



The Law Society

Family Justice Review Draft Legislation

Law Society Submission

October 2012



Draft legislation comments

The Law Society is the representative body for more than 145,000 solicitors in England and Wales ('the Society'). The Society negotiates on behalf of the profession, and lobbies regulators, government and others.

This response has been prepared by the Society's Family Law Committee and Children's Law Sub Committee. The Committees are made up specialist family lawyers who practice in both public and private law.

Section 1 Family mediation information and assessment meetings

Section 1 (1)

The Law Society supports the objective of s1(1) to transform the weak 'expects' of the Pre-Application Protocol into a firm 'must' as regards attendance at a Mediation Information and Assessment Meeting (MIAM).

We believe that attendance at a MIAM, other than in circumstances to be set out in Rules, should apply equally to respondents as well as applicants. Notwithstanding the difficulties of enforcing compliance, the draft legislation should be amended accordingly.

The explanatory notes state that under the draft legislation:

'The proposals will put privately funded persons in the same position as recipients of Legal Aid have been in since 1997, in terms of having to attend a MIAM unless specific exemptions apply.'

This does not seem correct, given that the LSC funding code (which replaced s29 of the Family Law Act 1996) required anyone applying for public funding to consider mediation, whether applicant or respondent. The Protocol's 'expectation' similarly applied to both parties. On the basis that public funding for mediation from 1 April 2013 will continue to extend to MIAMs, neither respondents nor applicants will have cost grounds for refusing to attend a MIAM.

This part of the legislation should be brought into force before 2014 and as close as possible to the legal aid scope changes next year.

Section 1 (2) (a) and (b)

It is entirely appropriate that the detailed application of the legislation be set out in new Family Procedure Rules. It is essential that the Family Procedure Rules Committee follows the Government's example in consulting at an early stage on the new Rules.

We do not see the need for s1 (2) (b) which allows for the new Rules to prescribe arrangements for the convening and conduct of MIAMs.

This should be a matter for professional practice. Little more should be required in the Rules under section 1 (2) (a) than was set out in s29 of the Family Law Act 1996 (subsequently re-enacted in the Access to Justice Act 1999 and later removed into the LSC Funding Code) indicating that the mediator function at this stage was:-

- (a) *to determine–*
 - (i) *whether mediation appears suitable to the dispute and the parties and all the circumstances, and*
 - (ii) *in particular, whether mediation could take place without either party being influenced by fear of violence or other harm; and*
- (b) *if mediation does appear suitable, to help the person applying for representation to decide whether [...] to apply for mediation.*

Section 1 (2) (c) and (d)

We accept that an officer of the court (as well as the court itself) should be able to assess whether a person has complied with requirement under Section 1(1). In making provision for determination by the court or an officer of the court, the new Family Procedure Rules should make provision for circumstances in which the court can overrule an officer's determination under section (1) (2) (d) to refuse an application. As a matter of principle, access to the courts should be a matter for the courts ultimately to determine. Although it is clearly undesirable for every application which is refused to be routinely referred to the court, there should be provision for the court on application to reach a different determination.

Section 1 (4)

The Society welcomes the reference to 'ways in which disputes of those kinds may be resolved otherwise than by the court' as this will allow those conducting MIAMs to offer the full range of family dispute resolution options including:-

- Collaborative Family Law
- Early Neutral Evaluation
- Family Arbitration
- Family Group Conferencing
- Direct and Indirect Negotiation

as well as mediation.

Section 2 Child arrangement orders

We support the proposal to replace Section 8 Children Act 1989 orders for residence and contact with Child Arrangements Orders (CAO), which is intended to move away from terminology that implies that there is a winner and loser in disputes concerning children.

Section 2 (3) refers to CAOs setting out with whom and when a child is to 'live, spend time or otherwise have contact'. It seems to us that there is a risk that this wording will itself create a new hierarchy of expectation among parents based on 'live, spend time or otherwise have contact'.

There are clearly limits to how far changes in terminology can minimise conflict, but we suggest that consideration be given to a simpler formulation for CAOs, for example ('spend time or communicate with'. The Law Commission has warned against

'invidious allocations of power and responsibilities between parents.'

recommending that

*'It need not be suggested that one parent is better or more fit than the other, simply the child is able to **spend** more **time** with one or the other. '[emphasis added]'*¹

We note that under schedule 1 new section 11A (3) there is a move away from simply promoting 'contact with the child concerned' to 'requiring an individual to take part in an activity that would in the court's opinion, help to establish, maintain or improve the involvement in the life of the child concerned of that individual or another individual who is a party to the proceedings.'

Section 12 is amended to provide for the court to grant parental responsibility to a person who is not a parent where the CAO makes provision for the child to spend time or otherwise have contact with that person, so there is no requirement for the child to be living with the person granted parental responsibility.

Although the government believes that new s 12 (2A) orders would be made rarely, there is a risk that this provision could encourage litigation (for example, by grandparents) or discourage agreements around a CAO.

We suggest considering defining this provision more narrowly, perhaps by drawing upon s 11 A3 'to help to establish, maintain or improve the involvement in the life of the child concerned of that individual or another individual who is a party to the proceedings.'

Under S 13 (2) removal is not prohibited where it is by the 'person named in the CAO as the person with whom the child is to live'. Again, this is a difficult area, but this provision could encourage conflict over a hierarchy of terminology in the CAO, that is to say, over whether the child is to spend time with or live with or have contact with one parent. It is unclear why either party to a CAO should not be able to remove a child from jurisdiction for a period of less than 1 month.

The FJR Final Report conclusions at paragraph 4.68 are relevant:

At present the holder of a residence order may remove the child from England and Wales for up to 28 days without the need to obtain the consent of any other holder of parental responsibility or the court. The panel's initial recommendation was that this automatic consequence should disappear along with residence orders and that in each case the parents with parental responsibility would decide between themselves the ground rules for either of them removing their child from the jurisdiction (or have this issue determined by the court) as is the case with all other potential issues. After further consideration we note the benefit that the automatic 28 day provision can bring to those cases where the parents have not expressly agreed matters, helping to avoid the need for uncontroversial applications to court. The panel now recommends that there be the facility to remove the child from the

¹ The Law Commission, Working Paper No. 96 (1988), *Family Law Review of*

jurisdiction of England and Wales for up to 28 days without the need to obtain consent from other holders of parental responsibility or the court. This provision could either be attached to all holders of parental responsibility or be attributed to named individuals where a child arrangements order is in force.

Section 3 Control of expert evidence, and of assessments, in children proceedings

Section 3 (1) (2) (3) (4) and (5)

Sections 3 (1) (2) and (5) effectively mirror the current FPR requirement that no party may call an expert or put in evidence an expert's report without the court's permission.

Sections (3) and (4) go into more detail, and it is not immediately clear to us what they will add to the effectiveness of the other clauses. This level of detail may lead to circumstances in which it is not clear to the parties whether permission of the court to instruct an expert is required: for example previous medical or psychiatric reports which a local authority may wish to rely on at first hearing; reports obtained for the purposes of previous proceedings or obtained for parents with children who are in multiple proceedings; and reports obtained through routine medical examinations.

Primary legislation cannot cover all circumstances, but to avoid such questions being raised by practitioners and by local authorities, there may be a need for further practical guidance, perhaps through or to accompany the Practice Direction.

Section 3 (6)

We agree with the formulation that expert evidence should be 'necessary'.

However, it is unwise to introduce the concept of resolving proceedings 'justly'. To whom should proceedings be 'just' - the child, or all the parties or an intervener? A definition will have to be provided by the courts, leading to more appeals designed to create judicially-led guidelines.

We strongly recommend removing this provision, leaving it to the court's discretion to decide whether the expert evidence is necessary in the best interests of the children. Another test is not required, and will only lead to delays and appeals.

Section 3 (7) (a) – (f)

We agree: the court should be clear about the purpose of an expert report having regard to the issues and questions to be addressed, without getting involved in the detailed drafting.

Section 3 (7) (g)

It is not obvious why the court should 'have regard to' the cost of expert evidence. If the parties are privately funded and agree to pay, the cost is not a matter for the court having decided that the evidence is necessary. For publicly-funded cases, the

LSC will not regard itself as being bound by the court's decision. If this provision were to have the effect of limiting the LSC's discretion for refusing to meet all or part of the costs of an expert report required by the court, because the court has discharged a statutory duty to 'have regard to the cost', then the provision would be useful. Otherwise, it is not clear what effect this Section is intended to have.

Section 3 (8) (a)

We agree that a social worker or other person who gives evidence as part of their employment with a local authority or the NSPCC in proceedings to which that authority or the NSPCC is a party should not be treated as an expert for the purposes of the preceding parts of Section 3.

There may be situations in which the social worker's status is less clear, for example if they are a member of a multi-disciplinary team which is employed by or has a contract with a local authority, but our reading is that evidence sought from a social worker in those circumstances will fall outside sub-sections (i) (ii) and (iii) taken together.

Section 3 (8) (b)

We agree that that a S94 report by a social worker should be excluded from the scope of expert evidence for the purposes of the preceding parts of Section 3.

There should be no implication that expert evidence cannot be sought on suitability for adoption, including in response to a S94 report.

Section 4 Time limits in proceedings for care or supervision orders

We have no comments on the drafting of Section 4.

The 26 week time limit is being brought into operation in many courts and it is proving possible to timetable certain cases within this period. This will not be true for all cases, and the crucial requirement will be for a shared understanding to be developed about the exceptional and specific circumstances in which extensions of up to eight weeks can be granted by the court. Judges, practitioners, local authorities and parents will all need guidance, which we hope will be provided through the Family Proceedings Rules.

The proposed amendment as to the duration of ICO or ISO is sensible because the current practice of renewals is often an administrative exercise.

Section 5 Care Plans

We agree with the policy intention to focus judicial scrutiny upon the key components of a care plan, but in common with many other commentators we believe that it would be a mistake under Clause 5 (3A) 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.

We believe that the key issues for the court to consider are those identified in the Family Justice Review final report (paragraph 62) as:

- planned return of the child to their family
- a plan to place (or explore placing) a child with family or friends
- alternative care arrangements; and
- contact with birth family to the extent of deciding whether it should be regular, limited or none.

The draft legislation should certainly be amended to include contact with parents and siblings. This is particularly important where there are a number of children in different placements, with differing needs.

The Explanatory Notes refer to consideration of the 'core components' of the plan only. This term is a wider one and could include provisions such as contact and work for/with the child. Instead of referring to 'permanency provisions' this clause could be amended to refer to 'core components' and list such components to include permanency provisions, contact arrangements and any specific work that the court considers should be undertaken with the child.

As a matter of principle, and in the best interests of the children whose future is to be decided by the court, an independent judiciary should not have its 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.

Our reading is that the amendments proposed under Section 5 (1), while not requiring a judge to scrutinise these elements, will nevertheless leave the judge the discretion to do so: it would be helpful to have reassurance on this point.

Although the court is not required to scrutinise the entire care plan, the judge should always be provided with the entire care plan. To do otherwise would not be sensible.

Section 5 (3C) and Section 6 Care proceedings and care plans: regulations: procedural requirements

We believe that the definition of the permanence (or we suggest 'core') provisions of the care plan – within which we would include contact - should not only be set out in primary legislation, but should be capable of amendment only by further primary legislation.

Section 7 Repeal of restrictions on divorce and dissolution etc where there are children

Section 7 (1)

The Law Society supports repealing Section 41 of the Matrimonial Causes Act 1973.

The explanatory notes state that the Government's aim is to expedite and simplify the procedure for uncontested divorces. Repealing this section will help to achieve this, but we believe that the provision would be more effective if the Statement of Arrangements form D8A were removed from the process altogether. We can provide further briefing on this detailed point.

The best means of simplifying the procedure for uncontested divorce would be to legislate for no-fault divorce.

Section 8 Repeal of uncommenced provisions of Part 2 of the Family Law Act 1996

Section 8 (1)

The Law Society supports the repeal of Part 2 of the Family Law Act 1996.

This Part introduced revised divorce procedures allowing for no-fault divorce with the aim of reducing the bitterness of divorce and the damaging impact on all involved. This included the requirement for a party to attend an information meeting before making a statement of marital breakdown to start the divorce process.

The provisions were not commenced (except section 22 relating to funding for marriage support services which will remain in place) as the Government determined that information meetings (FAINS) did not fulfil the principles behind the Act. The provisions relating to information meetings should therefore be removed as parties are provided with the relevant information without the need for FAINS.

However, as this information is provided only if the parties see a solicitor or issue proceedings (through MIAMs), there is still a role for extension of the current position on information provision. The Government should therefore consider the provision of information to cover the gap where MIAMs are not applicable.

Section 8 (2) (a)

The general principles contained in sections 1(c) and (d) of the Act are to be repealed but not sections 1(a) and (b).

- Section 1(a) states that the institution of marriage should be supported and section 1(b) that parties to a marriage which may have broken down should be encouraged to take all practicable steps to save it.

- Section 1(c) states that a marriage which has irretrievably broken down should be ended with minimum distress to the family and to promote as good a continuing relationship between the parties and their children as possible.
- Section 1(d) states that any risk to one of the parties or the children from the other party should be removed or diminished.

Removing only the principles in (c) and (d) appears inconsistent, as it removes the focus on maintaining family relationships whilst retaining the principle of supporting couples to save a marriage. This does not fit with the Act as a whole nor with the government's encouragement of sensible separations and co-parenting following separation.

Repealing these provisions 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 for fault-based divorce. It is not clear who will explain to the parties 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.