



The Law Society

Children and Families Bill

Law Society written evidence to the Public Bill Committee

11 March 2013



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Memorandum submitted by the Law Society of England and Wales

Summary

1. The Law Society welcomes the Children and Families Bill. The Bill represents the culmination of a great deal of work by everyone with a part to play in delivering family justice, and the Society supports and welcomes most of its provisions. This briefing has been prepared by the Society's Family and Employment Law Committees, whose comments are made based on experience and expertise in these fields of law.
2. **Part 1: Adoption and children looked after by local authorities** – The Society supports the clauses taking forward the recommendations outlined in '*Fostering for Adoption*', but is unconvinced that the removal of the requirement to give due consideration to ethnicity etc. will have any real impact on delays or rates of adoption.
3. **Part 2: Family justice** – The Society welcomes much of the family justice provisions in the Bill, which represent the culmination of a substantial period of work by all involved in the system. There are a number of improvements to the drafting which should be made, which are elaborated on below.
4. **Part 3: Children and young people in England with Special Educational Needs** – The Bill's provisions in relation to SEN children and young people are largely welcome.
5. **Part 6: Statutory rights to leave and pay** - Shared parental leave is a step in the right direction, but pay inequality remains a major obstacle to women achieving equality in the workforce.
6. **Part 7: Time off work: ante-natal care etc** - The proposed new right for fathers and partners to time off to attend ante-natal clauses is welcome. However, placing such strict requirements in primary legislation risks creating unnecessary inflexibility. The Bill should state that 'reasonable time off' is permitted, leaving detail to regulations.
7. **Part 8: Right to request flexible working** – The extension of the right to request flexible working is welcome, but the Society has concerns about plans for its practical operation.

Part 1: Adoption and children looked after by local authorities

Clause 1: Placement of looked after children with prospective adopters

8. The Society believes that the paramountcy principle must guide decision-making in all respects when it comes to placement and adoption.
9. The Society supports the Government's intention to place children with prospective permanent carers as soon as possible, where adoption is the best outcome for the individual child. These children are among the most vulnerable members of society, and measures to minimise disruption to young lives by reducing the number of placements that children experience while in care are to be supported. Evidence from Coram and the British Adoption and Fostering Agency estimates that the new duty will reduce the time children have to wait

for an adoptive placement by approximately two months. The Society therefore supports the clauses taking forward the recommendations outlined in 'Fostering for Adoption'.

10. Whilst speed of process and continuity are important aims, contact with the birth family should be facilitated whenever it is in the best interest of the child. The duty to consider family placements in s22C(7)(a)- (9), and the duty to place close to home, school and siblings and within the local authority's area will not apply under clause 1 (3) in the Bill. This is problematic, as dual-approved foster carers/adopters could live some distance away from the birth family, and outside the local authority's area. In such a case, contact is likely to be much less frequent and often impractical.
11. The Society therefore urges MPs to support the following amendment, drafted by the Association of Lawyers for Children:

That clause 1 be amended to insert in Clause 1 (3) amending Subsection 9 and deleting the proposed sub paragraph (b) and inserting

*"(a) they must consider **along side other placement alternatives defined in sub- paragraph (6)** placing C with a local authority foster parent who has been approved as a prospective adopter, and "*

(b) subparagraph (9) shall not prevent such placement outside the local authority area, if such placement is in the child's best interests.

Clause 2: Repeal of requirement to give due consideration to ethnicity

12. The Society is not convinced that the repeal of the requirement to give due consideration to ethnicity will reduce delays in practice, or improve adoption rates. Guidance has already been amended to make it clear that children should not be denied adoption because a precise ethnic match cannot be found.
13. The Society recognises that section 1(5) of the Adoption and Children Act 2002 gives issues of race, religion, culture and language a greater degree of prominence than the factors listed in section 1(4) of the Act. A more balanced approach needs to be achieved, but the Society is not convinced that repealing the requirement to give these factors 'due consideration' is the right way to achieve this. An alternative approach would be to explicitly introduce regard to race, religion, culture and language into the welfare checklist in section 1(4) of the Act, rather than a simple reference to 'background', which exists in section 1(4)(d) at present.
14. To achieve this, the Society urges MPs to support the following amendment proposed by the Association of Lawyers for Children:

That clause 2 be deleted from the Bill

*That Section 1 (3) Welfare Checklist in CA 1989 be amended by inserting '1 (3) (d) 'his age, sex, background, **religious persuasion, racial origin, cultural and linguistic origin**, and any characteristics of his which the court considers relevant'*

*That Section 1 (4) (d) of the Adoption and Children Act 2002 be amended by inserting 'his age, sex, background, **religious persuasion, racial origin, cultural and linguistic origin**, and any characteristics of his which the court considers relevant'*

Part 2: Family justice

Clause 10: Family mediation information and assessment meetings

15. The change in terminology from a weak 'expects' of the Pre-Application Protocol into a firm 'must' as regards attendance at a family mediation information and assessment meeting (MIAM) is welcome.
16. For the sake of clarity, and with the rise of self-representing parties in mind, the Society would support a change in terminology. Assessment meetings should not be limited to, or perceived to be only about, mediation as an alternative to court. There are other forms of dispute resolution available, and there is a need to raise public awareness of the options: one-size does not fit all.
17. The Society therefore supports the following amendment, put forward by Resolution:

Part 2, Clause 10, page 8

Leave out line 18 and insert "Assessment and information meetings"

Clause 10, page 8, line 19

Leave out "a family mediation information and assessment meeting." and insert "an assessment and information meeting."

Clause 11: Welfare of the child: parental involvement

18. The Society welcomes the removal of the term 'shared parenting' from the proposed legislation and the Government's confirmation that the purpose is not to promote the equal division of a child's time between separated parents. Nevertheless, there are risks with introducing a legislative presumption of 'parental involvement' into legislation.
19. There is no evidence that current legislation favours one type of parenting arrangement over another or one parent over another. The primary focus must remain the rights and welfare of the child.
20. The Society supports the following amendment, put forward by Coram Children Legal Centre:

Clause 11, after subsection (2), insert –

'(2B) 'involvement' is any kind of direct or indirect involvement that promotes the welfare of the child. It shall not be taken to mean any particular division of a child's time.'

Clause 12: Child arrangements orders

21. The Society supports the introduction of child arrangements orders, and the removal of the emotive labels of 'contact' and 'residence'. Although there are limits to what changes in nomenclature can achieve – most people will still refer to 'custody' - at least the new terminology makes it clear that the focus is the child.

22. For those parents who go to court, child arrangements orders could help them to agree practical arrangements for the child.
23. The new orders will need to be sufficiently robust and precise to ensure that they are enforceable, including within foreign jurisdictions.

Clause 13: Control of expert evidence, and of assessments, in children proceedings

24. The Society agrees with the formulation that expert evidence should be ‘necessary’ to assist the court.
25. The Law Society would support the creation of a positive duty for the court to consider at an early stage whether expert evidence is necessary to assist it in considering and making final decisions in relation to the child’s welfare. This would avoid the risk of a party producing expert evidence at a late stage and without permission; or parties realising at a late stage that expert evidence is required, both of which can cause delays.
26. The Society therefore supports the following amendment, put forward by Resolution:

Clause 13, page 10, line 15

At end insert

“()The court shall raise with the parties at the first hearing the issue of whether the use of expert evidence is likely to be necessary in the proceedings and have particular regard to setting a timetable for consideration of applications for permission to put expert evidence before the court.”

Clause 14: Care, supervision and other family proceedings: time limits and timetables

27. The Society supports the aim of reducing the length of care cases. There is a balance struck between investigating every available option for the care of a child, proportionality and the damage that is caused by delay.
28. For the courts to effectively decide which cases should fall outside the 26 week limit there needs to be a shared understanding about the exceptional and specific circumstances in which extensions can be granted by the court. Judges, practitioners, local authorities and parents will all need guidance on this.
29. In some, if not many cases it will be clear from the very the outset that the case will not be capable of being resolved in the child’s best interests within 26 weeks. The proposed approach envisages applications for extensions to be made at the end of the 26 week period for eight weeks at a time. Unless there is some flexibility for a judge to case-manage predictably complex and lengthy cases from the outset there will be unnecessary hearings and avoidable expense as parties return to courts to apply for an extension.
30. The Society supports the following amendment, put forward by the Family Law Bar Association:
 - (1) *The Children Act 1989 is amended as follows.*
 - (2) *In section 32(1)(a) (timetable for dealing with application for care or supervision order) for “disposing of the application without delay; and” substitute “disposing*

of the application –

- (i) without delay, and, provided subsection (5) below does not apply,*
- (ii) within twenty-six weeks beginning with the day on which the application was issued; and”.*

(3) In section 32 (care and supervision orders) after subsection (2) insert –

“(3) A court, when drawing up a timetable under subsection (1)(a), must in particular have regard to –

- (a) the impact which the timetable would have on the welfare of the child to whom the application relates; and*
- (b) the impact which the timetable would have on the conduct of the proceedings.*

(4) A court, when revising a timetable drawn up under subsection (1)(a) or when making any decision which may give rise to a need to revise such a timetable (which does not include a decision under subsection 25(5)), must in particular have regard to –

- (a) the impact which any revision would have on the welfare of the child to whom the application relates; and*
- (b) the impact which any revision would have on the duration and conduct of the proceedings.*

(5) A court in which an application under this Part is proceeding may

- (a) timetable the case beyond twenty-six weeks from the day on which the application was issued, or*
- (b) extend the period that is for the time being allowed under subsection (1)(a)(ii) in the case of the application, but may do so only if the court considers that the extension is necessary in the interests of the child’s welfare or otherwise to enable the court to resolve the proceedings justly.*

(6) When deciding whether to grant an extension under subsection (5), a court must in particular have regard to –

- (a) the impact which any ensuing timetable revision would have on the welfare of the child to whom the application relates, and*
- (b) the impact which any ensuing timetable revision would have on the duration and conduct of the proceedings;*

and here “ensuing timetable revision” means any revision, of the timetable under subsection (1)(a) for the proceedings, which the court considers may ensue from the extension.

(7) When deciding whether to grant an extension under subsection (5), a court is to take account of the following guidance: extensions are not to be granted routinely and are to be seen as requiring specific justification.

(8) (i) unless subsection (8)(ii) below applies, each separate extension under subsection (5) is to end no more than eight weeks after the later of –

- (a) the end of the period being extended; and*
- (b) the end of the day on which the extension is granted.*
- (ii) the court may grant an extension which is longer than 8 weeks where this is necessary in the interests of the child’s welfare or otherwise to*

enable the court to resolve the proceedings justly.

(9) The Lord Chancellor may by regulations amend subsection (1)(a)(ii), or the opening words of subsection (8), for the purpose of varying the period for the time being specified in that provision.

(10) Rules of the court may provide that a court –

(a) when deciding whether to exercise the powers under subsections (5) or (8)(ii), or

(b) when deciding how to exercise those powers, must, or may or may not, have regard to matters specified in the rules, or must take account of any guidance set out in the rules.”

Clause 15: Care plans

31. The Society agrees with the policy intention to focus judicial scrutiny upon the key components of a care plan, but in common with many other commentators the Society believes that it is a mistake under clause 15 to limit the court’s consideration of the care plan to ‘permanency’. On the face of it, this would be contrary to the welfare principle and specifically the court’s duty to consider the welfare checklist in section 1(3) of the Children Act.

32. The Society believes that the key issues for the court to consider are those identified in the Family Justice Review final report (paragraph 62) as:

32.1. planned return of the child to their family

32.2. a plan to place (or explore placing) a child with family or friends

32.3. alternative care arrangements; and

32.4. contact with birth family to the extent of deciding whether it should be regular, limited or none.

33. As a matter of principle, and in the best interests of the children whose future is to be decided by the court, judges should not have their hands tied when it comes to the consideration of care plans. If the court takes the view that it requires more information or clarity about any element of a care plan which does not come within the core elements identified in legislation, it must be able to seek that information or to ask for (and manage) a discussion with the parties at the hearing.

Clause 18: Repeal of uncommenced provisions of Part 2 of the Family Law Act 1996

34. The Society has no objection to repealing provisions of Part 2 of the Family Law Act 1996.

35. Repealing these provisions, however, does not provide any clarification on how ‘fault’ fits in with a simplified divorce system. It appears that the government’s proposals for an online divorce portal will be based on fault-based divorce. It is not clear who will explain to the parties, many of whom will be self-representing, the relevance of fault in the divorce petition, which may result in increased hostility and have a negative impact on the family as a whole in comparison to the no-fault divorce process which was envisaged by Part 2.

36. Fault-based divorce forces the parties to apportion blame for the breakdown of the relationship, and contributes to conflict and distress. In the wake of legal aid cuts, the risk is that, without the benefit of legal advice, separating couples will litigate over issues which should not need to go to court.

Part 3: Children and young people in England with Special Educational Needs

37. Part 3 of the Bill makes new provision for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. The Society welcomes many of the provisions in the Bill, in particular:

- 37.1. The greater specificity of Education, Health and Care Plans (EHCPs) and their extension to young people undertaking apprenticeships;
- 37.2. Proposals for the code of practice to be subject to parliamentary scrutiny; and
- 37.3. The removal of the requirement for compulsory mediation.

38. However, the Society is disappointed that the Government has not followed the recommendation of the Education Select Committee that EHCPs should be extended to disabled children and young people who do not have SEN. It is also a matter of concern that the 'local offer' (local authorities' published details of support available to children and young people

Part 6: Statutory rights to leave and pay

Clause 87: Shared parental leave

39. Part 6 implements a system of flexible parental leave. Specifically, Clause 87 would allow for parents to share parental leave when their baby is born. The proposals are welcome, but the Society cautions that these measures alone are not sufficient to achieve a culture of shared parenting that is readily taken up by employees and supported by employers. Unless there is greater parental pay it is unlikely that families will be able to afford to take their full entitlement to leave, whether shared or not. Furthermore, disparities in pay between mothers and fathers may make it more difficult for couples to share parental leave.
40. The Society is also concerned that the Clause does not provide for a father or partner of a mother who is not in employment, and therefore not taking maternity leave, to take additional time off work. As a principle, entitlement to parental leave should not be co-dependent on each other's rights and entitlements. The right to shared parental leave should be a stand alone right.

Part 7: Time off work: ante-natal care etc

Clause 97: Time off work to accompany to ante-natal appointments

41. Clause 97 introduces a right for fathers and partners to take 2.5 days unpaid leave in order to attend ante-natal appointments with their pregnant partner. However, as drafted the provision is unnecessarily complex and bureaucratic as it sets on the face of the Bill that the right can only be exercised on two occasions and for a maximum of six and a half hours on each occasion. This is highly restrictive and, by being on the face of the Bill, can only be altered via further primary legislation.

42. The Society therefore urges MPs to amend the Bill so that fathers and partners are able to take 'reasonable' time-off, with no set restriction on the amount of time – precise details could then be established in regulations, adding additional flexibility. Individual circumstances, e.g. proximity of the appointment to the workplace, or the complexity of the birth may mean that less or more time is required. The legislation should be flexible enough to deal with differing individual circumstances.

Part 8: Right to request flexible working

Clause 101: Removal of requirement to be a carer

43. Clause 101 extends the right to request flexible working hours, currently only available to parents with a child under 17 (or 18 if the child is disabled), to all employees. The Society welcomes this extension, which reflects a generational shift towards a better work/life balance for both genders, recognises the caring responsibilities and physical constraints that many people have to deal with and facilitates religious observance.
44. However, it is unclear why the qualifying period of 26-weeks has been retained before the right to request flexible working applies. The Society would urge MPs to take this opportunity to amend the Employment Rights Act 1996, so that such a right is available for all employees from day one.

Clause 102: Dealing with applications

45. Clause 102 would remove the current statutory procedure employers must follow when dealing with a request for flexible working and replaces it with a duty that employers consider such requests 'in a reasonable manner'. The Society does not support this proposal. Fostering the flexible working culture envisaged by the Bill requires certainty as to rights and obligations. This is best achieved by retaining the formality of the present approach, which creates the opportunity and sets the agenda for a discussion on the ways in which flexible working could be mutually advantageous.
46. Since the existing procedure is perfectly adequate, Clause 102 should be removed from the Bill.