviews have

emphasised court case management as means for reducing adversarialism. Managing the dispute according to the law has become the focus of judicial practice, and of professional development for judges. Elsewhere, for example in parts of the USA and the Netherlands courts dealing with child protection matters may draw on therapeutic justice and take a problem-solving approach. The demands are very different but judges still need to develop their skills and knowledge; interdisciplinary discussion may be particularly valuable in developing the skills these judges require.

### iii) Statutory regime

The key issue here is whether the judge's jurisdiction includes further review of cases. Most of the systems considered include some provision for review, either because all orders are time limited (Netherlands), short term orders have to be reviewed (NSW and Victoria), judges make short-term orders so they can review cases (Ireland: *Burns et al.* 2014) or because a case review duty is placed on courts rather than child welfare agencies (New Zealand, Florida). In the USA, the Adoption and Safe Families Act 1997 (Federal Legislation) sets time limits for achieving a safe, permanent home for a child in state care. Where reunification is not possible cases return to court for a decision on termination of parental rights. Where systems provide for court review, its primary aim is to secure the child's best interests, including by limiting the duration of court orders. A secondary aim is to monitor service provision. These aims can be satisfied by any judge who has sufficient information about the case. Feedback to the judge is a bi-product of the review but can be achieved only where the system secures judicial continuity.

In the New Zealand system there is no equivalent to the statutory review within the local authority, which operates in England and Wales. The New Zealand Children, Young Persons and their Families Act 1989 provides a continuing court review process in cases where there has been a finding that a child is in need of care and protection and certain orders have been made. The review must occur every 6 months for children under the age of 7 years and every 12 months for all other children. The effectiveness of the review process depends on the approach of the judge and of the lawyer for the child. The child is represented in these hearings; legal aid, subject to a means test, is available for representation for the child's parents. Review hearings are routine but vary considerably with some amounting to little more than 'a pro forma exercise'. Hearings can and are used to put pressure on the care authority to provide appropriate services to the child/carers. The judge's function:

'is more than to monitor a child's progress, but also to positively promote a child's welfare. The review process provides protection of the child, parents and interested parties.' *Per Judge Emma Smith in Chief Executive of Child Youth & Family Services v JH FC Dunedin* FAM-2002-012-177, 8 February 2005, at 2.

Pressures on the Family Court (Ministry of Justice New Zealand 2011) and an increase in the associated costs together with an increased focus on permanency have led to some curtailment of the Family Court's powers which means that fewer cases will be reviewed.



Theoretically, Court review hearings in New Zealand provide an opportunity for feedback, the judge can be updated on the child's situation. In practice there are limits on the ability of the review process to provide feedback. Some judges see themselves primarily as hearing cases and have less interest in the consequences of their decisions and using this information as feedback. Judicial continuity is not always prioritised. Also, where the same judge, social worker and lawyers are involved, reviews may be quite superficial, with a tick box exercise rather than a full enquiry. Arguably, judges cannot review service provision effectively without good knowledge of the services available and the processes used to allocate or ration them. Feedback on service provision for an individual child can only be understood within this wider context of resource availability and pressures.

#### iv) Data collection and analysis

Although judges are making decisions about individuals, data about cases or children subject to proceedings provides a relevant context for reflecting on these decisions. Aggregate data can be (and is) used to provide feedback about the operation of the family justice system and its constituent parts, including child protection services, courts and judges. However, within many systems opportunities to do this are undeveloped. A lack of data collection, poor quality recording or no automated means of extraction from case management systems leaves courts without reliable information about their operation. A general lack of data about the operation of care proceedings has been noted in Australia (Lawrence *et al.* 2010); reviews in New Zealand and England and Wales have had to rely on the examination of samples of case files to establish key aspects of how court process is working (Ministry of Justice New Zealand 2011, Family Justice Review 2011), meaning that such information is not routinely available to judges (Newton 2011). In contrast, making better use of court data has been a major strand in court improvement projects in the USA (Flango 2001, Tennessee 2005, US Department of Justice 2008).

Federally funded, Juvenile Court Improvement Projects in the USA seek to ensure courts and state child welfare agencies focus on delivering effective services appropriately and make them more accountable to the public. Performance measurement is viewed as a means of obtaining baseline data against which areas for change can be identified and improvements seen (US Department of Justice 2008). Performance measures have been selected to reflect goals in the legislation (safety and permanency); courts and agencies are expected to collaborate to achieve these goals whilst maintaining the independence of the courts:

Courts play a critical role in determining whether children will be removed from their homes, how long they will remain in foster care, and where they will permanently reside. To maintain the desired balance between court independence and accountability, courts need to identify what actions they should hold themselves responsible for. Achieving safety and permanency is a shared goal of courts and social

services agencies; they must work together to achieve and measure these outcomes.  
(US Department of Justice 2008, 2)

Other measures prescribed relate to procedural matters (due process and timeliness), and to judicial continuity and workload, on the basis that these impact on the quality of judges' work. Judges have facilitated change by leading projects to secure data-sharing agreements with social services in order to achieve a holistic approach to service evaluation. Through this work it has been possible to identify particular areas for action by courts and services, for example, the high proportion of children appearing before the court as offenders who have been subject to child protection interventions or the large numbers of children who 'age out' of state care (Heldman and Roberts 2014). Substantial variations in both social services action and court decision-making within the same state have been identified (Courtney and Hook 2012).

Another aspect of court improvement focuses on the evaluation of judicial performance. Schemes for the evaluation of judges have existed in the USA since the 1970s and now operate in 18 states (Elek *et al.* 2012). The American Bar Association has developed standards to secure effective evaluation without compromising judicial independence (ABA 2005) although these are subject to criticism. Approaches vary: in some states judges receive feedback to encourage self-improvement; in others they are used to inform the public who vote on judicial appointments (Elek *et al.* 2012).

Court User Surveys are another source of feedback. The Family Court of Australia's User Satisfaction Survey includes the views of lawyers, litigants and witnesses of their courtroom experience: whether they understood what was said, felt they were treated fairly and were satisfied with the decision (Family Court of Australia *et al.* 2011). There have also been two national surveys of judges, which cover such matters as the frequency of court work (eg preparing for hearings) outside usual hours and a national observational study of court hearings which examined aspects of judicial performance (Anleu and Mack 2014). In New Zealand, an annual report is published on complaints against judges, including the areas of practice complained about, the nature of the complaint and whether it was upheld (Judicial Conduct Commissioner 2014). However, it is unclear to what extent judges use this 'feedback' to aid reflection on their own experience.

In addition to routine analysis of data and surveys, bespoke research projects can provide feedback to judges about decisions and their consequences. For example, work on high frequency contact for babies separated from parents through child protection proceedings showed that such arrangements had negative consequences for babies and did not result in more reunifications than more limited contact regimes (Humphreys and Kiraly 2009). There is substantial research on aspects of the family justice system which relate to judicial work but it is not necessarily easily accessible to judges. For this reason, the Australian Institute of Family Studies (AIFS) provides summaries and overviews of the research it commissions. Best

Practice Principles for handling family violence cases have been developed, which includes substantial references to research literature. Similarly, the US Department of Justice runs the Clearinghouse on Juvenile Justice (US Department of Justice (n.d.)).

### Availability and use of feedback for judges in other jurisdictions

<b>Table 3: Sources and types of feedback for judges</b>		
<b>Source of feedback</b>	<b>Type of feedback</b>	<b>Examples</b>
<b>Appeals</b>	<b>Judgment Judicial performance</b>	<b>All jurisdictions</b>
<b>Observation of judges by judges</b>	<b>Judicial performance</b>	<b>Australia NZ</b>
<b>Court user surveys</b>	<b>Judicial performance: communication and demeanour</b>	<b>Australia USA*</b>
<b>Judicial performance evaluation</b>	<b>Judicial performance process feedback</b>	<b>USA*</b>
<b>Case reviews</b>	<b>Individual stories service compliance</b>	<b>Australia* Ireland Netherlands NZ USA*</b>
<b>Research summaries</b>	<b>Aggregate data</b>	<b>Australia (Aifs) USA (Clearinghouse)</b>
<b>* some states only</b>		

The organisation and scope of judicial work gives rise to diverse needs and demands for feedback for judges. The USA has the most developed systems for evaluating the performance of judges, courts and the family justice system so far as it relates to children in care. The data collected and analyses undertaken provide much information which could provide feedback for judges but this is not its primary purpose. Rather, this work is aimed

more generally at accountability and improvement of systems; change in judicial behaviour (personal demeanour, case management, decision-making etc.) in response to feedback is only a minor part of this.

## Conclusions

Much of judicial education is based on learning from experience. Judges in England and Wales have practised as lawyers and developed skills in analysing cases, assessing evidence and interpreting law throughout their legal careers. They develop their case management skills through managing cases and their ability to assess the credibility of witnesses, to weigh up evidence, to apply the law, to make decisions and to express these in judgments through working as judges. They have rarely had the advantage of feedback on the work they do and the decisions they make because of the nature of judicial work and the lack of systems through which feedback could be sought or given routinely. The views expressed by the judges who attended the focus groups suggests that some would like ways of knowing how they were performing as judges, in terms of the decisions they make about children's lives and/or the way they conduct their court. Researchers suggested that judicial decision-making could be improved by having rather different feedback, particularly to ensure that judge's frames of reference are informed by research evidence and not by misconceptions.

Table 4: Sources and types of feedback for judges - E+W comparison			
Source of feedback	Type of feedback	Examples	Available in E+ W
Appeals	Judgment Judicial performance	All jurisdictions	Yes
Observation of judges by judges	Judicial performance	Australia NZ	only for magistrates
Court user surveys	Judicial performance: communication and demeanour	Australia USA*	No (user surveys only cover court facilities)
Judicial performance evaluation	Judicial performance process feedback	USA*	process data by DFJ
Case reviews	Individual stories service compliance	Australia* Ireland Netherlands NZ USA*	No
Research summaries	Aggregate data	Australia (Aifs) USA (Clearinghouse)	Not systematically
* some states only			

A review of the sources of feedback available to judges in other jurisdictions identified a range of mechanisms being used; these judges have access to more different types of feedback than judges do in England and Wales, see table 4 (above). The only types of feedback judges in England and Wales can expect is the *process feedback* which was introduced as part of the implementation of the 26 week timescale in the PLO and the Children and Families Act 2014. Very rarely they may receive feedback from the Court of Appeal on their judgment or performance, and can reflect more often on published judgments, where other judges have been criticised. Magistrates see other magistrates performing their judicial role, and observe magistrates as part of their training. Aggregate data on the operation of the family court is poor; judges' access to research on aspects of the care system is limited to presentations on topical research during their (occasional) training by the Judicial College or local family justice board events.

Although provision for feedback for judges is more developed elsewhere than in England and Wales, it generally remains quite limited. Only in parts of the USA, where Court Improvement Programmes have been established, has there been a concerted effort to provide feedback for judges on the operation of the justice system and judicial decision-making. Feedback systems have not compromised judicial independence. Wherever judicial feedback is provided within the justice systems reviewed, judicial independence was maintained and there was a focus on self-reflection, facilitated by discussion with judicial colleagues.

There are common aims for judicial feedback. It is intended to do one or more of the following things: - to reduce judicial isolation; to improve decision-making and the operation of the system; to reduce unwarranted variation in processes and decisions; and to make the justice system more transparent. To achieve these aims, judges are provided with information and sometimes also with a structured opportunity to reflect through discussion with other judges. The information may be court user surveys, performance statistics for the court or the care authority, the findings of a research study or the impressions of a colleague who has observed a judge in court. It is not clear from the material reviewed what use judges make of this information. The impact of giving judges feedback has not apparently been assessed, nor is there evidence that judges use feedback to become better judges. However, judges both in this country and elsewhere are reported as saying that they want feedback, a view repeated by most participants in the focus groups for this study. Also, feedback on performance is widely used in education and training, and is particularly important for those who usually work alone.

Judges who participated in the focus groups mainly wanted feedback on their decisions. They wanted to hear *individual stories* to reassure themselves that they had made the right decision. However, merely confirming that a decision was positive or negative for a child is not feedback which can be used to improve judgment; not all good decisions turn out well. Moreover, reassurance based on a small, selective sample is not a reliable basis for

assessment; reassurance that produces (over) confidence may lead to worse decisions. Information about outcome which enables reflection on the reasons an arrangement had, or had not, worked may improve judgment but simple factual information about a child's placement cannot. Understanding why arrangements had or had not worked also requires far more than could be gained from individual stories.

### **Possible approaches to the development of feedback**

Judges carry heavy responsibility for the decisions they make and are fierce guardians of their role as independent decision-makers. Judicial independence also brings with it responsibility for developing wisdom – a well-informed frame of reference for analysing the evidence in the cases they have to decide. Any system for providing feedback must respect judicial independence. Judges will need to be engaged in the project of developing feedback systems and identifying how feedback should be used by judges. This will require new and broader thinking about feedback. Different types of feedback focus on different aspects of the judicial role. At present, only *process feedback* is available to most judges in England and Wales; feedback on *judicial performance* and *aggregate data* on decision-making and the outcomes of decisions has the potential to improve court practice but will require more analysis of existing data and, possibly, the collection of some new data.

The suggestions here are developed from reflecting on the material presented. They offer starting points for further discussion. There is no suggestion that there should be a unitary system or that one type of feedback can serve all aims. Rather, systems of feedback should be developed with judges, with the expectation that different approaches may be more acceptable or more effective. The system needs to learn how to create good judges just as judges need to learn how to do this difficult work better.

The development of feedback should be seen within the wider contexts of judicial education and making the family justice system more transparent. Currently, not all the information suggested as the basis for feedback is available or published. Any information which is used for feedback for judges should be made more widely available, if not at the judge level at least in relation to each family court. In this respect, the approach used in the looked after children statistical publications to avoid identification of individual cases would be appropriate: small counts, under 5 or under 10 are suppressed in data tables. For this reason, it may be necessary to report on circuits rather than designated family judge areas.

There will never be enough time or other resources to take every opportunity to improve a system. However, new developments should not be unfairly constrained with preference given to established approaches, especially where these have not been justified on a similar basis. Without such an approach the weight of past practice risks future improvement. Better data about how the system is working, for example the proportion of: care applications which result in care orders; care appeal applications which are given leave; appeals that are allowed; and remitted cases which result in a different order, can tell more people more about the operation of the care proceedings system more quickly and

coherently than the judgments the (selective) sample of judgments put on Bailii. Clearly judgments are not just about feedback to judges, they are a judge's 'feedback' to the parties and professionals involved. As *individual stories*, they lack a wider context which can develop frames of reference beyond case law. Putting resources into numbers, *aggregate data*, would provide the foundation for new forms of feedback for judges. It would also make the system more transparent than the publication of selected judgments.

### 1) *Feedback through observation and discussion*

This is a common method of training for family judges elsewhere; 'sitting in' is also used in England and Wales for potential and new judges. The proposal here is that it should continue throughout a judicial career, and be recognised a means to self-reflection for both the observer and the observed. Some judges will need reassurance about the value and use of this feedback. It is not intended (and cannot) approve or criticise judicial actions, or tell a judge that they were right or wrong. In order to be most effective, both sides of the feedback equation will need some assistance or training to use of the encounter, particularly because of limited exposure to the practice of giving or receiving feedback in their earlier careers. The investment of time and resource would be limited both in this initial training which could be via a DVD, showing extracts from observation and the following discussion, and in the practice with each judge observing and being observed at least once each year.

### 2) *Feedback through interdisciplinary discussion*

Interdisciplinary discussion supported by knowledge of relevant research evidence could help distinguish key factors with the potential to support or undermine good outcomes. Effectively, this would be post hoc discussion to enable participants to offer perspectives, which might not have been considered in the litigation. Obviously such discussions can only take place when there is no possibility of further litigation. The discussions do not need to be limited to the professionals involved in the case and would be case seminars. Effectively, this would be a stage above the common syndicate discussions at Judicial College seminars, with learning points and reflections not limited to judges but including the children's guardian and the social work witness/ managers etc. A key point would be for judges to learn how the court process interacted with other local authority processes (eg family finding and conducting viability assessments) so that all professionals could reflect on system interactions. The discussion would add to judicial knowledge about system compliance and assist other professionals to understand the judicial perspective. It would not provide the feedback on cases or systems, which researchers thought judges needed to develop a frame of reference beyond case law for analysing the evidence.

### 3) *Court user surveys*

Court user surveys are potentially expensive, with the need to use personal survey methods, particularly with hard to reach groups such as parents involved in care proceedings. Data collection is usually the most costly part of any personal survey, it therefore makes good sense for court user surveys to cover all that courts do, and not to omit hearings and judicial



decisions, which are what people use courts for. After all, no one would expect a restaurant critic to write a review without having eaten the food. The questions asked of all court users in the Australian Family Court user satisfaction survey (Family Court of Australia 2011) cover hearings. This approach should also be taken in England and Wales; in order to have sufficient data, samples will need to be larger, so that views of sufficient users in each court are included. The survey should not be done once only but a regular means of examining judicial performance as well as other aspects such as litigant safety and waiting times. Judges in each family court should discuss the findings for their court, compare these with those in other family courts and in previous years and consider what response they should make individually and collectively. Again some training for the judge who led the discussion could help to make discussions an effective learning opportunity.

#### *4) Using existing data and research studies*

Learning from case outcomes is better secured from substantial research than the study of individual cases. Large samples allow the identification of patterns and trends to provide a context which supports interpretation in an individual case. Increasingly, social work education seeks to ensure that social workers make use of factors identified in research in their assessments, for example, taking account of the feature of successful and unsuccessful reunification when assessing whether a child should be placed at home after removal to care (Farmer *et al.* 2011, NSPCC 2015). Such a decision necessarily involves risks – no one can expect always to be right. Taking account of the available evidence from a large sample of cases allows the best decision on current knowledge.

If judges obtained their feedback on children's outcomes from research studies and analyses of data on looked after children (LAC data) they would be drawing on the same material as other child care professionals such as social workers and children's guardians. This would serve to reinforce the importance of evidence informed practice, in the same way that reference to the Human Rights Act 1998 emphasises the importance of the rights of children and parents, and the obligations of children's services departments. Whilst judges would still not find out whether a child's placement had been successful or broken down, they would approve care plans with better understanding of what the risks were. Judges would also be able to make some comparisons between children in the care of the local authority whose cases they decide and all looked after children, a far more suitable comparator group than children in general.

#### *5) New data on decision-making in the family court.*

The use of data for judicial and system feedback should not be limited to timeliness as it is at present but should cover substantive issues of decision-making, the orders made or refused etc. The data currently published by HMCTS indicates the numbers of orders of a particular type made each year. In terms of providing feedback on the operation of the system it is useless – it shows only throughput not the number and proportion of applications resulting in particular orders or other outcomes. It is not therefore possible to explore how this varies over time or between areas without the time-consuming process of

collecting data manually. This was a problem faced by many courts in the USA when they adopted court improvement programmes. Some courts used the resources these programmes provided to develop automatic data extraction systems so that they could get the data they needed to understand the way the system was working from their administrative systems. The adage 'know your judge' has long been used in the family justice system to reflect the variation of styles and approaches of different judges in the same court, and in neighbouring courts. Making this more transparent both to judges (who are surely aware of it) and to the public would make the system more transparent and create a strong incentive for more consistency.

Masson and Dickens new ESRC study will link together some data on court process and decisions with administrative data comparing samples before and after the introduction of the 26 week time limit. Whilst the study is only based on a sample of local authorities and cases, it is hoped that it will be able to demonstrate both the utility of this approach and a method for doing this more routinely. The study will be completed in 2018, it remains to be seen if any of the other (simpler) suggestions outlined above are taken forward sooner.

None of these feedback mechanisms were suggested by the judges, many of whom seemed only to want to know the end of another chapter in the child's story. For the reasons discussed in this report, *individual stories* do not provide a good basis for developing judges' skills. Of course, judges will continue to pick up such snippets from time to time. They should be encouraged to recognise the great limitations of this information as a source for their development, and assisted to become better informed about the outcomes of being the subject of care proceedings for children over the life course, through improving their access to relevant research summaries. Judges should not make comparisons between children who are subject to care proceedings with children in the population as a whole. Children's pre-care experiences make such comparisons inappropriate.

Focus group discussions revealed that judges had quite limited understanding of the impact of the care system on children's lives, and lacked accurate knowledge about the system, which they could use as a frame of reference for evaluating alternative care plans. Some judges appeared to have an unduly negative impression of the achievements of care for children who have been abused or neglected based on practices in and before the 1990s and a misunderstanding of the care population. To ensure that all judges hearing public law children's cases have an adequate understanding of the current operation of the care system and the outcomes for children of spending time in care, it is recommended that a concise, research-based account of the care system is provided as essential reading for all judges. This should draw on the statistics collected by local authorities on looked after children and on major studies of different types of placement, their stability, impact on children's well-being and commonly observed difficulties. This should make clear how children subject to care proceedings differ from looked after children generally, and discuss the different patterns of care career children entering care at different ages experience (Sinclair *et al.* 2007). Whilst such a text could not hope to encompass the whole range of

research on child care or tell judges everything they might need to know to understand the difficulties provided by a complex case, it would provide a foundation of knowledge on which subsequent research understanding could be developed.

## Appendix

### Interviewees

Judy Cashmore	Professor of Socio-legal Studies University of Sydney
Allan Cooke	Researcher, Solicitor, New Zealand
Elaine Farmer	Professor of Child and Family Studies, Bristol University
Mark Henaghan	Professor of Law, University of Otago
Cathy Humphreys	Professor of Social work University of Melbourne
Patrick Parkinson	Professor of Law University of Sydney
Julie Selwyn	Professor of Child and Family Social Work, University of Bristol
Jim Wade	Research Fellow, Social Policy Research Unit, University of York
Harriet Ward	Professor of Social work, Loughborough University

### Other informants consulted in preparing the report

Masha Antokolskaia	Professor of Family Law, VU University of Amsterdam
Barbara Bennett Woodhouse	Professor of Law, Emory University
Kenneth Burns	Lecturer, University College Cork
Marie Connolly	Professor of Social Work, University of Melbourne
Carol Coulter	Director Law Reporting Project, Ireland
Monika Haug	Research Associate, Kassel University, Germany
Geraldine Macdonald	Professor, Queen's University, Belfast
Thomas Meysen	German Institute for Youth Human Services and Family Law
Tamar Morag	Director, Law and Society Clinical Centre, Haruv University
Regine Müller	Institut für soziale Arbeit e. V. Münster, Germany
Nancy Wilkov	General Magistrate, Alachua County, Florida
Stephen Pennypacker	Adjunct Professor, F. G. Levin College of Law, U of Florida
Marit Skivenes	Professor, University of Bergen
Gustav Svensson	Senior lecturer University of Goteborg
Liz Trinder	Professor of Socio-legal Studies, University of Exeter

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