



The Law Society

Justice Select Committee – pre-legislative scrutiny of the Draft Children and Families Bill

**Written evidence from the Law Society of England and Wales
October 2012**



1. The Law Society of England and Wales ("The Society") is the professional body for the solicitors' profession in England and Wales, representing over 160,000 registered legal practitioners. The Society represents the profession to parliament, government and the regulatory bodies and has a public interest in the reform of the law.
2. This response has been prepared by the Society's Family Law Committee and Children's Law Sub Committee. The Committees are made up of specialist family lawyers who practice in both public and private law.

Mediation

a) The safeguards in place to ensure that domestic violence or other welfare issue cases are filtered out from the Mediation Information and Assessment Meeting ('MIAM') system, and whether they will be effective

3. All family mediators who conduct MIAMs are trained to screen for domestic abuse, domestic violence, child protection and other welfare issues, and operate within the Family Mediation Council's Code of Practice.
4. Mediators will assess whether the abuse is of a type which would automatically rule out mediation, or whether it may be possible to offer mediation in a 'safe enough' environment where the victim of abuse feels safe and is prepared to attempt mediation, perhaps with co-mediators and/or by way of shuttle mediation. The mediation 'choreography' is also able to incorporate other protective arrangements such as staggered arrival and departure times, and separate waiting arrangements.
5. The Family Mediation Council is exploring the use of videoconferencing for family mediation by way of offering 'virtual proximity'. It is likely that progress in this area will await the availability of the results of research in British Columbia and Queensland. Research published to-date makes reference to only three video-conferenced mediations (one in British Columbia and two in Queensland).
6. Pre-legislative revisions to the Form FM1 and associated guidance for HM Courts and Tribunal Service (HMCTS) staff have been considered by the Ministry of Justice's (MoJ) Family Mediation Steering Group. The Law Society believes that the exemptions from the assessment processes as set out in the revised FM1 strike the right balance.

b) The role of officers of the court in the MIAM process

7. The Society accepts 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).
8. Guidance to court staff should be given as to the type of evidence to be considered when deciding whether Clause 1(1) applies and has been complied with, and what would be required to be disclosed by the MIAM provider.
9. 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.

10. The Society would welcome government's assurance that the new Rules will so provide.
11. Much of the detailed application of the new legislation is being left to new Family Procedure Rules. It is essential that there should be adequate consultation on the content of the new Rules - there was no consultation as to the content of the FM1 Form or Pre-Application Protocol itself prior to the introduction of MIAMs in 2011.

c) Are there any gaps in the process, and if so, who will fall through and what safeguards are needed?

First gap

12. Following the removal from the scope of legal aid of the bulk of family proceedings by the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the loss of the Legal Services Commission's Funding Code referral and its replacement with section 1 shifts to a much later point in the development of any family dispute the compulsory consideration of mediation and other dispute resolution options.
13. Historically, most solicitors have been making funding code referrals early in the life of any case, as Legal Help runs out and before taking any more substantial steps in the case, even though the option has been available for some time to delay making such referral until an application for Legal Representation is made.
14. Conducting a MIAM immediately before the issue of proceedings is chronologically precisely where the relative positions of the parties are liable to be most polarised – it is highly likely that informal attempts at resolution by correspondence or negotiation will have been attempted, will often have been rebuffed or ignored.
15. The note accompanying the draft legislation states that:

“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.”
16. This is incorrect, as the effective point at which cases will become eligible for legal aid/public funding by reference to the draft legislation will now be much later in the development of any family dispute.

Second gap

17. The Legal Services Commission (LSC) Funding Code (which replaced s29 of the Family Law Act 1996) requires any person applying for public funding to consider mediation, whether applicant or respondent to potential proceedings.
18. Historically, there was an exemption available to respondents if there was only a limited amount of time before the matter was listed at court, but that was removed in 2009 in the last substantive amendment of the CLS APP 7 (the LSC form required to be submitted by parties with their legal aid application, and confirming the position with regard to matters of mediation suitability).
19. The current Pre-Application Protocol to the Family Proceedings Rules expressly preserved the equality and universal application of the 'expectation' that both

applicants and respondents attend a MIAM. It is unfortunate that the transformation from 'the court expects' into 'must attend' of s1(1) only applies to applicants.

20. At the National Family Mediation AGM and Conference on 18 September 2012, the Supreme Court Judge Baroness Hale of Richmond highlighted the failure of the draft legislation to require MIAM attendance as a universal requirement for all those involved in family proceedings.

Third gap

21. Public funding will continue to be available for mediation after March 2013. Mediators and mediation providers are working on the assumption that such public funding will not only extend to mediation, but also to the intake or MIAM preceding mediation.
22. If that is the case, there will be a need to continue to align the financial eligibility criteria for public funding with the criteria for HMCTS fees exemption.
23. The availability of MIAMs on a 'free at the point of delivery' basis for both respondents and applicants who qualify financially for public funding/legal aid, effectively removes cost as a barrier to the extension of MIAMs to respondents of limited means, who will be on an equal footing to applicants of similar limited means.

Child arrangement orders

d) What is the effect of the amendments to section 11A to 11P, is it simply a 'shift in focus' to remove the perception of 'winners and losers'?

24. The stated aim of the change in terminology in section 11A to 11P is to ensure that the focus of the court and the parties is firmly on the practical arrangements for caring for the child. Removing the labels 'contact' and 'residence' might change the perception of 'winners' and 'losers', but more importantly it diverts attention away from the parents and towards the children. This is consistent with the Family Justice Review's wish to establish a clear focus throughout the process of dispute resolution on the needs of the child.
25. The change in terminology goes further by signalling 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'.
26. These concepts will need to be set out clearly in Orders, particularly where they are to be applied in other jurisdictions.
27. As the Society stated in its response to the draft legislation, there are clearly limits to how far changes in terminology can minimise conflict, but the Society suggests 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]*

Expert evidence

e) Does the new test adequately safeguard against miscarriages of justice?

28. The Law Society would like to see a positive duty for the court to consider at an early stage whether expert evidence is needed to assist it in making a decision about a child's welfare. This could be inserted in subsection 6 of Section 3, applying the criteria listed in subsection 7.
29. This approach would help to ensure that litigants (especially litigants in person) do not produce expert evidence at the last minute, or considering too late whether expert evidence is needed.

f) Are social workers receiving the support and training they need to meet this increased court role?

30. Expert evidence is by definition that which is not available to the court from social workers or guardians. It is difficult for us to comment on the support and training being given to social workers, but our perception is that social workers would benefit from more training on court presentation skills generally.

Time limits

g) What progress has been made to achieve the 26 week limit?

31. Although the Society has misgivings about judges appearing to anticipate legislation which has yet to be approved by Parliament, the 26 week limit is being applied in some courts and it is proving possible to timetable some cases within this period.
32. It is difficult to provide anything other than anecdotal evidence with regards to the progress that has been made in achieving the 26 weeks time limit without access to HMCTS's CMS data.
33. Care proceeding cases are often complex, dealing with vulnerable children and parents, requiring concomitant assessments, sometimes running in parallel with concurrent criminal proceedings. There should be clear guidelines, from the outset, as to which cases are expected to take over 26 weeks. Cases involving complex fact-finding cases, those involving large families or absent families members, or where the child has complex medical needs (such as disability), will rarely be resolved in under 26 weeks.
34. The proposed legislation allows for extensions of up to eight weeks in exceptional circumstances, and it is essential that guidance on the consistent application of judicial discretion will be given, whether through a Practice Direction or other means, as failure to do so could lead to satellite litigation based on process, rather than substance.
35. For the 26 week time limit to become widely effective, other provisions in the Family Justice Review will need to be implemented, including judicial continuity, and speedy processes at the Legal Services Commission for authorising legal aid and especially publicly-funded experts' fees. Failure to do so could result in placements breaking down or in an increase in litigation by parties who might feel short-changed by the process.

36. The draft provisions appear to allow the Lord Chancellor to reduce the 26 week statutory time limit by Rules in the future: of so, this seems to us to be wrong in principle.

Care plans

h) Should the Judge's role be restricted to considering only the permanence provisions of care plans?

37. No, 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:

- 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.

38. The draft legislation should certainly be amended to include contact with parents and siblings.

39. 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 include components such as permanency provisions, contact arrangements, any specific work that the court considers should be undertaken with the child, and other components that the specific circumstances of a case might require.

40. 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.

41. 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.

42. If the quality of social work continues to rise consistently, then a reduction in the court's scrutiny role will happen organically. Independent Reviewing Officers require a comprehensive and fully considered Care Plan to discharge their role in ensuring that it is properly implemented. Limiting Guardian input into care plans and limiting judicial scrutiny of care plans might be a false economy and create delays down the line once the full information is provided by the Guardian's final assessment and the final scrutiny of care plans.

Divorce

i) Do the suggested provisions remove an important safeguard for children?

- 43. No, the Law Society does not believe that the suggested provisions remove an important safeguard for children. Neither section 41 nor the Statement of Arrangements form provide additional or more effective protection for children.
- 44. As Part II of the FLA 1996 contains provisions in relation to a new divorce procedure which has not been commenced, the repeal of these provisions would not remove safeguards from the current system.