



**Children and Families Bill 2013:  
Contextual Information and Responses to Pre-Legislative Scrutiny**

Presented to Parliament  
by the Secretary of State for Education  
by Command of Her Majesty

February 2013



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## Foreword

The Coalition Government is determined to enable all children and young people to succeed, no matter what their background. We want to give families freedom to manage the care of their children and balance their work and family needs effectively.

We have introduced greater freedom and autonomy for schools, delivered an extension of early education for 3 and 4 year olds, are offering the same programme to 2 year olds from low income backgrounds from this September, and are raising the quality of childcare.

To address the disadvantages faced by our most vulnerable children and young people, we are reforming children's services, removing barriers to adoption and providing better support for looked after children, their carers and care leavers.

The aim of our reforms is to ensure that services consistently place children and young people at the centre of decision making and support, enabling them to make the best possible start in life and challenging any dogma, delay or professional interests which might hold them back.

The Children and Families Bill, with a twin focus on vulnerable children and strong families, sits at the heart of those ambitions. The measures will improve services for vulnerable children and transform the special educational needs system. We will introduce a new system of shared parental leave, increase the availability of flexible working, and improve childcare provision for working parents. Our commitment to promoting children's rights is a thread running throughout the Bill.

We are very grateful to the four Parliamentary Committees that have conducted pre-legislative scrutiny on many of the draft provisions in the Bill. We have considered their reports carefully and believe that the Bill has been significantly enhanced as a result of this scrutiny process.

The Government has produced this document to explain the provisions that make up the Bill and how they fit within the wider context of reform. It is designed to provide easy access to further information as well as our formal responses to each of the Committees that conducted pre-legislative scrutiny.

We believe the reforms in this Bill fulfil and affirm our determination to improve the outcomes of all children and families in our society, whatever their start in life. We look forward to working with all those who share in that ambition.

The image shows two handwritten signatures in black ink. The signature on the left is for Edward Timpson, and the signature on the right is for Jo Swinson. Both are written in a cursive, flowing style.

**Edward Timpson MP**  
**Parliamentary Under Secretary of**  
**State for Children and Families**

**Jo Swinson MP**  
**Parliamentary Under Secretary of**  
**State for Employment Relations**  
**and Consumer Affairs**

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# Chapter 1

## Introduction

1. The Children and Families Bill will make the legislative changes that underpin our wider reforms to support children and families.
2. The first half of the Bill improves services for some of our most vulnerable children and young people by reforming the systems for adoption, looked after children, family justice and special educational needs. The second half takes forward our commitment to support all children and families, by encouraging growth in the childcare sector, ensuring children in England have a strong advocate for their rights and offering shared parental leave in a child's first year.
3. The provisions in the Bill build on extensive consultation and pre-legislative scrutiny. This document gives an introduction to each part of the Bill and the wider reforms within which the legislation sits. It provides links to the consultations and policy papers which have informed the development of each part.
4. Significant parts of the Bill have also been considered in a detailed process of pre-legislative scrutiny by four Parliamentary Committees. This has significantly enhanced the legislation we are presenting to Parliament. The Government's responses to pre-legislative scrutiny on the provisions relating to adoption, family justice, special educational needs and the Office of the Children's Commissioner are published as annexes to this document.

### Parts 1-3 of the Bill – Supporting vulnerable children

5. Improving the **adoption system and the lives of looked after children** are key priorities for the Government. Our ambitious reform programme aims to make sure that adoption agencies consider placing children earlier with permanent loving families where this is in their best interests. We have considered expert advice from Sir Martin Narey as well as evidence from professionals, representative organisations, people personally touched by adoption and the recommendations from pre-legislative scrutiny. In response we are taking urgent steps to increase the number of prospective adopters, reduce unnecessary delays in the system, improve the quality and timeliness of adoption services and expand the support available to adopters. For those children that continue to be looked after by a local authority, we are improving the support available to them, recruiting more foster carers and strengthening local authorities' role in supporting their educational achievement. For further information, including on the specific measures in the Bill, see Chapter 2.
6. We are reforming the **family justice system** so that it can deliver better for children and families, keeping children's needs at the heart of the process. Our reforms implement the commitments we made in February 2012 in response to the independent Family Justice Review, chaired by David Norgrove. The Government accepted the vast majority of the Review's

recommendations which were based on extensive and detailed consultation with everyone involved in or affected by the family courts. In addition, our legislative provisions have been informed by the pre-legislative scrutiny process. We are taking forward measures to tackle damaging delays in the system, foster closer collaboration between local authorities and the courts and ensure that children's best interests remain at the heart of decision-making. Our reforms will also encourage more parents to agree co-operative arrangements for their children so that they do not have to come to court and, for those that do, we are supporting swift agreements that focus on the child's needs. For further information, including on the specific measures in the Bill, see Chapter 3.

7. We are transforming the system for **children and young people with special educational needs (SEN), including those who are disabled**, so that services consistently support the best outcomes for them. We set out this reform programme in *Support and aspiration: A new approach to special educational needs and disability: Progress and next steps* (May 2012), following extensive consultation before and through our SEND Green Paper (published in March 2011). We are creating an improved, single system from birth to 25 for all children and young people with SEN and their families, through reforms including: simplifying the assessment system; improving cooperation between all services responsible for providing health or social care; and giving parents and young people greater choice and control over their support. Our legislative provisions have been revised as a result of the pre-legislative scrutiny process. For further information, including on the specific measures in the Bill, see Chapter 4.

#### **Parts 4-8 of the Bill – Supporting all families**

8. We are reforming **childcare** to ensure the whole system focuses on what matters; providing safe, high-quality care and early education for children. We want to substantially increase the supply of high quality, affordable and available childcare. The evidence is clear that a good start in these early years can have a positive effect on children's development, preparing them for school and later life. This is important for individual children and families. It is also important for our wider society and economy. The measures in this Bill form part of wider reforms planned for childcare, in response to the commission on childcare and the Nutbrown Review on early education, including those set out in *More great childcare* on 29<sup>th</sup> January. For further information, including on the specific measures in the Bill, see Chapter 5.

9. We want to make sure that the **Children's Commissioner** can act as a strong advocate for children, helping to embed a culture where children's interests are always put first and ensure that policies and practices affecting children take account of their rights. Our reforms build on the recommendations John Dunford made in his independent *Review of the Office of the Children's Commissioner (England)* (December 2010) and have been informed by consultation with children and children's organisations, as well as pre-legislative scrutiny. They will give the Children's Commissioner a



strong role in promoting and protecting children's rights, particularly those who are vulnerable, and result in greater independence from Government. For further information, including on the specific measures in the Bill, see Chapter 6.

10. Finally, our changes to **shared parental leave and flexible working** will give individuals more choice over how they organise their lives and help us to create a truly family friendly society. They will support economic growth and increased productivity by making working arrangements work better for modern life. These reforms implement the commitments we announced in November 2012 in response to the *Modern Workplaces* consultation. They are informed by detailed consideration of the consultation responses to ensure that the changes will benefit families, individuals and businesses. We are taking forward measures to remove the barriers that prevent parents from sharing leave in the first year of a child's life, to enable working families to share the care of their child from the earliest stages, and to reform the system that gives individuals the right to request flexible working. For further information, including on the specific measures in the Bill, see Chapter 7.

## Chapter 2

### Adoption and Looked After Children

11. The Government wants to see more children being adopted by loving families with less delay. Our *An Action Plan for Adoption: Tackling Delay* (March 2012) summarised the evidence of harm being done to vulnerable children by drift and delay in care and adoption services; delays that mean children wait an average of almost two years between entering care and moving in with an adoptive family.

12. To improve the adoption system we are implementing wide ranging reforms to: increase the number of prospective adopters; reduce unnecessary delays in the system; improve the quality and timeliness of adoption services; and expand the support available to adopters.

13. The number of adopters does not match the number of children awaiting adoption, contributing to fewer, slower adoptions. There were around 4,600 children with placement orders who were waiting to be placed with their likely adopters on 31 March 2012. There are underlying problems in the way adopter recruitment and assessment is organised. The structure of the system weakens the incentives on individual agencies to respond to the national adopter shortage, and dictates that they operate at too small a scale to be able to do so effectively. The Government is working with the adoption sector which is considering how best it can address these systemic problems. We are committed to significant improvement in the recruitment of adopters and are therefore taking a power through part 1 of the Bill that would enable the Secretary of State to require local authorities to commission adopter recruitment services from one or more other adoption agencies.

14. In addition, part 1 of the Bill:

- encourages local authorities to place children for whom adoption is an option with their potential permanent carers more swiftly, by requiring a local authority looking after a child to consider placing them in a “Fostering for Adoption” placement if one is available;
- reduces delay by removing the explicit legal wording around a child’s ethnicity so that black and minority ethnic children are not left waiting in care longer than necessary because adults want a perfect or partial ethnic match;
- gives prospective adopters a more active role in identifying possible matches with children, by amending the current restrictions around “public inspection or search” of the adoption register so that they can access the register directly, subject to appropriate safeguards;
- improves the current provision of adoption support by placing new duties on local authorities to consider requests for personal budgets and to give prospective adopters information about their entitlements to support; and
- reforms the arrangements for contact between children in care and their birth parents, and adopted children and their birth parents, to reduce the disruption that inappropriate contact can cause to adoptive

placements.

15. All of these changes apply to England only apart from the changes to family proceedings around contact which apply to both England and Wales.

16. This Bill delivers our legislative commitments made in *An Action Plan for Adoption: Tackling Delay* and subsequent adoption reform announcements. The *Action Plan* set out the steps the Government is taking to streamline the adoption system to help find families for more children, more quickly and effectively. Our adoption reform programme is informed by expert advice from Sir Martin Narey, our Expert Working Group on Adoption which published its report *Redesigning Adoption* in March 2012 and extensive public consultation. Information about the adoption reform programme can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/families/adoption](http://www.education.gov.uk/childrenandyoungpeople/families/adoption)

17. In addition, last summer we ran a call for views exercise on contact arrangements for children in care and adopted children and on the placement of sibling groups for adoption. The summary of views and the Government's formal response can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/families/adoption/a00212027/consultation-review](http://www.education.gov.uk/childrenandyoungpeople/families/adoption/a00212027/consultation-review)

18. The House of Lords Select Committee on Adoption Legislation carried out pre-legislative scrutiny of the provisions for "Fostering for Adoption" and removing the explicit legal wording around a child's ethnicity so that black and minority ethnic children are not left waiting in care longer than necessary because adults want a perfect or partial ethnic match. Their report can be accessed at:

[www.parliament.uk/business/committees/committees-a-z/lords-select/adoption-legislation-committee/news/adoption-pre-legislative-scrutiny-report---publication-19-december-2012/](http://www.parliament.uk/business/committees/committees-a-z/lords-select/adoption-legislation-committee/news/adoption-pre-legislative-scrutiny-report---publication-19-december-2012/)

19. Our response to the Committee is in Annex A of this document. We agree with their concern that the original clause on "Fostering for Adoption" placements would have had a limited practical effect because the duty on local authorities to give priority to such placements would take effect relatively late in the process. Therefore, we have revised the clause so that the point at which local authorities have to consider "Fostering for Adoption" placements will be earlier in the process.

20. The Committee will publish its full report on post-legislative scrutiny of all adoption legislation in early 2013; we will consider their recommendations carefully and issue a separate response.

21. Alongside the steps we are taking to improve the adoption process, we are committed to improving life chances for all children looked after by local authorities. Improving the educational attainment of these children is central to that ambition. As well as improving support for foster carers, we are working with the National College for School Leadership (soon to be merged

with the Teaching Agency) to help schools and local authorities gain a deeper understanding of how they can enhance the educational support they provide for looked after children. For further information about the support available, see:

[www.education.gov.uk/childrenandyoungpeople/families/childrenincare/](http://www.education.gov.uk/childrenandyoungpeople/families/childrenincare/)

22. Part 1 of the Bill delivers an important part of this agenda by requiring every local authority in England to appoint an officer of that or another authority in England to discharge its duty to promote the educational achievement of looked after children. The officer's role is about championing the educational needs of the children looked after by the authority, monitoring and tracking their educational progress as if in fact they all attended a single school. The term "Virtual School Head" (VSH) is the most common name used for the officer with this role in local authorities. While the term will not be used in primary legislation, it will be used in the accompanying statutory guidance.

23. For some time, there has been a growing consensus about the value of making the role of VSH a statutory post. Between 2007 and 2009, the then Government ran eleven local authority pilots and the basic VSH model was gradually taken on board by other authorities. The All Party Parliamentary Group (APPG) for Looked After Children and Care Leavers published a report in September 2012 on its cross-party inquiry into educational attainment. The report recommended putting the role of the VSH onto a statutory footing. In October 2012 Ofsted published its thematic inspection, *The impact of virtual schools on the educational progress of looked after children*, based on visits to nine virtual schools. Inspectors saw evidence of very effective support involving the VSH that made a difference to children's educational progress, enhanced the stability of their placements and had a positive impact on their emotional health. Further information about the APPG report can be accessed at:

[www.thewhocarestrust.org.uk/news.php/289/appg-chair-launches-education-report](http://www.thewhocarestrust.org.uk/news.php/289/appg-chair-launches-education-report)

Further information about Ofsted's thematic inspection can be accessed at: [www.ofsted.gov.uk/resources/impact-of-virtual-schools-educational-progress-of-looked-after-children](http://www.ofsted.gov.uk/resources/impact-of-virtual-schools-educational-progress-of-looked-after-children)

## Chapter 3

### Family Justice System

24. As the Family Justice Review recommended, we want to reform the family justice system by tackling delays and ensuring that children's best interests remain at the heart of decision-making.

25. Public family law cases are those where the court, working with local authorities and other services, helps to find a stable placement for a child. Care and supervision proceedings may result in a child being returned home with the appropriate support being provided to their family, being placed with another family member, going into care or being adopted where this is in their best interests. We are tackling the damaging delays throughout the system and refocusing it so that there is a more explicit reference to the child's welfare in the process. Part 2 of the Bill:

- introduces a maximum 26 week time limit for completing care and supervision proceedings;
- ensures that timetabling decisions for the case are child focused and are made with explicit reference to the child's welfare. Since pre-legislative scrutiny, we have made a small amendment to this clause to make the need to consider the child's welfare clear, when deciding whether to grant an extension of time;
- restricts the use of expert evidence in children proceedings to that which is necessary to resolve the proceedings justly and requires courts to have regard to the impact of delay on the child when deciding whether to permit expert evidence in children proceedings and whether the court can obtain information from parties already involved;
- makes it explicit that, when the court considers a care plan, it should focus on those issues that are essential to its decision about whether to make a care order; and
- reduces unnecessary administrative work, by removing the need to renew interim care orders and interim supervision orders as frequently, allowing the courts to set interim orders which are in line with the timetable for the case.

26. Private family law applies when relationships break down and families approach the courts to help settle disputes. We are supporting parents to agree co-operative arrangements for their children, where necessary through alternative dispute resolution services such as family mediation, so that they do not have to come to court. When going to court is necessary, we are supporting timely agreements that focus on the child's needs. Part 2 of the Bill:

- makes it a requirement for a person who wishes to start certain types of family proceedings to first attend a family mediation information and assessment meeting ("MIAM") to find out about and consider mediation as an alternative way to settle the dispute;
- sends a clear signal to separated parents that courts will take account of the principle that both should continue to be involved in their

children's lives where that is safe and consistent with the child's welfare, which remains the court's paramount consideration;

- introduces a new "child arrangements order", replacing residence and contact orders, encouraging parents to focus on their child's needs rather than what they see as their own 'rights';
- makes changes so that the courts can make full use of powers to direct parties to a case to undertake relevant activities when child arrangements orders are breached, with the aim of helping people understand the importance of complying with child arrangements orders and making them work; and
- streamlines court processes for divorce and dissolution of a civil partnership by removing the requirement for the court to consider the arrangements for children as part of these processes. In uncontested cases this will facilitate the proposed delegation of judicial functions to appropriately trained legal advisers and assistant legal advisers, allowing judges to focus their time on more difficult cases.

27. These changes apply to both England and Wales. Almost all of the provisions are non-devolved matters. In those areas which relate to devolved matters (local authority preparation of care plans and some consequential amendments arising from the "child arrangements order"), the Welsh Government has agreed in principle to the provisions.

28. This Bill delivers our legislative commitments made in response to the Family Justice Review (FJR). The FJR was established in March 2010 and led by an independent review panel, chaired by David Norgrove. The review panel was asked to consider radical reform of the current systems for family law. The Government accepted the vast majority of the Review's recommendations in our response, published in February 2012. Information about the Review and our response, including a version for young people, can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/families/familylaw/a00200548/family-justice-review](http://www.education.gov.uk/childrenandyoungpeople/families/familylaw/a00200548/family-justice-review)

29. In addition we ran a further, separate consultation on *Co-operative Parenting following Family Separation* in summer 2012 and further information about this and the responses received can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/families/familylaw/a00216607/family-justice-reform-shared-parenting](http://www.education.gov.uk/childrenandyoungpeople/families/familylaw/a00216607/family-justice-reform-shared-parenting)

30. The Government is implementing a wide-ranging family justice reform programme in response to the Family Justice Review. Further information about the reform programme can be accessed at:

[www.justice.gov.uk/about/moj/advisory-groups/family-justice-board](http://www.justice.gov.uk/about/moj/advisory-groups/family-justice-board)

31. The Justice Select Committee carried out pre-legislative scrutiny of these provisions. Their report can be accessed at:

[www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/pre-leg-sub/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news/pre-leg-sub/)

32. Our response to the Committee is in Annex B of this document. In summary, we have broadly accepted their recommendations in relation to public law. This includes making a small revision to the care plan clause to make it clearer that the clause does not affect the court's existing duty to consider the contact arrangements the local authority has made (or proposes to make) before making a care order. We have also removed the word "exceptional" from the clause about time limits in care or supervision proceedings. We accept that it has been interpreted by some as a second, competing legal test for the court to apply when considering whether to grant an extension. The only legal test they should apply in relation to extending the time limit will be whether an extension is necessary in order to enable the court to resolve the proceedings justly.

33. For the clauses relating to private law proceedings, we have accepted a recommendation made by the Committee to change the title of the clause that requires the courts to presume that it will further the welfare of the child to have both parents involved in that child's life where that is safe and consistent with the child's welfare. Rather than "Shared parenting", we will use the title "Welfare of the child: parental involvement" to help promote a clearer understanding of the clause's purpose. The Government is committed to making the enforcement of court-ordered child arrangements more effective and has concluded that this can best be achieved through primarily non-legislative measures. However, to support those reforms, we are introducing amendments to the Children Act 1989 to ensure courts can make full use of their powers to direct parties to a case to undertake activities aimed at helping them to make "child arrangements orders" work.

34. On mediation information and assessment meetings ("MIAMs"), while the detailed wording of the clause on Introduction is different to that considered by the Committee during pre-legislative scrutiny, the change of wording does not change the intention that the court officer should determine whether a prospective applicant has complied with the procedural requirement to attend a MIAM or is exempt from the requirement to do so, evidenced through completion of the necessary court form. We intend to ask the Family Procedure Rule Committee to make detailed provision for the procedural requirements in court rules.



## Chapter 4

### Special Educational Needs

35. We are transforming the special educational needs (SEN) system from birth to age 25; raising aspirations; putting children, young people and parents at the centre of decisions; and giving them greater choice and control over their support so that they can achieve at school and college and make a successful transition to adult life.

36. Part 3 of the Bill introduces a new, single system from birth to 25 for all children and young people with SEN and their families, with consistent statutory rights and protections throughout. In addition to maintaining existing rights for parents, it:

- introduces a new requirement for local authorities and health services to commission education, health and social care services jointly. This includes arrangements for considering and agreeing what advice and information is to be provided about education, health and care provision, and by whom, to whom and how such advice and information is to be provided;
- requires local authorities to publish a clear and transparent “local offer” of services to support children and young people with SEN and their families;
- requires greater co-operation between local authorities and a wide range of partners, including schools, Academies, colleges, other local authorities and services responsible for providing health and social care;
- requires local authorities to involve parents, children and young people in reviewing and developing provision for those with SEN;
- introduces a more streamlined assessment process for those with more severe and complex needs, integrating education, health and care services and involving children, young people and their parents;
- replaces statements and learning difficulty assessments with a new birth to 25 Education, Health and Care Plan, which co-ordinates the support for children and young people in a way that focuses on desired outcomes including, as they get older, preparation for adulthood;
- promotes mediation to resolve disagreements; and
- gives families and young people with an Education, Health and Care Plan, the offer of a personal budget, extending choice and control over their support.

37. These changes extend to England and Wales but only have effect in respect of children and young people from England. They apply to the English education, health and social care agencies and the Welsh agencies that have duties under the Bill when providing support for children and young people from England undertaking their learning in Wales.

38. The Bill delivers the legislative commitments made in *Support and aspiration: A new approach to special educational needs and disability: Progress and next steps* (May 2012).



39. *Progress and Next Steps* included wider reforms that, along with the legislation, will improve outcomes for children and young people with SEN, including those who are disabled, and their families. It develops and builds on the original proposals contained within the Green Paper *Support and aspiration: A new approach to special educational needs and disability* (March 2011). Both documents can be accessed at: [www.education.gov.uk/childrenandyoungpeople/send/b0075291/green-paper](http://www.education.gov.uk/childrenandyoungpeople/send/b0075291/green-paper)

40. The Green Paper's case for change and proposed reforms were informed by extensive consultation and research. This included a call for views in 2010 and a range of reports and reviews:

- *The special educational needs and disability review: a statement is not enough* (Ofsted, 2010)
- *Progression post-16 for learners with learning difficulties and/or disabilities* (Ofsted, 2011)
- *The Lamb Inquiry – special educational needs and parental confidence* (Brian Lamb, 2009)
- *Better Communication: a review of services for children and young people 0-19 with speech, language and communication needs* (John Bercow, 2008)
- *Identifying and Teaching Children and Young People with Dyslexia and Literacy Difficulties* (Sir Jim Rose, 2009)
- *The Salt Review – independent review of teacher supply for pupils with severe, profound and multiple learning difficulties* (Toby Salt, 2010)
- *Adult Social Care* (Law Commission 2011)

41. Our formal consultation on the Green Paper informed the proposals set out in *Progress and Next Steps*. Local pathfinders involving 31 local authorities and their health partners are testing the best ways of putting the reforms into practice. Lessons learned from the pathfinders have informed the provisions in the Bill and will continue to inform the development of regulations and the SEN Code of Practice, which gives guidance to public bodies on carrying out their statutory duties.

42. The Education Select Committee carried out pre-legislative scrutiny of these provisions. Their report can be accessed at: [www.parliament.uk/business/committees/committees-a-z/commons-select/education-committee/news/sen-substantive-report-notice/](http://www.parliament.uk/business/committees/committees-a-z/commons-select/education-committee/news/sen-substantive-report-notice/)

43. Our response to the Committee is in Annex C of this document. We are responding positively to the majority of the Committee's recommendations to amend the draft legislation and our response also takes account of the written evidence presented to the Committee by various organisations and individuals.

- Across the legislation the Committee recommended that learning from the pathfinders needed to continue. We have extended funding for pathfinders until September 2014 to ensure this happens, particularly in developing the regulations and Special Educational Needs Code of Practice.

- We have reaffirmed that existing protections and rights for parents will be protected within the new system and where this required clarification in the legislation we have done so, for example retaining an explicit right to request an assessment. We have also extended comparable rights and protections to those aged 16-25 in further education.
- We will go further in improving support for parents and young people through better access to information, advice and practical support and in a new clause we have also set out some key principles which place the involvement of children, young people and their parents at the heart of the SEN provisions in the Bill.
- After considering the opposition to the proposed introduction of arrangements for compulsory mediation, the Committee strongly recommended that it be reconsidered, proposing a mediation information and assessment meeting approach instead. We agree that mediation should not be compulsory and are introducing legislation to ensure mediation takes place before appeals are registered only where parents and young people ask for it.
- We are making arrangements to include Independent Specialist Colleges and independent schools for SEN in the range of institutions for which young people and parents of children with Education, Health and Care Plans can express a preference.
- Several of the recommendations made were in relation to how the new system will work for young people post 16. In response, we will ensure that Education, Health and Care Plans are maintained for 16/17 year olds who become NEET (not in education, employment or training) while they are subject to compulsory participation requirements, to help them return to education. We will enable young people on Apprenticeships to have an Education, Health and Care Plan. Also, we will ensure that there is greater clarity about how the new system will work for 19-25 year olds.
- The Committee made a number of recommendations about the role of health in the new system, placing considerable emphasis on securing strong commitment from the National Health Service for joined up working. Annex C sets out the action we are taking.

## Chapter 5

### Childcare

44. We are reforming childcare to ensure the whole system focuses on providing safe, high-quality care and early education for children.

45. Our changes to the system are designed to: drive up quality and build a stronger, more professional early years sector; attract more high-quality childcare providers; support working families and promote growth by increasing the affordability of provision; and remove obstacles for providers where this does not impact on quality and safety. Part 4 of the Bill:

- introduces provisions to enable the creation of new childminder agencies enabling childminders to register with a registered childminder agency rather than Ofsted. Childminder agencies will increase the number of childminders, encouraging more people to enter the market. They will help to remove barriers between home-based care and higher quality group provision, support the training of childminders, provide a clearer way for parents to find and work with a suitable childminder, and improve the quality of provision;
- reduces bureaucracy by removing the existing duty on local authorities to assess the sufficiency of childcare provision in their area;
- introduces a power for Ofsted to charge for an early re-inspection at the request of a childcare provider. Providers will be able to request and pay for an early re-inspection if they believe they have made improvements following a previous Ofsted judgement. This will encourage providers to improve and give those who are serious about improving an opportunity to be recognised; and
- removes the unnecessary duties on schools to consult local authorities, parents and staff, and to have regard to advice and guidance given by the local authority or the Secretary of State, before offering facilities or services (such as school-based childcare) to the community. This will give schools greater freedom in how they exercise their power to offer community facilities, making it easier for them to offer before- and after-school and holiday care that meets the needs of their pupils and their families.

46. These changes apply to England only.

47. The Bill's provisions form part of our wider work to improve the supply of high quality, affordable childcare through the commission on childcare and in response to Professor Cathy Nutbrown's report, *Foundations for Quality* (June 2012). On 29 January 2013, we published *More great childcare: Raising quality and giving parents more choice*. This report sets out a plan of action for how this Government will achieve its vision of a dynamic childcare market, delivering high quality early education and childcare and incorporates the Government's response to Professor Nutbrown's review. The proposals set out in *More great childcare* include those for childminder agencies and charging for re-inspection at the request of providers.

*More great childcare* can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a00220847/more-great-childcare](http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a00220847/more-great-childcare)

48. The commission on childcare was set up in summer 2012 to look at how to reduce the costs of childcare for working families and burdens on childcare providers. The commission has drawn on the knowledge and views of a range of early years and childcare organisations and other interested parties, together with international evidence on high-quality, affordable childcare, and a public call for evidence (July to August 2012). The commission will report shortly. For further information about the commission, see:

[www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a00211918/childcare-commission](http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/a00211918/childcare-commission)

49. The Government consulted on the proposal to remove the existing duty on local authorities to assess the sufficiency of childcare provision in their area between November 2011 and February 2012. Some local authorities reported that the current system was unnecessarily burdensome and did not provide useful information. Further information about the Government's response to the consultation can be accessed at:

[www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1782&external=no&menu=3](http://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1782&external=no&menu=3)

Current statutory guidance for local authorities regarding securing sufficient childcare can be found at:

[www.education.gov.uk/publications/standard/AllPublicationsNoRsg/Page2/DFE-00066-2012](http://www.education.gov.uk/publications/standard/AllPublicationsNoRsg/Page2/DFE-00066-2012)

## Chapter 6

### Office of the Children's Commissioner (OCC)

50. Our reforms to the Office of the Children's Commissioner (OCC) are designed to improve its impact, by ensuring the Commissioner has the powers and remit to carry out the role effectively.

51. We want to ensure that all policies and legislation affecting children are: in their best interests; lead to real improvements in their outcomes; and do not have unintended consequences or inadvertently infringe their rights. Having an effective Children's Commissioner – who can act as a champion for children, ensuring that their views are represented and their rights are understood by decision-makers – will help us to achieve that objective. Part 5 of the Bill:

- gives the Commissioner a statutory remit to 'promote and protect children's rights';
- introduces changes to make the Commissioner more clearly independent from Government;
- provides for greater scrutiny of the Commissioner's impact, through an annual report to Parliament and the establishment of an advisory board;
- combines the functions of both the existing OCC and the Office of the Children's Rights Director (currently located in Ofsted, with a remit to advise on the rights and interests of children living away from home or receiving social care), within a single organisation; and
- clarifies the Commissioner's powers and remit.

52. The reforms apply to the Children's Commissioner's responsibilities for: promoting and protecting children's rights in England; and promoting and protecting children's rights in the UK as a whole in relation to non-devolved matters, such as youth justice and immigration.

53. The Bill's provisions are based on the legislative changes that John Dunford recommended, following his independent *Review of the Office of the Children's Commissioner (England)* in 2010. He concluded that there were strong arguments for having a Children's Commissioner, but that changes were needed (including to the legislative framework) for the Commissioner to have greater impact. We accepted all of his recommendations in principle and said we would consult on the legislative changes needed to implement them.

54. The consultation ran from July to September 2011 and included a separate consultation with children and young people. Responses indicated that there was strong support for the key proposals, but concerns were expressed about a number of points of detail. Further information about the review and our consultation can be accessed at:

[www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/a0074780/office-of-the-childrens-commissioner](http://www.education.gov.uk/childrenandyoungpeople/healthandwellbeing/a0074780/office-of-the-childrens-commissioner)

55. The consultation feedback was subsequently reflected in the draft clauses that we published for pre-legislative scrutiny by the Joint Committee on Human Rights (JCHR) in July 2012. A copy of the JCHR's report is available at:

[www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/](http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/publications/)

56. Our response to the Committee is in Annex D of this document. We have accepted many of the Committee's recommendations and revised the draft clauses accordingly. The changes help to clarify the Commissioner's remit, including by: making it clear that the Commissioner can engage with Parliament directly; providing the Commissioner with the power to "investigate" rather than just "consider or research" matters; and making it an explicit part of their remit to undertake periodic stock takes on the Government's progress on implementing the United Nations Convention on the Rights of the Child (UNCRC).

57. The legislation that is introduced to Parliament will also clarify that the obligations on public bodies to provide information to the Commissioner and respond to any recommendations that he or she makes, apply equally to services provided directly by central or local government as well as those contracted out to a private provider. In addition, we agree with the Committee that, in light of the representations made by the four UK Children's Commissioners, we should not pursue our proposed changes to the devolution arrangements and these provisions have been removed from the Bill.

## Chapter 7

# Shared Parental Leave and Flexible Working

58. The Coalition Government is committed to encouraging the full involvement of both parents from the earliest stages of pregnancy – including through the promotion of a system of shared parental leave; and to extending the right to request flexible working to all employees.

59. We want to: encourage greater participation by fathers in caring for their children; reduce the gender penalty suffered by women who take long periods away from the workplace; and bring the entitlements for adopters and intended parents in surrogacy cases more closely into line with the rights available to birth parents. Part 6 of the Bill reforms statutory rights to **leave and pay**, by:

- introducing a mechanism for an eligible woman to bring her maternity leave and pay or allowance to an end early to allow her and/or her partner to take shared parental leave and/or pay (and analogous rights for an adopter to end adoption leave and allow them and/or their partner to take shared parental leave and/or pay);
- creating new entitlements to shared parental leave and statutory shared parental pay for eligible employees meeting prescribed qualifying requirements;
- abolishing additional paternity leave and additional statutory paternity pay;
- enhancing statutory adoption pay to 90% of an adopter's salary for the first six weeks to bring it into line with maternity pay; and
- creating a new right for intended parents in surrogacy cases to be entitled to adoption leave and pay, paternity leave and pay, and shared leave and pay.

60. Part 7 of the Bill gives parents and adopters greater rights to **time off work for ante-natal care etc.** by:

- introducing a right for employees and qualifying agency workers to take unpaid time off to attend up to two ante-natal appointments with a pregnant woman – this right will be available to: the child's father or same-sex second parent; the woman's husband, partner or civil partner; and the intended parents in a surrogacy situation; and
- creating a new right for a primary adopter to take paid leave to attend up to five introductory appointments and for the other adopter to take unpaid leave to attend up to two introductory appointments.

61. Extending the right to request **flexible working** to all employees will make the UK labour market flexible, efficient, fair and family-friendly. Part 8 of the Bill:

- extends the right to request flexible working to all employees; and
- replaces the current statutory procedure, through which employers consider flexible working requests, with a duty on employers to deal with requests in a reasonable manner, and within a '*reasonable*' period of time.



62. These changes extend to England, Scotland and Wales.

63. The Bill delivers the legislative commitments made in response to the *Modern Workplaces* consultation which ran from May to August 2011. The *Government Response* to both elements was published on 13 November 2012. In addition to the commitments taken forward within the Bill, the documents set out the intention to increase the number of weeks of parental leave from the current 13 weeks to 18 weeks; to increase the child's age limit for parental leave from the current 5 years to 18 years; and to make adoption leave an employment right without any qualifying conditions (a "day one" right, like maternity leave). These changes will be made by regulations under existing legislation and come into effect in 2015 at the same as the changes arising from the Bill.

64. The *Government Response* to the shared parental leave element of the *Modern Workplaces* consultation can be accessed at:  
[www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1267-modern-workplaces-response-flexible-parental-leave](http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1267-modern-workplaces-response-flexible-parental-leave)

65. The *Government Response* to the flexible working element of the *Modern Workplaces* consultation can be accessed at:  
[www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working](http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1269-modern-workplaces-response-flexible-working)

66. The Better Regulation Executive (part of the Department of Business, Innovation and Skills) requires government departments to carry out economic impact assessments for regulatory measures with a significant impact on business. The impact assessment for shared parental leave can be accessed at:

[www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1268-modern-workplaces-response-flexible-parental-leave-impact](http://www.bis.gov.uk/assets/biscore/employment-matters/docs/m/12-1268-modern-workplaces-response-flexible-parental-leave-impact)

The impact assessment for flexible working can be accessed at:

[www.bis.gov.uk/assets/BISCore/employment-matters/docs/M/12-1270-modern-workplaces-response-flexible-working-impact](http://www.bis.gov.uk/assets/BISCore/employment-matters/docs/M/12-1270-modern-workplaces-response-flexible-working-impact)

67. We intend to launch a consultation on the administration of the shared parental leave and pay system in the spring.



# Annex A

## Response to Select Committee on Adoption Legislation



**Edward Timpson MP**

Parliamentary Under Secretary of State for Children and Families

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tel: 0370 000 2288 [www.education.gov.uk/help/contactus](http://www.education.gov.uk/help/contactus)

The Rt Hon Baroness Butler-Sloss GBE  
Chairman of the Select Committee on Adoption  
Legislation  
Committee Office  
House of Lords  
London  
SW1A 0PW

February 2013

### **Pre-legislative scrutiny report on adoption clauses**

I would like once again to express my thanks to your Committee for its thorough consideration of the draft adoption clauses, through the pre-legislative scrutiny process. My letter of 21 December 2012 said that I would send a substantive reply, with a response to your Committee's recommendations, in the New Year.

I am pleased the Committee supports the general principles of the legislation. I agree that legislation alone will not bring about all the changes that we want to see in adoption practice but it has an important part to play alongside our wider adoption reform programme which includes changes to regulations and guidance. I intend to offer as much detail as possible on proposed changes to regulations and guidance during the committee stage of the Bill. In the meantime this letter provides the Government's formal response to your Committee's interim report which shows how it is taking into account and responding to your recommendations.

I have considered the report of your Committee in detail as well as the evidence provided to you. I have also considered other feedback I have

received from organisations in the adoption system since I published the draft clauses on adoption delay and on “Fostering for Adoption” for scrutiny by your Committee. I found the views expressed by the members of your Committee and those who gave evidence to it extremely helpful in giving full consideration to the complexity of legislating in this area. The Committee’s views on “Fostering for Adoption” were particularly helpful in bringing to our attention areas of concern. We have made substantial revisions to the original draft clause to address those concerns. I hope you will agree that the changes fully address the points made in the Committee’s report. On adoption delay, after careful consideration, we have decided not to change the draft clause we published that amends section 1 of the Adoption and Children Act 2002. The reasons are set out below.

Although the full report of your Committee dealing with wider adoption legislation has not yet been published, I have taken into consideration many of the points made by organisations and individuals in their evidence to your Committee. When your Committee publishes your full report, we will consider the recommendations carefully and provide a separate response.

I am publishing this letter alongside the publication of the Children and Families Bill and the Government’s response to the call for views on contact arrangements and sibling placements. The Children and Families Bill will improve services for vulnerable children and support strong families. It contains adoption provisions together with provisions on looked after children, family justice, special educational needs, childcare, Office of the Children’s Commissioner, shared parental leave and flexible working. Alongside the Bill we are publishing an explanatory command paper *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* which includes this letter in Annex A. I am attaching copies of the Bill, the command paper and the Government’s response to the call for views exercise for your information. The command paper can also be accessed at: [www.education.gov.uk/childrenandfamiliesbill](http://www.education.gov.uk/childrenandfamiliesbill)

The Bill contains a range of adoption provisions, many of which it was not possible to publish for pre-legislative scrutiny. Together with our wider reforms to adoption these measures will create an adoption system where adoption is available earlier for all those children for whom it is in their best interests. The proposed legislation will:

- reduce unnecessary delays that cause lasting harm for the most vulnerable children;
- give more children the chance of an earlier, permanent placement through the wider use of “Fostering for Adoption”;
- enable the Secretary of State to increase the recruitment of adopters;
- improve the way the adoption register works;
- improve the support for adopters through better information and greater control over the support they receive; and
- make sure that contact arrangements really benefit children.

My Rt Hon friend Lord Nash and I would welcome the opportunity to discuss our proposals with you and members of your Committee if you would find this

helpful.

### **“Fostering for Adoption”**

Your Committee expressed its support for the aim of the proposed duty to place children with their potential adoptive families earlier than is currently the case. You were concerned that the proposed duty failed to place any wider obligation on local authorities actively to promote and encourage “Fostering for Adoption” placements as soon as adoption becomes the permanence plan, thus enabling more children to benefit from this type of placement. Your Committee recommended that the scope of the duty should be widened to require local authorities to consider a “Fostering for Adoption” placement at the point at which adoption becomes the permanence plan for the child.

I have carefully considered these arguments and you will see that the clause I am publishing as part of the Children and Families Bill has been significantly re-drafted. I agree with the spirit of the Committee’s recommendation, and so the clause has been amended to bring forward the point at which the duty on local authorities to consider placing a child with carers who may go on to become their permanent carers will bite, thus widening the application of the early permanence principle.

I gave careful consideration to your recommendation that I take the point at which the child’s permanence report is prepared as the trigger for this duty. You will see from the redrafted clause that we have decided to take an earlier point as the trigger, namely the point at which the local authority “is considering adoption for the child”. This describes the point at which the adoption agency first considers that adoption is one of the possible options for the child. That point could come, for example, in the first week the child is in care. However in some cases, as you know, adoption is considered as an option for a child, even before the child is born, so some time before the permanence plan is prepared. Taking this point as the trigger for the early permanence duty, will place a wider obligation on local authorities to consider early permanence placements. It will catch both “Fostering for Adoption” type placements and will also encourage the use of concurrent planning placements in appropriate cases. (The point at which the adoption agency “are considering adoption for a child” is the trigger for the duties in Part 3 of the Adoption Agencies Regulations 2005 to, inter alia, prepare the child’s permanence report.)

The original draft clause placed a duty on local authorities to “give preference” to a “Fostering for Adoption” placement, once the agency decision maker has made the decision that the child should be placed for adoption. As the duty now kicks in before the agency decision maker’s decision, I do not think it would be appropriate that the duty should be one to “give preference”, but that it should be a duty on local authorities to “consider” a “Fostering for Adoption” placement.

I hope the Committee will agree that the new duty has been sufficiently broadened so that more children can benefit from it, and that it will also

achieve the aim of enabling the placement of children with their potential adopters much earlier than is currently the case.

### **Adoption Delay**

With regard to that draft clause, your Committee recommended *“that the words religious persuasion, racial origin and cultural and linguistic background be included in the welfare checklist, at section 1(4) of the Adoption and Children Act 2002”*.

I have carefully considered this recommendation and the rationale behind it. I understand the concern of the Committee and those who gave evidence to it that the proposed change would risk the child’s ethnicity not being taken into account. On balance however I believe that section 1 of the Adoption and Children Act 2002, amended as we propose, will most effectively serve the best interests of children. Adoption agencies would continue to make the child’s welfare throughout his or her life their paramount consideration, and they would continue to be required to have regard to the welfare checklist in section 1(4) which includes *“the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant”*.

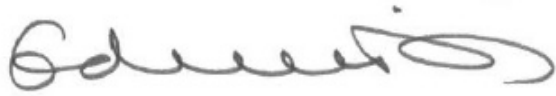
We believe that ethnicity should not be considered more important than a child’s other characteristics, background and needs. Making a decision about a child’s new family is an extremely important task for a social worker. In reaching a decision we want the social worker to find a family who can best meet the child’s needs. These might be medical, emotional or behavioural needs as well as the child’s ethnicity, religious persuasion, culture and linguistic background. This is clearly not an easy task. There may be specific circumstances that make language or religion, say, a pressing issue for a particular child. However, it is not in the best interests of children for social workers to delay and wait for the perfect or partial ethnic match when there are suitable approved adopters who are available and able to provide a loving and caring home for those children.

It is our view that to amend section 1(4) of the Act as the Committee proposes would not remove the excessive emphasis that the present legislation is perceived to create for those aspects of a child’s background and characteristics that relate to their ethnicity. Placing a specific reference in section 1(4) of the Act would continue to create the impression that these issues are of more importance than the child’s other needs that are covered by the welfare checklist.

Your Committee also recommended that *“The Government needs to give further consideration to the practical effect of the proposed change on social work culture and practice.”* The changes that we are proposing to the law are part of our broad and ambitious adoption reform programme. I intend to provide further information on its implementation to support the detailed consideration of the Bill’s provisions.

I look forward to reading the full report of your Committee when it is published

and to further discussions and debate. Can I once again thank you and the members of your Committee for your keen and sustained interest in this hugely important subject.

A handwritten signature in black ink, appearing to read 'Edward Timpson', with a stylized flourish at the end.

**Edward Timpson MP**  
**Parliamentary Under Secretary of State for Children and Families**

# Annex B

## Response to Justice Select Committee



Ministry of  
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February 2013

The Rt Hon Sir Alan Beith MP  
Chair of the Justice Select Committee  
House of Commons  
London  
SW1P 3JA

### **GOVERNMENT RESPONSE TO THE JUSTICE SELECT COMMITTEE: Pre-Legislative Scrutiny on the proposed Family Justice Clauses in the Children and Families Bill**

Today we have published the Children and Families Bill which will improve services for vulnerable children and support strong families. It contains the family justice provisions together with provisions on adoption, looked after children, special educational needs, childcare, Office of the Children's Commissioner, shared parental leave and flexible working. Alongside the Bill we are publishing an explanatory command paper *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* which includes this letter in Annex B. I have attached a copy of the command paper to this letter and it can also be accessed at: [www.education.gov.uk/childrenandfamiliesbill](http://www.education.gov.uk/childrenandfamiliesbill)

Thank you for the Committee's consideration of our draft clauses on Family Justice reform. We are grateful both to Committee members and to those they called for evidence in considering these important issues.

## ***Public Law***

We welcome the Committee's broad support for the public law clauses and its recognition of the importance of tackling delay in care and supervision proceedings through establishing a time limit. We would also want to join the Committee in commending the good work being undertaken by local authorities, the judiciary and by Local Family Justice Boards to begin to reduce delay on the ground.

Overall, the Committee has recommended a small number of changes to the public law clauses on the time limit, experts and care plans and our detailed response is set out in **Annex 1**. Having considered carefully the Committee's conclusions, we broadly agree with the recommendations made.

Perhaps the most significant issue on which we do not agree with the Committee is the recommendation to set out the 26 week time limit in secondary legislation (regulations), rather than on the face of the Bill. We remain of the view that the provision should be in primary legislation. This will provide the family justice system with a clear and unambiguous statement about the need to tackle delay in care cases. Additionally, it enables a full, transparent debate on the time limit to take place in Parliament. Further information about our rationale for this decision is included in the annex.

The Committee has also requested a detailed response to the criticisms raised in the evidence sessions of the system of payments made by the Legal Services Commission (LSC) to experts. A response is provided at **Annex 2**. The Ministry of Justice will write to the Committee again, providing a further update on progress, by the end of April 2013.

## ***Private Law***

The Committee has made a number of detailed recommendations in relation to the private law clauses, specifically relating to Mediation Information and Assessment Meetings (MIAMs), child arrangement orders and shared parenting.

We welcome the Committee's support for our focus on providing information about and assessing separating couples for mediation. However, we do not agree with the recommendation that the MIAM clause should be revised to make it clear that any decision about the merits of compliance must be made by a judge. The intention is that the court officer will only check if the form evidencing attendance at a MIAM (or exemption from that requirement) has been completed and signed appropriately and, if so, will proceed to issue the application. The Family Procedure Rule Committee (FPRC) will be asked to make detailed provision for the process, including ensuring the appropriate safeguards are in place, as identified by the Committee.

In relation to shared parenting, the Government remains of the view that a legislative amendment will send an important message to parents about the valuable role which they both play in their child's life. As well as helping to



promote greater understanding about the way in which court decisions are made, we believe the amendment will, in time, encourage separated parents to adopt less rigid and confrontational positions with regard to arrangements for their children. The safety concerns raised during the consultation have been addressed in the clause and we believe that robust safeguards are built in. Whilst we agree that legislation alone will not bring about a cultural shift in social attitudes and expectations, we believe it is an important part of the wider package of measures to support parents.

We have considered the Committee's specific concerns around the wording of the shared parenting clause but, for the reasons set out in full in **Annex 1**, we do not agree with the suggested revisions to the wording. However, as the Committee has noted in its report, it is important that the heading of this draft clause does not give rise to confusion surrounding its purpose or effect. We therefore intend, in the light of the Committee's comments on this point, to amend the title to refer to "Parental Involvement".

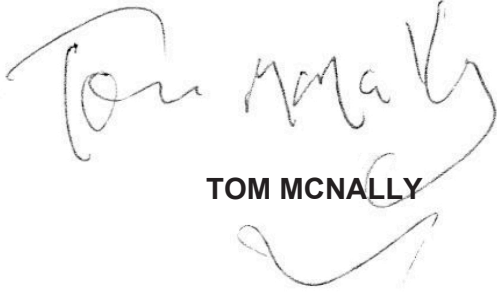
We recognise that the Committee had hoped to receive a draft clause on enforcement and we intended no discourtesy in not bringing one forward for pre-legislative scrutiny. In our response to the consultation responses on shared parenting (published on 5 November 2012), we did make clear our wish to reflect further on consultation responses. Alongside the Introduction of the Bill, we are publishing our response to the consultation setting out proposals to improve the timeliness and effectiveness of enforcement of court-ordered child arrangements. Having considered all of the points raised during consultation, we have concluded that legislation to give the courts additional punitive enforcement sanctions would be premature. We are, however, committed to reform enforcement of orders for child arrangements and our separate response to the consultation sets out a revised process to achieve this, supported by amendments to the Children Act 1989 to strengthen the use of contact activities in an enforcement context. We believe these proposals are constructive, proportionate and focused on making contact work for the benefit of children. Practical issues and welfare concerns should be addressed early on where they arise in a breach context. Where there is wilful obstruction the courts should deal with this using their existing punitive powers.

Finally, the Committee asked for an update on the Government's policy on media and public access to the family courts and whether we had any plans to legislate to allow greater transparency and openness in the family court. We acknowledge that there is a public perception that family courts are unjustifiably secret and that this cannot be allowed to continue. However, one of the lessons learned from previous attempts to legislate is that a solution to this important area of policy should not be rushed. We remain committed to taking this work forward and are currently considering ways in which more information can be released to the public.

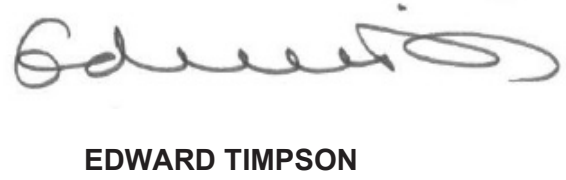
The Government believes that these reforms will progress our ambition to address the disadvantages faced by our most vulnerable children and young people, and to support their families to support them. We are grateful to the



Committee for its careful and thorough consideration of these clauses in pre-legislative scrutiny.



**TOM MCNALLY**



**EDWARD TIMPSON**

**Government Response to the recommendations made in the  
Justice Select Committee's Report on Family Justice Provisions**

**Recommendations**

**Lessons Learned (recommendations 1-3)**

***We recommend that the Government consider agreeing to share consultation responses for all pre-legislative scrutiny inquiries. (Paragraph 12)***

***We recommend that, in future, all draft clauses are published for the start of a Committee's inquiry, particularly where a Committee is working to a shorter inquiry timetable. (Paragraph 13)***

***We recommend that Impact Assessments are published for the draft clauses at Pre-Legislative Scrutiny stage. (Paragraph 14)***

1. The Government believes that publishing legislation in Draft for pre-legislative scrutiny is a valuable process which facilitates Parliamentary and public engagement in advance of that carried out during the passage of the Bill. The issues raised by the Committee will be considered in future cases of pre-legislative scrutiny, however the form of pre-legislative scrutiny for draft legislation is best considered on a case-by-case basis rather than relying on a uniform approach.

2. Updated material assessing the impact of the proposed legislation will be published to support Committee consideration of the Bill in the House of Commons.

**Data (recommendation 5)**

***We are pleased to note the progress that has been made within the family justice system to improve data collation and analysis, for example the new Care Monitoring System; however, this affects only the public law sphere. We recommend that the Government ensures that the effect of the individual draft clauses is recorded and analysed as well as the combined effect of the draft clauses. We have found the evidence of the Australian Institute of Family Studies to be extremely detailed and helpful on a number of private law topics, as did the Norgrove Report and various organisations. We recommend that the Government considers providing funding for a similar scale project within England and Wales, to pool research and provide a platform for future policy formation and discussion. (Paragraph 18)***

3. The Government accepts the need to continue improving data collection and analysis. The Ministry of Justice and the Department for

Education have already made significant progress, working with other relevant agencies and the Family Justice Council, in improving data collection, analysis and dissemination and by developing a research programme to support the reforms to the Family Justice System. This includes:

- Producing a regular Performance Evidence Pack for the Family Justice Board. This collates and analyses data from across the system to help the Board focus efforts in driving up performance, while also providing Local Family Justice Boards with key data on their performance.
- Establishing a co-ordinated forward research programme, agreed by the Family Justice Board, covering issues such as the use of experts in public law cases, the needs of self-represented parties and how they impact on the court, improving the evidence base on the provision of mediation services and their role in resolving disputes, and identifying better outcome measures for the family justice system. This work is underway and the research programme will be reviewed annually with the Family Justice Board.
- Providing a clear evidence base on the key areas of social work practice that can be drawn on by social workers in their pre-proceedings work with families and in the preparation of care applications and assessments. In November 2012, the Childhood Wellbeing Research Centre (CWRC) published a new distillation of the evidence on child development and the impacts of delay (*Decision-Making Within a Child's Timeframe*). Copies will be disseminated to the judiciary via the Judicial College and the research will be presented to social work practitioners at a series of local authority training events taking place in early 2013, led by the Children's Improvement Board.
- Establishing closer links with the academic community, and taking a lead in collating and disseminating research findings across the Family Justice System through a regular Family Justice Research Newsletter.

4. Work is now underway reviewing the current data collection and research programme against the potential impact of reforms, with a view to identifying where further evidence gathering would be of help. A combination of quantitative and qualitative data will be required to help assess overall the potential impacts of reforms, though in the context of the wide ranging reforms, and within a complex system, it is not possible to attribute specific impacts to particular clauses with any degree of certainty.

### **Public Law Recommendations**

#### **The role of local authorities (recommendation 6)**

***All our witnesses agreed that accurate, comprehensive and detailed pre-proceedings work was vital to reducing delay within the care proceedings process; we agree. As part of this Inquiry we have not given detailed consideration to social work training, but we commend the work of the Tri-borough Pilot and Hampshire County Council in assessing, training and managing their social work teams to reduce***

***delays. We recommend that their models of social work and social worker training are disseminated to all local authorities as examples of effective good practice. (Paragraph 34)***

5. We agree with the Committee's recommendation and, similarly, acknowledge that high-quality pre-proceedings work is one of the critical factors necessary to reduce delay. We await the final evaluation of the Tri-borough report with interest and will also look to develop other case-studies. Working with the Children's Improvement Board, and through the Local Family Justice Boards, we will look to share the best examples of innovative and sustainable local practice across the system as a whole.

**The role of local authorities (recommendation 7)**

***At local authority level we consider that a 26 week time limit is beneficial and feasible in the majority of cases. In terms of the concerns raised by the Kinship Care Alliance, we consider that this forms part of the wider discussion of the need for high quality and comprehensive pre-proceedings work by local authorities. Where such work is performed competently and efficiently, we do not think that wider family members or family friends will be excluded from the process. However, this is an area where we recommend that the Government reviews the practical effect of the clause over its initial period of operation to ensure that kinship carers are not excluded from the Local Authority or Court decision-making. (Paragraph 35)***

6. We accept this recommendation and welcome the Committee's view that a 26 week time limit is both beneficial and feasible.

7. We agree that, where it is in the child's best interests, the wider family should not be excluded from the process. Statutory guidance for local authorities is already clear that options to help avoid recourse to care proceedings, including care by family members, should always be explored fully prior to proceedings where this is consistent with the child's welfare. We will consider further whether any additional guidance is required in advance of the legislation. The general impact of the clause will be reviewed, as suggested, on an ongoing basis.

**In the Courts (recommendations 9 and 10)**

***We agree with the Family Law Bar Association that [lack of flexibility in granting extensions to the 26 week limit] is a practical problem, that will simply build further delay into the system as cases that are clearly likely to take longer than 26 weeks are repeatedly referred back to the Court in order for extensions to be granted. We also agree with the NSPCC that where intervention projects have been proved to be effective, such as the Family Drug and Alcohol Court in London, they must be allowed time to work with children and families, without needing to apply for extensions mid-programme. This should apply equally to cases where it is clear that the behaviour of the parent or parents has changed or will***

***change to allow the child to remain with its parents. (Paragraph 43)***

***We recommend that [...] draft clause [4] is amended to increase flexibility and allow judges to identify cases that are likely to take longer than 26 weeks at case management hearings throughout the proceedings, and to take such cases out of the 26 week timetable and/or to allow directions to be given beyond 26 weeks, rather than requiring constant re-listing and fruitless, taxpayer-funded, extension hearings. We consider that allowing limited flexibility for the disposal of applications for care or supervision orders, but greater flexibility in making interim care and supervision orders [...] has the potential to create a disjointed judicial case management process. (Paragraph 44)***

8. In respect of the points covered by both recommendations 9 and 10, we do not think it necessary to amend the clause. The clause strikes the necessary balance between signifying a clear policy position about the use of extensions and the need to meet the maximum 26 week time limit, whilst allowing judicial discretion to extend time where necessary to resolve the case justly.

9. Under the new legislation, the starting point for the court should always be that the proceedings should be completed without unnecessary delay and in any event within 26 weeks. However, the court will have the discretion to extend the case beyond the 26 week time limit if it is considered necessary to resolve the proceedings justly. When drawing up or revising the timetable, the court will be required to have particular regard to the impact that the timetable or any revision would have on the welfare of the child. We intend to invite the Family Procedure Rule Committee to set out in court rules the specific factors to which the court should have regard when considering whether to grant an extension.

10. Orders to extend time will not usually require an additional hearing, as the extension should be dealt with during the normal stages of the case identified in the Public Law Outline. It is also expected that when making an Interim Care Order (ICO) or Interim Supervision Order (ISO) it will usually be appropriate to align the duration of the ICO or ISO with the timetable for the proceedings (including any extensions that may have been granted) to avoid the need for the court to make multiple interim orders within proceedings.

11. Requiring extensions to last for a maximum of eight weeks from the end of the 26 week time period (or the end of the period being extended, whichever is the later) will help ensure the court is focused on resolving cases as quickly as possible. To allow the court to grant an extension without imposing any limit as to the length of the extension, or to place certain categories of cases outside the 26 week timeframe from the outset, would undermine the Government's policy intention. This would create the risk that cases could drift and could mean that the 26 week time limit may have no practical effect on a significant number of cases.

12. We consider that the Case Management Conference (CMC) would be

the logical place first to consider the need for an extension, although the court will need the flexibility to consider the need for an extension as the case progresses. However, it will be for the Family Procedure Rule Committee to consider this practical timetabling point further.

13. The legislation on the time limit will apply to both conventional proceedings and to the Family Drug and Alcohol Court (FDAC) model. FDAC is a successful court model and we are keen to consider how we share the lessons learned from this approach and how it might assist care and supervision cases to meet the 26 week timetable. There will always be some very complex cases where it is apparent that proceedings will not be able to be completed within 26 weeks. In those cases the clause provides the court with the discretion to extend time in order to resolve the proceeding justly. Equally, where cases can be completed in a shorter time scale, they should be.

**Drafting revisions (recommendation 11)**

***We recommend that the Government redrafts clause 4 to follow the Norgrove Report recommendation that “The power to set a time limit should be introduced in primary legislation. Secondary legislation and guidance should specify the actual time limit and provide the operational detail.” Given the importance of the timetable and the need for parties to be aware of and contribute to any decision to vary the limit, we further welcome the confirmation from the Government that the affirmative resolution procedure would apply to the secondary legislation varying the time limit. (Paragraph 51)***

14. We do not accept this recommendation. The Family Justice Review identified that delay in care and supervision proceedings was a significant problem. It concluded that delay was endemic in the system and built up at every stage. Primary legislation must, therefore, be clear and unambiguous about the need to avoid delay. Setting the time limit on the face of the legislation is central to that. The 26 week time limit is also becoming increasingly well understood by the system. The Government is clear as to the proposed period of both the maximum time limit and of any extension to that limit.

15. By including the time limit in primary legislation, we wish to enable a rich and full Parliamentary debate on the issue. Importantly, we have provided for any variation to the 26 week time limit (or the eight week time limit for any extension) to be made by way of affirmative regulations, thereby allowing Parliament the opportunity to debate any changes. Given the Government’s clear position on the time limit, it is difficult to see what the advantage would be in putting the 26 week time limit in secondary legislation.

**Drafting revisions (recommendation 12)**

***Consideration should be given to changing the word ‘exceptional’ to a more neutral term or removing it so that the clause reads “[...]”***



***extensions are not to be granted routinely, and require specific justification". (Paragraph 52)***

16. We accept the Committee's recommendation. Having listened to the evidence given during pre-legislative scrutiny, we recognise that there is some confusion surrounding the word "exceptional" in the new section 32(6). In our letter dated 15 November, we explained to the Committee that there would be only one legal test to be applied by the court when considering whether to grant an extension and that would be whether an extension is necessary in order to enable the court to resolve the proceedings justly. In exercising its discretion, the court would be required to take account of the guidance set out in section 32(6) - that extensions are not to be granted routinely but are to be seen as exceptional and as requiring specific justification. The purpose of section 32(6) is to provide guidance to be taken into account by the court and is not a competing legal test.

17. However, the inclusion of the word "exceptional" in the guidance appears to have been interpreted as a second and competing legal test. This was not the intention. Therefore, in order to reduce any confusion, we have removed the word "exceptional" from the clause, as recommended by the Committee.

18. We consider that requiring the court to specify the reasons for extending a case beyond the 26 week time limit will provide a key safeguard to ensure that decisions are made in line with the legal test. Further, we will work with the Family Procedure Rule Committee to set out in secondary legislation the type of factors which may result in the need for an extension.

**Cafcass (recommendation 13)**

***The primary responsibility for parliamentary monitoring of Cafcass as an organisation rests with the education Committee, but we will continue to take a close interest in its impact in the Court system. (Paragraph 55)***

19. The Government welcomes the Committee's on going interest in Cafcass, alongside that of the Education Select Committee.

**Interim Care and Supervision Orders (recommendation 14)**

***We conclude that [the provisions in draft clause 4 on interim care and supervision orders] are a useful legislative change, which allows flexibility for judges in effectively and proportionately managing cases. As to the concerns that the clause may make it more difficult to involve the wider family and friends of the family, we consider that improvements to pre-proceedings work should enable kinship carers to be involved at an early stage in the care process. (Paragraph 61)***

20. We welcome the Committee's support for the clause as drafted. As outlined earlier, high-quality pre-proceedings work is critical. That is why we

are helping support local practice, in conjunction with Cafcass, the Association of Directors of Children's Services (ADCS) and the Children's Improvement Board (CIB).

**Experts (recommendation 15)**

***It is not clear to us why the permission test for experts [in draft clause 4] is "necessary to assist the court to resolve the proceedings justly" whereas the test for the 26 week limit extensions is "necessary to enable the court [...]" [our emphasis]. We recommend that the Government explains the need for different wording, or chooses only one word for consistency. (Paragraph 63)***

21. The Government accepts this recommendation and is happy to explain why it considers that the current wording should be retained. We believe that the provisions on expert evidence rightly require the court to consider whether the evidence is necessary to "assist" the court to resolve the proceedings justly. However, we consider that in the context of the time limits clause, an extension should be granted only when necessary to secure that justice is done; the extension will make the difference between justice and injustice. On that basis, our view is that "enable" conveys the required sense better than "assist".

**Experts (recommendation 16)**

***We recommend that the Government clarifies whether the definition of "children proceedings" will be the same as current Family Procedure Rules Part 12, or whether a new definition will be recommended for insertion into Part 12 or another Part. (Paragraph 64)***

22. We accept this recommendation and are happy to clarify. The intention is that the definition will be the same as in the Family Procedure (Amendment) (No 5) Rules 2012 (SI 2012/3061) which came into force on 31 January 2013 (see new Part 25, rule 25.2). Placing the definition in the Family Procedure Rules allows flexibility should new proceedings relating to children need to be added, for example as a consequence of future legislation.

**Experts (recommendation 17)**

***We recommend that the Ministry of Justice monitors whether the number of successful appeals against case management decisions refusing expert evidence increases in order to assess whether the test is being applied too strictly. (Paragraph 72)***

23. The Government accepts the need to examine the impact of the new test and will make use of available HMCTS data and other sources of information to assess its effect.

**Experts (recommendation 18a)**



***We make the following recommendations for further smaller revisions to draft clause 3:***

***a. 3(2) and (5) – the two sub-clauses appear to be the same. We recommend that (5) is deleted; (Paragraph 73a)***

24. We do not accept this recommendation, as we do not agree that the two sub-clauses are the same. Sub-clause 3 (2) sets out the sanction for contravening the prohibition on instructing an expert without permission. Sub-clause 3 (5) sets out the prohibition on putting expert evidence before the court without permission. The former relates to obtaining expert evidence and the latter to adducing that evidence. In addition, there will be cases in which a fresh expert is not instructed and a party or parties may wish to introduce existing expert evidence (for example from earlier proceedings or expert assessments commissioned by a local authority during the pre-proceedings stage of the case).

**Experts (recommendation 18b)**

***b. (9) – whilst helpful within Explanatory Notes a number of definitions are already defined elsewhere within the Children Act 1989 and should not be repeated here. In addition, it is not clear why “authorised applicant” has been used rather than “authorised person” as in s.31 Children Act 1989; if there is a difference it should be explained in the Explanatory Notes. (Paragraph 73.b)***

25. The Government does not accept this recommendation. Definitions are needed because this is a freestanding provision and, other than the provision in subsection (11), is not an amendment to the Children Act.

26. The term “authorised applicant” has been used intentionally. Using a different label from the one in section 31 of the Children Act 1989 helps to highlight the fact that the definition of “authorised applicant” is not quite the same as the definition of “authorised person” in section 31. For example, an “authorised applicant” would not include members of staff of the officers of the NSPCC or of the officers of another authorised person. It also avoids repetition of the word “person” in different places which could be confusing.

**Legal Services Commission (LSC) funding (recommendations 19 and 20)**

***We share the concern of our witnesses that statements of the type made by the LSC about trends in the number of hours requested to undertake expert assessments when based on anecdotal information, are unhelpful unless supported by robust evidence, as they can come to be repeated as fact. (Paragraph 77)***

***We recommend that the Government urgently reviews the system of payments by the LSC to experts. We further request that firstly, the Ministry of Justice provides us with a detailed response to the criticisms***

***raised by our witnesses, and confirm that Wall LJ's guidance is being followed by the LSC, and secondly, that they provide us with a further update on progress made to meet the criticisms by the end of April 2013. (Paragraph 78)***

27. We note the Committee's comments about LSC funding. However, the LSC's written evidence was clear that the increase in hours was based on observations from its caseworkers based on the large number of prior authority applications that they deal with.

28. The Government does not accept that the system of payments to experts needs urgent review. The Ministry of Justice and the LSC monitor the operation of the system in discussion with key stakeholders, including representative bodies such as Law Society, on an ongoing basis and work is already underway to introduce a number of changes that are expected to address some of the relevant criticisms raised by practitioners. The Ministry of Justice and LSC will continue to work with such interested bodies in the future to try to address any further operational difficulties that are identified. **Annex 2** contains a response to the specific criticisms raised with the Committee by witnesses. The Ministry of Justice will write again to the Committee to provide a further update by the end of April 2013.

29. The set of fees payable to experts in publicly funded cases was introduced in October 2011. The scheme is, therefore, a relatively new one. Where specific issues have arisen concerning any of the rates, the Ministry of Justice has worked with the LSC to resolve them. This includes producing guidance on risk assessment work, which had been an area of concern for experts and legal aid providers, and also, using evidence provided by housing practitioners, agreeing a new rate payable to expert witnesses for housing disrepair work. Furthermore, LSC data shows that where legal aid providers have made applications for prior authority for payments to experts, these are being processed within reasonable timescales. The average time taken to deal with prior authority applications has not exceeded 10 days (in respect of non urgent applications) and has not exceeded 7 days (in respect of those defined as urgent by legal aid providers). This is illustrated in the table below:

**Volume of prior authority applications and average processing timescales, Jan-Nov 2012**

Monthly applications	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov
Applications for Prior Authority	784	1,140	1,840	1,855	2,568	2,232	2,455	2,480	2,231	1,686	1,051

Time taken	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct <sup>2</sup>	Nov <sup>2</sup>
Urgent <sup>1</sup>	3 days	3	3	5	4	7	7	5	4	6	5
Non urgent	4 days	6	8	8	6	10	10	10	5		

<sup>1</sup>Urgent applications are those defined as such by the legal aid provider applying for prior authority.

<sup>2</sup>With effect from October, the LSC no longer splits applications into two separate categories.

30. To assist with prior authority applications in future, the LSC has worked with representative bodies in the legal sector to produce further guidance, which was published in January 2013. This will provide greater certainty for legal aid providers and experts and so reduce further the need for providers to make applications to the LSC for prior authority.

31. The Ministry of Justice is currently collating the results of a case file review of public law family work undertaken prior to the introduction of the new codified rates for experts in October 2011. The review has examined the number and type of experts used in cases together with associated costs, the number of hours and hourly rates claimed and our current expectation is that we will include the findings in a report that will present the findings from the wider case file review. Once this work is complete, we plan to use any relevant analysis, along with other related data sources, to see if they can provide insight into hours claimed by experts in prior authority applications since the introduction of the payment scheme. We will write again to the Committee to provide a further update on this by the end of April 2013.

**Judicial scrutiny of care plans (recommendation 21)**

***We conclude that the draft clause on care plans should be revised to make express reference to contact with the birth family, as recommended in the Norgrove Report. We consider that the concerns of groups such as the NSPCC about the restriction of the judge's scrutiny role are apposite as to the draft clause on paper; however, the evidence we received from the Family Judiciary and from Ministers is that in practice judges will retain a discretion to look beyond the permanence provisions, where they think it is appropriate to do so. If such a level of flexibility is retained by the words "is not required to consider" of proposed new s.(3A)(b) we doubt whether the draft clause will have any effect in refocusing judicial scrutiny. We suspect that, similarly to the draft clauses on the 26 week time limit and new permission tests for experts, if the quality of social work reports and care plans improves, judges are likely to have confidence in focusing solely on the permanence provisions of the care plan, exercising a wider scrutiny beyond permanency issues in appropriate cases. (Paragraph 86)***

32. We accept that the clause should be revised and are providing a small amendment which makes clearer the link to the court's duty to consider the contact arrangements for the child.

33. The overall intention remains to keep the court focussed on the essential issue of the local authority's long term permanence plan for the child when considering whether to issue a care order, but while retaining the flexibility to allow the court to consider in more detail any other part of the care plan where it is in the child's best interests to do so. In the majority of cases, the detail of the care plan could, and should, be left to the local authority. As the Committee rightly points out, the intention was to return the court's role in this area to that originally envisaged by the Children Act 1989. Legislation is needed to reinforce this focus and reduce the unnecessary delays that can

occur.

34. Section 34(11) of the Children Act 1989 requires a court, before making a care order with respect to a child, to (a) consider the arrangements the local authority have made or propose to make for affording any person contact with the child; and (b) invite the parties to the proceedings to comment on those arrangements. This duty will remain and will not be affected by the care plans clause.

35. With that in mind, we have amended the care plans clause by inserting words to the effect of “subject to section 34 (11)” into new section 31(3A). This will make the link more explicit.

**Independent Reviewing Officers (recommendation 22)**

***We are encouraged by the Minister’s evidence to us on the steps being taken to improve the performance of Independent Reviewing Officers, and would like to receive copies of the reports of the reviews which the Government has commissioned in April 2013. (Paragraph 90)***

36. We agree with the recommendation. The Department for Education will submit a copy of the Ofsted report to the Committee as soon as it becomes available and will ask the National Children’s Bureau to do likewise.

**Private Law Recommendations**

**Mediation**

***The existing means of encouraging MIAM attendance through the Pre-Action Protocol was not judged a success by some of our witnesses. Resolution provided detail as to its application across the family courts:***

***‘We carried out a membership survey in March 2012 after almost one year of operation of MIAMs which showed inconsistency in the way in which the courts applied the Protocol. The survey responses covered over 100 courts in England and Wales revealed that over 40% of those courts were not requiring an FM193 at the point of issue and over 75% of judges were not raising with the parties in proceedings whether a non-court based method to resolve their dispute might be appropriate’.***  
***(Paragraph 95)***

37. The Government recognises that there are continuing difficulties with the operation of the Pre-Application Protocol, and that its impact has not been as significant as we had hoped. However, this is about implementation rather than the principle itself and the Government believes that the protocol is an important mechanism for ensuring that mediation is given consideration prior to court proceedings. We are, therefore, committed to increasing attendance at MIAMs in appropriate cases and believe that the draft clause will help achieve this. The Government is grateful for the Committee’s support.

#### **Mediation (recommendation 25)**

***We conclude that well-trained family mediators should be just as able as legal practitioners to identify cases of domestic abuse that should be exempt from MIAMs or mediation; however the responsibility for filtering out domestic abuse cases from the MIAM process should not solely rest on mediators. We ask the Government to consider the options suggested by our witnesses, and to work with recognised mediation organisations to clarify what advice mediators should seek and from whom, if they are concerned about a party's welfare, and then put that agreed system into place. (Paragraph 100)***

38. The Government recognises that safeguarding in a pre-proceedings context is a very important issue and will consider carefully the Committee's recommendation. We are keen to promote out of court settlement but children and vulnerable adults must always be safeguarded when they do use services, such as mediation, away from court. We have asked the Pre-Proceedings Working Group of the Family Justice Council to look at how risk identification currently works pre-court across different organisations and how this might operate in the future. As part of this work we have asked the working group to consider, how those delivering services can share information about risk.

#### **Mediation (recommendation 26)**

***The MIAM process is an assessment and information providing meeting, and any opportunity for the voice of the child to be heard must be considered within these parameters; however, the child's voice is important and may have a role in persuading parents to mediate, or to focus discussion within the MIAM. We recommend that the Government look again at the MIAM process with recognised mediation organisations to produce guidance on how the child's voice can be heard within the MIAM, with such guidance being applicable to all mediators undertaking MIAMs (not just those that are members of recognised mediation organisations). (Paragraph 101)***

39. The Government is committed to ensuring that the voice of the child is heard in decisions made about them. If parents can understand the impact of separation on children, and the need to focus on their own child's needs, this can provide a powerful incentive to mediate. We are concerned, however, with the suggestion that the views of the individual child or children of the family can or should be part of the MIAM stage. We think this could risk drawing children into the dispute at the point where parents are at a crossroad in deciding how – or indeed whether to – settle their dispute. We think that the appropriate stage for the voice of the individual child is during the process of mediation itself, rather than in the MIAM, where this can be done in an appropriate way by appropriately trained mediators.

#### **Mediation (recommendation 27)**



***We again recommend that privately-funded mediators should have to meet the current requirements for mediators undertaking legal aid work set by the Legal Services Commission. This must be a priority and should be included in the draft clause. (Paragraphs 102-3)***

40. We acknowledge that this is an important issue. The final report of the Family Justice Review made a similar recommendation:

*All mediation should be centred on the best interests of the child. This and the other tasks of mediators are demanding. The assessment of risks to the parties in the MIAM is difficult and important. Mediators should at least meet the current requirements set by the LSC. These standards should themselves be reviewed in the light of the new responsibilities being laid on mediators. Mediators who do not currently meet those standards should be given a specified period in which to achieve them.*

*Government should closely watch and review the progress of the Family Mediation Council to assess its effectiveness in maintaining and reinforcing high standards. The FMC should if necessary be replaced by an independent regulator.*

41. As acknowledged by the Family Justice Review, the Government does not regulate privately funded mediation services. Most family mediators are a member of one of the six Member Organisations which comprise the Family Mediation Council (FMC) and this is the body which sets standards for family mediators.

42. In our response to the Family Justice Review, we committed to continue work with the FMC and Legal Services Commission to make sure that accreditation standards are harmonised and that mediators are able to access Continuing Professional Development. The FMC's Member Organisations all agree that there should be a single accreditation standard for publicly funded and privately funded mediation. The Ministry of Justice has established a small working group to oversee implementation of this and other reforms to the FMC and is in discussion with the FMC about the timetable for implementing changes.

#### **Mediation (recommendation 28)**

***We agree that court officers should not be deciding upon the merits of whether a party has complied with the MIAM process or not, but, the draft clause as currently drafted does not make this clear, and leaves the process open to the problems identified by the Association of Lawyers for Children and other witnesses. The draft clause should be revised to clarify that where a decision about the merits of compliance must be made, that is a decision for a judge. (Paragraph 107)***

43. The Government understands concerns expressed to the Committee

about the role of the court officer and is committed to ensuring that access to the courts remains available for those who genuinely need it. The Government does not, however, believe that the clause should seek to define matters of court procedure. The intention is to invite the Family Procedure Rule Committee to make rules under subsection (2)(d) of the clause to set out the process to be followed when a person seeks to make an application. The intention is that the court officer will check if a standard form (currently the FM1) has been completed and signed appropriately. If the form has been completed and signed then the officer will proceed to issue the application.

44. If the form has a box ticked to state that one of the prescribed exemptions applies, then the officer will proceed to issue the application (assuming all other procedural requirements have been met). The court officer will not be “assessing the merits” of whether a person has complied with the requirements. The officer will be checking if a form has been completed to say that the person has complied (or that an exemption applies). However, if on a given case an officer has concerns about, for example, whether the requirement to attend a mediation information and assessment meeting applies in the type of case a person is seeking to issue, then the intention is that the officer should be able to refer the matter to a member of the judiciary for guidance.

45. While the detailed wording of the clause on Introduction is different to that considered by the Committee, the Government would stress that any change of wording does not change the intention as regards the roles of court officers, as set out above.

46. The Crime and Courts Bill, currently before Parliament, inserts a new paragraph (aa) into section 76(2) of the Courts Act 2003, the effect of which is to enable Family Procedure Rules to provide that specified functions of a court in family proceedings may be carried out by officers of other staff of the court. This will mirror provision already in place in relation to civil proceedings and rules of court relating to them.

47. We propose to invite the Family Procedure Rule Committee to exercise this power so that the proposed functions in relation to the MIAM requirement can be undertaken by court officers, or the court.

#### **Mediation (recommendation 30)**

***We recognise the difficulty in requiring compulsory attendance at a MIAM by a party who, as a respondent, may have no wish to attend Court; however, we ask the Ministry of Justice to work with the Family Judiciary to develop a consistent practice across the Courts in adjourning cases for MIAM attendance. We recognise that each case will be different, and that in many cases, delay for compulsory respondent MIAM attendance will not be suitable, but we consider that there should, in practice, be an equal and universal requirement for MIAM attendance for applicants and respondents. We do not recommend inclusion of the requirement in the draft clause, because we conclude that as a matter of***



***Court practice and procedure, it is more appropriately included within the Family Procedure Rules. (Paragraph 112)***

48. The Government welcomes the Committee's conclusion on this difficult issue. We are already working with the family judiciary, through the President's Office, on how a more consistent practice can be developed across the courts. The Committee may wish to note that, prior to the appointment of the new President, the acting President wrote to the family judiciary on the operation of the current Pre-Application Protocol. Revised guidance has also been issued to court staff to assist them in explaining the Pre-Application Protocol to applicants.

**Mediation (recommendation 32)**

***We recommend that the Government considers the inclusion of a time-limited exemption to prevent parties from having to pay for repeat MIAMs before applying to the Court. We have considered the National Family Mediation's suggestion of three months, but consider this to be too short where parties have engaged in MIAM and mediation, and therefore are unlikely to need to be provided with repeat information about how the process operates. We suggest the inclusion within the Family Procedure Rules, Pre-Action Protocol, Annex C, of a period of six months, after which there would be a potential benefit in their dispute being re-assessed for suitability for mediation, and we ask the Government to discuss this recommendation with the Family Procedure Rules Committee. (Paragraph 119)***

49. The Government recognises that this is an important issue and will give the matter further consideration and discuss it with the Family Procedure Rule Committee. Any provision on this issue would not require an amendment to the clause, as the rule-making power in the clause as drafted is already wide enough to accommodate any such provision on "exemptions" in making new Family Procedure Rules.

**Mediation (recommendation 33)**

***We ask the Government to clarify what policies and practical measures will be in place to assist the group of litigants in person who are not entitled to legal aid or considered suitable for mediation. (Paragraph 120)***

50. The Government is very aware of the need to help unrepresented litigants navigate their way through the system and is working with others, including the Civil Justice Council, to help co-ordinate and implement a range of measures designed to better meet the needs of unrepresented litigants in family, civil and administrative justice cases. We would be happy to provide the Committee with further information on this as work develops.

**Drafting Amendments (recommendation 34)**

***We make the following recommendations for further smaller revisions to draft clause 1:***

***a. 1(1)(d) – replace “deal with” with “issue”, to accurately reflect Court procedural terminology, and clarify that this relates to relevant family applications;***

***b. (4) – we ask the Government to clarify why two definitions are needed for applications falling within the section: “family application” and “relevant family application”. Either one should be deleted, or the differences more clearly explained, preferably by the use of different terms. The terms used should also be consistent across (1), (2)(c) and (d). (Paragraph 121)***

51. The Government understands why the Committee has made these suggested revisions to the draft clause and has considered the “deal with” amendment suggested. The revised version of the clause reads “issue or otherwise deal with”, as the court needs the ability to decline to deal further with a case where, although issued, it becomes clear at the first hearing that the applicant has failed to comply with the MIAM requirement, for example by falsely claiming an exemption.

52. On the second point concerning subsection (4), in an effort to simplify the clause the Government has acted on the Committee’s recommendation and omitted the concept of “family application” and made consequential changes to the definition of “relevant family application”.

**Child Arrangements Order (CAO) (recommendations 36 and 37)**

***We [...] recommend that the individual elements of the CAO are separately set out within the draft clause, leaving one order, but with clearer contents; and secondly, that the clause sets out that the person with whom the child is to live has rights of custody for the purposes of the Hague convention and other relevant international law treaties. (Paragraph 138)***

***We ask the Government to look again at the potential practical problems with interpretation of the draft clause in light of how the international law relating to children operates. (Paragraph 139)***

53. The Government acknowledges the Committee’s concerns about the need to minimise the complexity of the clause, and the importance of clarity in the context of international law. However, we are of the view that the clause is drafted in as simple terms as possible, whilst still achieving the policy aim of reducing the perceived hierarchy of different types of order, and moving away from the concept of orders being made in favour of one parent over and above another.

54. It is the Government's view that the way the new order will operate is consistent with the requirements of international law. As set out in the joint letter of 27 November 2012 from Edward Timpson and Lord McNally to the Committee, the Government is not changing the law on parental responsibility. A "child arrangements order" that regulates living arrangements will operate in the same way as a residence order in terms of specifying with whom a child is to live.

55. International recognition depends on the content of an order not the name of the order. As now, it should be clear from the content of the child arrangements order whether the order regulates arrangements relating to the person with whom a child is to live. If, for example, the order regulates the child's living arrangements and consequences flow from the child living with a particular person, that person (or others seeking confirmation that the child lives with that person), should be able to rely on that child arrangements order as confirmation that the child should be living with that person, in the same way as is currently the case in relation to a residence order. Parental responsibility that results from the making of such an order will remain.

56. The existing definition of a residence order does not include a reference to international treaties, and given that the child arrangements order will operate in the same way as a residence order in as far as it regulates a child's living arrangements, we do not believe it is necessary to include such a reference in the definition of the new order.

57. However, as previously stated to the Committee, we will consider how best to provide information to other states which are party to relevant treaties, with the aim of raising awareness of the legislative change.

#### **Shared Parenting (recommendation 45)**

***If the Government chooses to proceed with the draft clause, we recommend that they make the following revisions for the purpose of clarity. Firstly that "unless the contrary is shown" is either defined separately or through proposed subsection (6); the intention should be made clear that there are two stages to the rebuttal. Secondly, the Government should give consideration to whether an amendment similar to that in Australia in 2012, needs to be added to the clause to make clear that of (sic) the child's welfare is paramount and should be given the most weight. (Paragraph 172)***

58. The Government does not accept the need to amend the clause as the Committee recommends. The presumption as currently framed only applies to a parent who can be involved in a way that does not pose a risk of harm to the child; it is then rebutted if there is any evidence to suggest that the child's welfare would not in fact be furthered by the involvement of that parent. The two-stage nature of the presumption is clearly set out in the explanatory notes and is further explained in the process chart and example scenarios included in the notes. This ensures that no court will be required to presume that the welfare of a child would be furthered by the involvement of a parent who

cannot be involved without posing a risk of harm, and “harm” will be given the broad definition as contained within section 31(9) of the Children Act 1989.

59. Courts will continue to be subject to the overriding duty in section 1(1) that the child’s welfare shall be their paramount consideration whenever determining any question with respect to the upbringing of a child. In applying the presumption they will make individualised decisions based on whether the child’s parent can be involved in the child’s life in a way that does not pose a risk of harm, and if so will then consider in light of the particular circumstances of the case whether there is any evidence to suggest that the child’s welfare would not, in fact, be furthered by the parent’s involvement. If the court reaches the decision that a parent cannot be safely involved in a child’s life the presumption will not apply, and even where a parent can be safely involved, if the court is satisfied that such involvement would not in fact be consistent with the child’s welfare, the presumption will be rebutted (i.e. “the contrary will be shown”). The child’s welfare is the overriding consideration, both within the presumption itself, and in the overall decision making process.

60. The Government therefore considers that it is clear from section 1(1) of the 1989 Act and from the presumption itself that the child’s welfare will remain the court’s paramount consideration when determining any question with respect to the upbringing of a child.

61. The 2012 amendment in Australia to prioritise the child’s welfare was made in very different circumstances. It tackled tensions created by the apparent equal weighting given to the two ‘primary considerations’ considered by family courts when determining the best interests of the child (the benefits of a meaningful relationship with both parents, and the need to protect the child from harm). The Government’s draft clause does not create competing considerations in this way, or give rise to the level of complexity that evolved in the Australian legislation.

**Shared Parenting (recommendation 48)**

***If the Government proceeds with its intention to include the draft clause in the Children and Families Bill as introduced, we recommend the Government make clear, preferably before introduction of the Bill, what effect they intend the draft clause to have on court orders. (Paragraph 179)***

62. The Government accepts this point. Whilst it is not a specific policy intention to change the outcome of court decisions in particular cases, we anticipate that the amendment will encourage parents to adopt less adversarial and entrenched positions in relation to the care of their child. This may affect the positions and attitudes of parents who seek a decision from the courts and may, as a result, have a bearing on the decision made. However, it is not possible to set out how the content of court orders may be affected by the change, since decisions will continue to be made in the light of the circumstances of the individual case and will ultimately be governed by the welfare of the child.

63. The amendment would serve to reinforce by way of statute the expectation that both parents should be involved in a child's life, unless of course that is not safe or not consistent with the child's welfare. The Government recognises that courts already operate on this basis, but nevertheless there is a widespread perception among those who use the courts that this is not the case. The amendment will address this, and will provide greater clarity and transparency in relation to the court's decision-making process. In doing so, it will encourage the resolution of agreements outside court by making clear the basis on which courts' decisions are made and by ensuring that parents' expectations are realistic when deciding whether to bring a claim to court. The Government anticipates that over time, this change will contribute to a societal shift towards greater recognition of the value of both parents in a child's life, and to a reduction of the perception of bias within the court system. The Government is taking forward a range of measures aimed at supporting parents to work together in the best interests of their child, following family breakdown, and the message sent by this legislative amendment is consistent with that wider work.

**Shared Parenting (recommendation 48)**

***We also recommend that the draft clause is revised firstly to include a definition of "involvement" setting out that it does not give or imply a right to a set amount of time, and secondly, and to avoid any possible confusion, the short title, although not a material part of an Act, is changed to "Parental Involvement". If "involvement" is not defined, we expect that the Appeal Courts will be required to define it. (Paragraph 179)***

64. The explanatory notes which have been published alongside the Bill address this issue explicitly and make clear that the purpose of the clause is not to promote the equal division of a child's time between parents. The Government does not agree that there is a need to define the term "involvement" on the face of the Bill in order to explain that it does not give or imply a right to a set amount of time. The appropriate level of involvement of a parent in the life of the child concerned will depend on the facts of the particular case and will be a matter for the judge.

65. The Government accepts the Committee's recommendation that the title of the provision should be changed. We agree that such a change would be helpful in terms of promoting a clearer understanding of the purpose of the amendment. Taking into account the recommendation of the Committee, the Government's preferred title is "Welfare of the Child: Parental Involvement" to reflect the title of section 1 of the Children Act 1989, which is amended by the clause.

**Divorce (recommendation 54)**

***We conclude that, on the balance of the evidence we received, draft clause 7 does not remove an important safeguard for children, and we***

***consider that the changes are likely to be merely administrative. We recommend, however, that the Government monitors the changes to ensure that if the problems suggested by some of our witnesses arise, they are identified and appropriate safeguards are re-introduced either in statute or by changes in Court procedure. (Paragraph 197)***

66. The Government accepts the need to review the change and we will seek the views of the judiciary, Cafcass and other interested parties to identify if any problems materialise as a consequence of this change. Repeal of this requirement streamlines court processes for divorce and dissolution of a civil partnership (and related proceedings) by removing the requirement for the court to consider the arrangements for children as part of these processes. In uncontested cases this simplification will facilitate the proposed delegation of these judicial functions to appropriately trained legal advisers and assistant legal advisers, allowing judges to focus their time on more difficult cases. Judges will be able to advise legal advisers on the exercise of these judicial functions in cases where assistance is needed.



## **Legal Services Commission: Response to criticisms from witnesses**

### ***1. The LSC has set hourly rates which are too low, and it objects to the number of hours requested to complete an assessment.***

The Ministry of Justice has overall responsibility for legislation that sets out the rates payable for legal aid expert witness work. Maximum rates for certain types of expert are set out in section 1 of Schedule 6 to the Community Legal Service (Funding) Order 2007 (as amended). As the relevant paying authority, the LSC has a duty to consider applications for expert witness funding in accordance with the Order.

The Order provides that LSC may only pay higher rates where the criteria set out in Section 2 of the Order are satisfied. These are where the expert's evidence is key to the client's case, and either (i) the complexity of the material is such that an expert with a high degree of seniority is required; or (ii) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence. The LSC does pay higher rates where it considers that these criteria are met.

The MoJ and the LSC have been working together to monitor the effect of the introduction of the codified rates on all affected groups and, as set out earlier in this response, appropriate action has been taken where there has been clear evidence of difficulties.

The LSC will consider the appropriate number of hours based on the individual circumstances of each case and the information presented by the solicitor requesting the expense.

Prior authority is not a cap on the number of hours that may be undertaken by an expert. Additional hours of work may always be justified on assessment at the end of the case to the relevant assessing authority who will be the LSC or the Court.

### ***2. The LSC restricts the number of expert reports.***

As the LSC stated in its evidence to the JSC, it is not the LSC's role to determine the number of expert reports required. This will continue to be a matter for the court.

However, the LSC will generally require a copy of the Court Order before approving any payment for expert services, as it must be satisfied that the court has requested a particular report.

A refusal of prior authority by the LSC does not mean that the LSC will not fund use of that expert, rather it could indicate that the LSC does not agree with the number of hours requested.



### ***3. The LSC has ceased prior authority.***

Prior to October 2011 there were very limited circumstances in which prior authority could be applied for. Following the introduction of the new rates in October 2011, the LSC agreed, as a transitional measure, to consider all applications for prior authority as solicitors were not familiar with the new scheme.

The LSC received a significant increase in the number of applications for prior authority for expert costs from solicitors. This increased the average time taken to deal with applications.

In order to simplify the process and prevent delay in proceedings providers were notified that from October 2012 the LSC would revert back to the contractual position and prior authority would only be considered in limited circumstances. The LSC's Standard Civil Contract states that there is a contractual right to seek or obtain prior authority only where the rate sought exceeds the codified rates introduced in October 2011, or where the item of costs is unusual in its nature or is unusually large.

The LSC has worked with representative bodies in the legal sector to produce further guidance on prior authority applications which was published in January 2013. The guidance will confirm the circumstances in which providers should or may choose to apply for prior authority and when it is not necessary to do so. It will also provide information on the range of hours that the LSC would normally consider to be acceptable for the most commonly requested types of expert used in family proceedings. This will provide greater certainty for legal aid providers and experts and so reduce further the need for providers to make applications to the LSC for prior authority.

### ***4. MoJ to confirm that Wall LJ's guidance is being followed by the LSC.***

Lord Justice Wall emphasised the need for speedy decision making in family cases. The LSC has reduced the time taken to make decisions on prior authorities, as set out in paragraph 29 in **Annex 1**.

The LSC has also highlighted to the caseworkers that deal with the applications the importance of providing reasons for decisions made on prior authorities, particularly where the application has not been granted. The LSC will continue to undertake quality checks on decisions made by its staff including whether appropriate reasons have been provided.

# Annex C

## Response to Education Select Committee



**Edward Timpson MP**

Parliamentary Under Secretary of State for Children and Families

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Graham Stuart MP  
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February 2013

### **PRE-LEGISLATIVE SCRUTINY OF SPECIAL EDUCATIONAL NEEDS PROVISIONS**

Today we have published the Children and Families Bill which will improve services for vulnerable children and support strong families. It contains the special educational needs provisions together with provisions on adoption, looked after children, family justice, childcare, Office of the Children's Commissioner, shared parental leave and flexible working. Alongside the Bill we are publishing an explanatory command paper *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* which includes this letter in Annex C. I have attached a copy of the command paper to this letter and it can also be accessed at: [www.education.gov.uk/childrenandfamiliesbill](http://www.education.gov.uk/childrenandfamiliesbill)

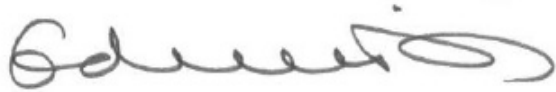
I am grateful to you and your Committee for carrying out pre-legislative scrutiny of the SEN provisions and for your detailed report. The process has been very constructive and helpful to us in shaping the legislation.

I am pleased the Committee feels that the reforms are moving in the right direction and supports the Government's ambition to introduce legislation in 2013 and finalise it by 2014. I recognise it is challenging to evaluate the likely success of the legislation until more detail is provided in regulations and the revised Special Educational Needs Code of Practice. I intend to offer as much

of that detail as possible during the committee stage of the Bill and the extended pathfinder programme will continue to play a central role in informing that process.

In the meantime I enclose a response to the Committee's report which shows how the Government is taking into account the recommendations it has made.

I look forward to further discussion and debate on these important changes as we take the legislation through Parliament.

A handwritten signature in black ink, appearing to read 'Edward Timpson', with a stylized flourish at the end.

**Edward Timpson MP**  
**Parliamentary Under Secretary of State for Children and Families**

## 1. INTRODUCTION

1. Responses to recommendations are set out below under the section headings in the Committee's report.
2. In framing those responses we have taken into account the ***Committee's recommendation to examine with close attention the written evidence provided to its inquiry and give careful consideration to the points raised by witnesses in drafting the Bill (Paragraph 10)***, much of which has been in the public domain following the publication of the draft special educational needs provisions in September 2012. We have made changes to the provisions in the light of this evidence, for example, to maintain essential protections and entitlements for parents and young people, including an explicit right to request a statutory assessment. We will continue to work with those who submitted evidence throughout the progress of the Bill and in the development of the Regulations and the Special Educational Needs Code of Practice. This will complement the work we are doing with the local pathfinders testing our reforms.

## 2. THE DRAFT CLAUSES: PROCESS AND CONTEXT

### Detail, timing and context

3. I welcome the Committee's support for the direction of the Government's special educational needs reforms, the plans for introducing legislation this year, and the extension of funding for the local pathfinders until September 2014. ***The Committee seeks a firm assurance that we will continue to draw on the learning from the pathfinders extensively in framing the regulations supporting the Bill and in developing the statutory guidance in the new 0-25 Special Educational Needs Code of Practice (Paragraph 26)***. I can provide that assurance.

### Joined up thinking: cooperation between agencies

4. The Committee places considerable emphasis on securing strong commitment from the National Health Service for the joined up working needed to ensure the success of our reforms. The Government is doing all it can to make sure that the health service contributes fully to improving planning, commissioning and provision of services for children and young people with special educational needs and securing better outcomes for them. I set out in the section on cooperation between local authorities and health below the measures I am taking with the Department of Health to strengthen the position.

### Terminology

5. ***I accept the Committee's recommendation that, in the absence of strong support for a change in terminology, we should continue to use the term "special educational needs." (Paragraph 37)***. The new

legislation would apply this term across the birth to 25 age range. As the definition of special educational needs incorporates young people with a learning difficulty or disability, some providers may continue using this term within their institution where it more closely meets the needs of their students.

### 3. PROVISION FROM BIRTH TO 25

6. It is encouraging to read of the widespread support the Committee found for a new framework for special educational needs that works for children and young people aged from birth until 25. The Government is committed to making this a reality and to ending the artificial divide in approach between those who are staying on in school beyond 16 and those in further education.

### Funding and post-16 education

7. The Committee asked about the involvement of colleges in the local pathfinders. Funding has been provided for twenty local pathfinders involving thirty-one local authorities and their health partners to test the reforms. Each pathfinder is involving a broad range of partners. In the majority of cases this includes one or more local further education college, sixth form college, or independent specialist provider in their area. Twelve of the twenty pathfinders are focusing specifically on preparation for adulthood, working closely with post-16 providers. In extending the pathfinders, we will reinforce our expectation of effective involvement of the post-16 sector. We plan to offer additional funding to between 9 and 15 pathfinder local authorities to advise and support others on implementation, including in relation to post-16 provision and we are working closely with the further education sector, through the Association of Colleges and others.
8. ***The Committee reiterates the importance of ensuring that, by extending statutory protections to 16-25 year olds, the quality or quantity of provision for others is not compromised (Paragraph 43).*** The Education Funding Agency already provides funding to colleges and other providers to meet the additional needs of all young people aged 16-18 with learning difficulties/disabilities, and up to 25 for those with a Learning Difficulty Assessment. Overall funding for post-16 High Needs Students will increase by 9% from £585m to £639m between 2011/12 and 2013/14.
9. From the 2013/14 academic year, funding for students with additional needs will be provided to all institutions through three distinct elements. Element 1, the core education funding for the course being studied; Element 2, the first £6,000 of additional support; and Element 3, any top-up funding required to meet the total costs of the education provision. Elements 1 and 2 will be provided direct from the Education Funding Agency and Element 3 will be provided by the relevant local

authority from its Dedicated Schools Grant (DSG), which will include this element of funding from August 2013.

10. Decisions will be more transparent and, as local authorities will establish a single high needs budget from within their DSG to cover their education funding responsibilities for all high needs children and young people aged 0-25 resident in their area, there should be fewer delays in making decisions on provision for the young person. The greater transparency about funding in the new arrangements will encourage collaboration between education institutions and across health and social care services in developing packages of support for individual children and young people.

### **Provision for 19-25 year olds**

11. ***The Committee expresses concern that a potentially confusing picture is emerging over responsibility and rights for 19 to 25 year olds and urges the Government to clarify responsibility, funding and, where appropriate, access to advocacy (Paragraph 50). It also seeks reassurance that the extension of approaches for 0-25 provision will also address the needs of young people pursuing higher education (Paragraph 51).***
12. It is right that, for the first time, young people will be able to enter further education and training with the same rights and protections as pupils in school. These new arrangements can continue up to age 25 for those young people who, as is already recognised now, need to take longer to complete their education or training.
13. However, the provisions do not create a new guarantee, or expectation that young people with special educational needs should stay in education until they are 25. To do so would not be in the best interests of many young people, who will want to complete their education and progress into adult life and work. The revised legislation is clear that local authorities must consider a young person's age when deciding whether to prepare an Education, Health and Care Plan, and they should take account of whether the outcomes in the plan have been achieved when determining that a plan should end. We would expect these decisions to be taken in consultation with the young person and their parent, though where they did not agree they would have access to mediation and, for the first time, appeal via the Tribunal.
14. I have considered the Committee's recommendation of statutory eligibility criteria for when individual 19-25 year olds can receive Education, Health and Care Plans. But I have decided against pursuing this as circumstances vary greatly and I believe that the local authority and the individual young person must be free to agree together what is in the young person's best interests. Remaining in fully funded education or training must enable young people to progress, building on what they have learned before and helping them to make a successful transition to

adult life.

15. Further detail on how these principles will work in practice for 19-25 year olds with SEN will be set out in regulations and the Special Educational Needs Code of Practice, drawing on the learning from our local pathfinders.
16. The Committee also asked for reassurance that our reforms will support young people pursuing higher education. Young people with learning difficulties and disabilities should have the same opportunity to apply to higher education as their peers. The new Education, Health and Care Plan will provide a much greater focus on outcomes, building on young people's own ambitions and aspirations. This can include progressing to higher education, as well as finding employment and living independently. The provision specified within the plan will support young people towards those outcomes, and help them to realise their full potential.
17. Whilst these provisions won't apply to young people undertaking higher education courses, there are other means of support available to them. Young people with a disability (including a long-term health condition, mental health condition or specific learning difficulty) who are successful in securing a place on a higher education course can apply for a Disabled Students Allowance (DSA). DSAs are not means-tested, are awarded in addition to the standard package of support and do not have to be repaid. In the academic year 2010/11, 47,400 full time students were provided DSA support, amounting to £109.2m.

#### **4. INTEGRATED PROVISION AND EDUCATION, HEALTH AND CARE PLANS**

18. The Committee acknowledges the importance of securing integrated provision for children and young people with special educational needs who need support from a range of agencies. It also welcomes the additional time given to the local pathfinders to test approaches to assessment.

##### **The integrated assessment process**

19. ***The Committee recommends that regulations clarify the necessary skills for individuals undertaking assessments. It recommends in particular that regulations should create a presumption that a key worker/lead professional will be appointed unless there are good reasons not to do so (Paragraph 60).***
20. The work of the local pathfinders will be essential in helping us to make sure we get the regulations right. We will draw on learning from the pathfinders to help frame the regulations and to develop effective guidance on carrying out high quality assessments in the new Special Educational Needs Code of Practice. I set out in paragraph 24 below the



additional arrangements I am making to support parents through the assessment process.

### **Cooperation between local authorities and health**

21. ***The Committee expresses concern that, in the absence of specific duties on health agencies and a single route of redress, the joint commissioning arrangements will be insufficient to secure better engagement of those agencies in the assessment process and the provision of services. It believes that the lack of specific duties on health will cause confusion and difficulty in securing services such as speech therapy, which could be defined as supporting educational or health needs.***
22. The Government shares the Committee's view that cooperation between local authorities and local health agencies is vital. The specific requirements we included in the draft SEN provisions on local authorities and local health agencies to plan and commission services for children and young people with special educational needs jointly and to promote integrated services are key to that. Those duties will build on the framework introduced by the Health and Social Care Act 2012 for local joint strategic needs assessments and health and wellbeing strategies supported by a local Health and Well-being Board and a local Healthwatch to make sure that those using services have the opportunity to feed back on their experiences and, in this way, contribute to improvements.
23. In order to address the Committee's recommendations on cooperation and the duties on health agencies, I am working closely with the Department of Health to develop a package to improve commissioning and delivery of services and redress.
24. This includes measures to ensure provision of coordinated advice and information services by local authorities and clinical commissioning groups, and to require local authorities to consider what support parents might need through the assessment process, such as support to navigate through the assessment process. I have made provisions in the clauses of the Bill to support this.
25. Following further productive work with the Department of Health on non-Bill related policy issues, the Government will ask Healthwatch and the Care Quality Commission (CQC), given their role in championing the needs of patients, to explore how they could hold the NHS to account for how well it meets the needs of children and young people with SEN.
26. I am continuing to work with the Department of Health to develop further policy around the NHS Commissioning Board and will be able to say more about this in due course.

27. On the question of therapies, the provisions in the Bill will retain the position established in case law to date. It makes clear that health or social care provision which is required wholly or mainly for the purposes of education or training is to be treated as special educational provision.
28. I believe that the strengthened arrangements for planning and commissioning of services to support children and young people with special educational needs will reduce disputes about who pays for which services.

### **Entitlement to integrated provision and Education, Health and Care Plans**

29. ***The Committee recommends that disabled children and young people from birth to 25 without special educational needs should be included in the scope of the legislation, including the provisions relating to integrated provision and Education, Health and Care Plans (Paragraph 78).***
30. I have considered the arguments for this very carefully. The definition of special educational needs in the legislation includes children and young people with a disability where this disability results in the child or young person needing special educational provision to be made. This includes children who have a disability which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions. The scope of the legislation is wide and will encompass most disabled children. It means that where children need additional or different provision to support their education they will be covered by the SEN statutory framework.
31. Whilst it is true that disabled children and young people who do not have special educational needs fall outside the SEN definition and would not be eligible for an assessment for a statutory Education, Health and Care Plan, they would have important protections in other legislation.
32. For example, all disabled children and young people up to age 17 are eligible for a child in need assessment under section 17 of the Children Act 1989; and if found to require an assessment, the local authority has a duty to support them in various ways, including in relation to their health and development. Where they meet the criteria, disabled young people aged 18 and over have their needs met by adult social care services and, under proposals in the draft Care and Support Bill, would have a statutory Care Plan.
33. Disabled children and young people are also supported by the Equality Act 2010, which gives schools, colleges and local authorities a range of duties. Schools are expected to plan to increase access to school premises and the curriculum and to make information available in accessible formats. They are also required to make reasonable

adjustments to their policy and practice to prevent disability discrimination. From September 2012 in schools, and since 2001 in colleges, this has included providing auxiliary aids and services such as specialised computer programmes, hoists and sign language interpreters. This duty was introduced for schools in response to concern from SEN and disability organisations that disabled children with no SEN may miss out on auxiliary aids and services they need. Colleges are also required to make reasonable adjustments to physical features of their premises.

34. The Bill will not prevent local authorities who wish to develop non-statutory plans for disabled children without SEN from doing so. Some pathfinder authorities are taking this approach. But in view of the wider statutory provisions mentioned above I do not feel it would be appropriate to require all local authorities to do so.
35. For these reasons, I am not minded to include disabled children and young people with no special educational needs in the provisions.
36. On the question of very young children, the Bill makes provision for children under compulsory school age to be regarded as having special educational needs if they are likely to need special educational provision at school. We intend to carry forward requirement in the 1996 Education Act for health bodies, who identify pre-school age children who they feel have or probably have special educational needs to inform the local authority, after discussing it with their parents. In addition, the Bill enables health professionals and others to bring any child or young person to the attention of the local authority as having or possibly having special educational needs and request an assessment for an Education, Health and Care Plan. The requirements for joint commissioning and integrated working will help to increase the focus on planning to meet the needs of very young children and the provision for early development and health checks will support early identification.
37. The Department of Health is recruiting and training an additional 4,200 health visitors by 2015 to deliver a full service and family offer, ranging from community and family support to additional services related to SEN or disability. Identifying whether a child is disabled or may have SEN is a core part of the training for health visitors. As capacity grows, every Sure Start Children's Centre should have access to a named health visitor, working with other health professionals and social workers where families have ongoing needs requiring multi-agency support. When parents have concerns about their child's development and learning, they will be offered additional support and, where appropriate, referred to another health professional such as a speech and language therapist or a paediatrician. This will be particularly important in identifying children's support needs.
38. We are working with the Department of Health to bring together the early years progress check at age two in the new Early Years Foundation

Stage with the Healthy Child Programme health and development review at age two to two and a half to create a fully integrated early years and health review. We are looking at possible models for conducting an integrated review with health and early years experts and with a number of local areas as part of an external evaluation. As part of this work we will look at how an integrated review can contribute to the SEN single assessment process, drawing on the findings from the pathfinders.

### **Triggering assessments and timescales for conducting assessments**

39. ***The Committee recommends that the current protections for parents should be reiterated in the Bill and that timescales for responding to requests for assessments and for carrying out assessments should be set out in regulations, including provision for aligning assessment timescales between local authorities and health agencies (Paragraph 84).***
40. The Bill retains existing protections for parents, including explicit rights for them (and schools) to request assessments for Education, Health and Care Plans. It also extends these rights to young people in post-16 provision and colleges and will make it possible for any professional or family member to bring a child or young person to the attention of the local authority to consider whether an assessment is necessary. Provision has been made for timescales to be included in regulations, for the areas mentioned specifically by the Committee, including provision for aligning timescales for health advice.

### **Specifying versus setting out**

41. ***The Committee recommends that the Bill make clear that Education, Health and Care Plans have the same status as statements of special educational needs by including a requirement for Plans to 'specify' rather than 'set out' the provision to be made for a child or young person (Paragraph 89).*** This change has been made.

### **Stopping and starting the Education, Health and Care Plan**

42. ***The Committee recommends that the cut-off point for Education, Health and Care Plans should be when the educational outcomes in the Plan have been achieved but that there should be provision in regulations to ensure that 18-25 year olds with special educational needs can quickly have their Plans reinstated if they move back into education. The Committee also recommends that legislation provides entitlements to young people of compulsory participation age and not in education, employment or training (NEETs) and to young people on Apprenticeships (Paragraph 98).***
43. The revised legislation no longer requires a Plan to cease when a young person drops out of education or training. Regulations will ensure that local authorities maintain the EHC Plan of any young person that

becomes NEET while of compulsory participation age. They will also allow local authorities to review the EHC plan of a 19-25 year old at the point they become NEET and to maintain support where it is clear that re-engaging them in education or training is the best possible option for them and the young person wants to complete or consolidate their learning.

44. Some young people with complex needs will primarily require on-going health and/or care support. In such circumstances it is right that these young people receive the support and care that they need via health services and/or adult care and support. For others, following time on an Apprenticeship or a Supported Internship the best option may be to leave formal education and access the support and training available to help them to secure a job through the welfare system. In these cases, maintaining an Education, Health and Care Plan would not be appropriate.
45. Finally, and reflecting the broad range of views we received from partners on this issue, the new legislation allows young people on an Apprenticeship to have an Education, Health and Care Plan.

### **Reviewing the Education, Health and Care Plan**

46. ***The Committee recommends that regulations should allow flexibility in the timing and frequency of reviews of Education, Health and Care Plans to reflect individual circumstances (Paragraph 100).***
47. Provision has been included in the Bill for regulations to make provision about circumstances in which a local authority must or may review a Plan or carry out a reassessment, including in advance of key transition points. The regulations will draw on the experience of the local pathfinders to enable sensible flexibility to meet the needs of individual children and young people whilst avoiding unnecessary bureaucracy.

### **Appeals and mediation**

48. The Committee has reflected considerable opposition to the proposed introduction of arrangements for compulsory mediation from those who submitted evidence through the pre-legislative scrutiny process. The aim of the proposals was to ensure that all avenues for resolving disagreements were thoroughly explored before decisions were made on taking appeals to the Tribunal. We wish to save families the stress of the appeal process whilst maintaining their right to register an appeal within current timescales if mediation did not yield a positive result.
49. ***The Committee recommends that the mediation proposals be changed so that it is compulsory to attend a meeting to consider mediation but not compulsory to enter it (Paragraph 116).*** I have considered the Committee's views carefully and have decided to accept its recommendation that parents and young people should be required to

consider mediation but not compelled to enter mediation if they do not wish to do so. The Bill makes provision for parents and young people to have a telephone conversation with independent mediators who will provide information about mediation and how it might help but for the parents or young people to decide whether they wish to go forward to mediation. Further detail will be included in regulations and will draw on the views of the local pathfinders.

### **Transition from statements to Education, Health and Care Plans**

50. The Committee highlights the importance of the local pathfinders in contributing views on the transition from statements to Education, Health and Care Plans. We are taking great care to ensure we take the pathfinders' views into account in developing the arrangements for making the transition from the current to the new system. The Bill makes provision for regulations to set out those arrangements and I plan to share further details of our thinking with Parliament during the passage of the Bill.

### **5. CHILDREN WITH SPECIAL EDUCATIONAL NEEDS BUT WITHOUT AN EDUCATION, HEALTH AND CARE PLAN**

51. *The Committee emphasises the importance of ensuring that those without Education, Health and Care Plans will be supported in the new system. It makes the case for greater clarity about provision to be made, particularly for pupils who currently receive support under the School Action and School Action Plus categories (Paragraph 128). The Committee recognises the importance of the Special Educational Needs Code of Practice in providing this and recommends that the Code should remain a statutory document, subject to consultation and be laid before Parliament under the negative resolution procedure (Paragraph 129). The Committee also recommends that the role and status of SENCOs be strengthened by requiring them to be teachers (Paragraph 130).*

### **Greater clarity about support**

52. The local offer will set out the support that is available for children and young people with special educational needs who do not have Education, Health and Care Plans. This will include health and social care and the provision children, young people and parents can expect from schools and colleges from their delegated budgets. The school and college funding reforms will work with the local offer to provide much greater transparency. The cooperation duties in the Bill apply to those working with children and young people with special educational needs, whether or not they have Education, Health and Care Plans. The requirement for local authorities to promote the integration of special educational provision with health and social care provision where it would promote the well-being of children and young people with special educational needs or improve the quality of special educational provision relates to all



children and young people with special educational needs. Similarly, the requirement on local authorities and clinical commissioning groups to have arrangements for planning and commissioning services for children and young people with special educational needs relates to those with and without Education, Health and Care Plans.

53. Beyond the legislation, a number of measures have been taken to improve the knowledge, skills and understanding of those working with children and young people with special educational needs, including:
- funding to secure initial teacher training placements in special schools (£1.3m in 2012 supporting 1000 placements in 2012/13);
  - funding to train newly-appointed SENCOs to Master's level (£1.5m in 2012) – over 10,000 SENCOs have been supported to obtain the National Award since 2009;
  - scholarships for teachers to undertake mainly postgraduate-level qualifications in SEN and specific impairments (£1.5m has been provided in 2012 and the scheme has supported over 600 scholarships for teachers and 237 scholarships for support staff);
  - online training resources for teachers and others in relation to the most prevalent types of special educational need, including autism, dyslexia, speech, language and communication needs and behavioural, emotional and social difficulties;
  - training resources for supporting children with the most severe and complex needs; and
  - funding clusters of post-16 providers, special schools and teaching schools to share expertise and resources, build capacity and improve local delivery and supporting the development of a new Beacon Award run by the Association of Colleges to recognise excellence in working with young people with special educational needs. £3m has been provided in 2012/13 and this will support sustainable arrangements from 2014. Around 220 schools are already committed to clusters and 16 will take a lead role across the clusters.

The report *Professionalism in Further Education*, published in October 2012 proposed that those working with young people with special educational needs should have a level 5 certificate in further education with special emphasis on foundation skills or working with students with learning difficulties or disabilities. We support this.

### **Special Educational Needs Coordinators**

54. I share the Committee's view of the important role of Special Educational Needs Coordinators. Regulations will set out the requirements of those who hold the role in schools and I intend that those regulations will maintain the current requirement for the SENCO to be a qualified teacher.



## The new 0-25 SEN Code of Practice

55. I appreciate the Committee's views about ensuring meaningful scrutiny in development of the new 0-25 Special Educational Needs Code of Practice. It is my intention for there to be wide consultation on a new draft Code, particularly as in future, the Code will apply to a broader range of institutions across the 0-25 age range. The Department has already held a number of consultative meetings with individuals and organisations, including many of those who submitted evidence to the Committee, and parents and young people. I intend to make an outline of the Code available to Parliament during the passage of the Bill and after careful consideration of the Committee's views I have decided to accept its recommendation that the Code should be laid before Parliament under the negative resolution procedure, in line with other statutory Codes.

## 6. LOCAL OFFER

### National framework

56. ***The Committee recommends that the duties applicable to Academies and Free Schools are spelt out clearly in the Bill (Paragraph 139). It also recommends that there should be minimum standards for the local offer, informed by the local pathfinders, and calls for the establishment of a national framework to ensure consistency, together with accountability measures by which they can be evaluated (Paragraph 146).***

57. I can confirm that the duties applicable to Academies and Free Schools are spelt out in the Bill. The detailed requirements for the local offer will be spelt out in regulations and I plan to share further details with Parliament during the passage of the Bill. The regulations will provide the common framework for local offers and help to ensure the consistency the Committee seeks. They will require local authorities to set out what families can expect from local services and where they have eligibility criteria and/or thresholds for accessing services, they will be expected to make those explicit. Local authorities will need to set out what services are available to support those without Education, Health and Care Plans, including what children, young people and parents can expect schools and colleges, including Academies and Free Schools, to provide from their delegated funds to support children and young people with special educational needs. They will need to set out what specialist support is available and how to access it and to give details of where parents and young people can go for information, advice and support. Provision has also been made in the revised Bill for the local offer to set out provision to help children and young people prepare for adult life, including support available to find employment, obtain accommodation and participate in society.

58. Each service will be accountable for delivering what is set out in the local offer and if families are unhappy with what they receive or what is

available they will be able to take this up with those services. The local offer will give details of how to complain about provision and about rights of appeal. Schools and colleges, along with a range of organisations including those responsible for health provision, will be required to cooperate with the local authority in developing the local offer.

59. Advice on the local offer will be provided in the Special Educational Needs Code of Practice. It will stress the importance of involving children, young people and parents in monitoring the local offer and the value of organisations such as Parent Carer Forums in this. We will continue our work with OfSTED on an improved accountability framework for the achievement of children and young people with special educational needs in the school and post-16 sectors. We will seek to reflect this work alongside the work we are doing to develop a single school based category of special educational needs. The guidance in the Code of Practice will set out what should be expected from school and college based provision for special educational needs. As the Committee notes in its report, we are enabling all schools to benefit from the highly successful Achievement for All approach through our support of the Achievement for All 3 As charity and will reflect the key features of that approach in the Code of Practice.

### **Young people and parental involvement in designing local offers**

60. ***The Committee emphasises the importance of parents and young people being fully involved in developing the local offer and recommends that they are given a clearer mandate in the legislation. In particular, the Committee recommends that Parent Carer Forums are listed as organisations that the local authority should cooperate with (Paragraph 153).***
61. The Government shares the Committee's views about the importance of involving children and young people with special educational needs and their parents in the local offer. The Bill now sets out some key principles which place involvement of children, young people and their parents at the heart of the legislation. Explicit provision has been made for regulations to set out how local authorities are to involve children and young people with special educational needs and their parents in preparing and reviewing their local offer. Parent Carer Forums are not legally constituted bodies so we cannot place statutory cooperation duties upon them in the Bill. Local authorities will wish to work with a broad range of parents and young people to ensure that their local offer reflects local need. We do not intend to specify particular organisations local authorities should work with. We are confident however, that Forums will wish to be involved in the local offer, building on the successful work they have done with local authorities to date. We intend to cover this in the advice in the Special Educational Needs Code of Practice.

62. To strengthen accountability we have made provision in the Bill for local authorities to publish both comments about their local offer received from children and young people with special educational needs and their parents and the authority's response to those comments. A power has been taken for regulations to set out how that should be done. And to further strengthen the role of children, young people and parents explicit provision has been made in the Bill for them to be consulted by local authorities when they are reviewing their local provision. This will complement the changes to the arrangements for the local offer mentioned above and improve transparency and accountability.

### **Advice and information**

63. ***The Committee recommends that the Bill make clear that advice and information to parents and carers and to young people is tailored appropriately to its audience (Paragraph 156).*** I agree that this is important but I believe that the most effective way of reinforcing this principle is through the guidance in the new 0-25 Special Educational Needs Code of Practice where it can be set in context and where advice can reflect what works in practice. I am considering further how we might best ensure that parents and young people have access to information, advice and support across education, health and social care.

## **7. EXTENDING CHOICE AND DIRECT PAYMENTS**

### **Choice of schools and colleges**

64. ***The Committee recommends that Independent Specialist Colleges and Independent Schools for those with special educational needs are added to the institutions for which young people and the parents of children with Education, Health and Care Plans can express a preference (Paragraph 164).*** I agree. The Bill now makes provision for the Secretary of State to approve individual institutions for this purpose and for a power for him to make regulations setting out the types of institutions that may be approved, criteria an institution must meet for approval, the matters for the Secretary of State to take into account in deciding whether to give or remove approval, and the publication of a list of institutions approved.

### **Personal budgets and direct payments**

65. ***Finally, the Committee recommends that lessons learned from the local pathfinders are taken fully into account when regulations are formulated on personal budgets and direct payments (Paragraph 169).*** I can give a firm assurance that this will be done and we have established an accelerated testing group of pathfinders to this end.

## **8. CONCLUSION**

66. I welcome the Committee's report. It demonstrates a widely positive response to its pre-legislative scrutiny of the draft special educational needs provisions. I welcome the Committee's support for the direction of the reforms and for the Government's ambitions to introduce legislation in 2013 so that it can be finalised by 2014.

67. I recognise it is challenging to evaluate the likely success of the legislation until more detail is provided in regulations and the revised Special Educational Needs Code of Practice. I intend to offer as much of that detail as possible during the committee stage of the Bill and the extended pathfinder programme will continue to play a central role in informing that process.

# Annex D

## Response to Joint Committee on Human Rights



**Edward Timpson MP**

Parliamentary Under Secretary of State for Children and Families

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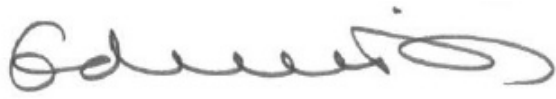
### **REFORM OF THE OFFICE OF CHILDREN'S COMMISSIONER (OCC): REPORT FOLLOWING PRE-LEGISLATIVE SCRUTINY**

Today we have published the Children and Families Bill which will improve services for vulnerable children and support strong families. It contains the OCC provisions together with provisions on adoption, looked after children, family justice, special educational needs, childcare, shared parental leave and flexible working. Alongside the Bill we are publishing an explanatory command paper *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* which includes this letter in Annex D. I have attached a copy of the command paper to this letter and it can also be accessed at: [www.education.gov.uk/childrenandfamiliesbill](http://www.education.gov.uk/childrenandfamiliesbill)

I am writing further to my letter of 19 December, to thank you again for the detailed consideration that the Committee gave to the draft OCC clauses and to provide a substantive reply to each of the Committee's recommendations.

I have given very careful consideration to all of the Committee's recommendations and my conclusions are set out in the attached annex, which follows the same order as in your report. It also responds to the outstanding points from your letter of 12 September.

I will also write to you shortly enclosing a summary statement of our considerations on relevant ECHR and UNCRC issues.

A handwritten signature in black ink, appearing to read 'Edward Timpson', with a stylized flourish at the end.

**Edward Timpson MP**  
**Parliamentary Under Secretary of State for Children and Families**

## **Annex 1: Response to JCHR Recommendations**

### Mandate

1 I welcome the Committee's support for the change we are proposing to make to the Commissioner's primary function, which will give him/her a statutory remit to promote and protect children's rights.

2 The Committee recommended that the Bill should expressly define the rights of children for the purpose of defining the Commissioner's primary function; and that those rights should include the UNCRC, the UNCRC optional protocols, and any other international treaties or domestic laws in so far as they promote or protect children's rights.

3 I agree with the Committee's view that the draft clauses should make clear that all references to the UNCRC include the Optional Protocols that have been ratified by the UK Government. However, with respect to the Committee's other recommendations, I would note the following:

- firstly, defining children's rights expressly by reference to the UNCRC would not be appropriate in my view given that the UNCRC has not been directly incorporated into UK law. It is also the case that the UNCRC contains a mixture of rights and aspirations that are often imprecisely defined, and I believe this is another reason why the "must have regard to" formulation is a better approach.
- secondly, Article 41 of the UNCRC already recognises that where other rights exist in domestic law or international law applicable to that State, which afford children greater protection than the UNCRC, these should apply. I therefore do not believe that it is necessary or appropriate to define other rights specifically on the face of the Bill. In practice, this will give the Commissioner greater flexibility in how he or she interprets children's rights and therefore greater flexibility in deciding on which particular issues to focus.

4 I welcome the Committee's support for our general principle that, as far as possible, the Commissioner should have as free a reign as possible in deciding his or her own priorities and activities. However, I agree with the Committee that an exception should be made in the case of the Commissioner's role in undertaking periodic stocktakes on the state of children's rights/implementation of the UNCRC. I agree that this monitoring role is sufficiently important and distinct from the overall function of promoting and protecting children's rights to make it appropriate to include it explicitly in the list of specific functions. It is important to note, however, that reporting formally to the UN Committee on implementation of the UNCRC will remain the responsibility of the State party.

5 The Committee also recommended that new section 2 should be amended to make clear that the Commissioner's primary function includes promoting awareness of children's rights (as well as their views and interests). I do not believe that such clarification is needed in respect of promoting



awareness of children's rights, as this is implicit within the new primary function. This will, however, be made clear in the explanatory notes to the Bill. The proposed legislation retains the Commissioner's role of promoting awareness of children's views and interests (the Commissioner's primary function under the existing legislation), making it part of the new primary function (new section 2(2)). This is because I believe it is important that children's views continue to inform any recommendations that the Commissioner makes.

6 The Committee recommended that the Commissioner's title be amended to 'The Commissioner for Children and Young People'. There are pros and cons to adding "young people" into the title. I recognise that some young people do not see themselves as children and that the Commissioners for Northern Ireland and Scotland include the term "young people" in their titles. At the same time, it has been pointed out to me that in some circumstances it is beneficial for under-18s to be classified as children – for example, where it is important that they are not treated the same as adults. This issue arose in particular in the context of the Commissioner's inquiry into child sexual exploitation. It is also the case that Children's Commissioner is the term generally used by the UN and internationally to describe the post. On balance, I am not persuaded that there are compelling arguments for making this change and therefore propose to leave the Commissioner's title as it is. I know this decision is supported by the current Children's Commissioner.

### Powers

7 The Committee sought assurances that the Commissioner's powers and remit would enable him or her to carry out all of the activities listed in paragraph 19 of UN General Comment No. 2. I have reviewed the list and can confirm that the draft legislation gives the Commissioner the powers to undertake the key activities that would be expected of a human rights institution. There are, however, a small number of activities that I do not think are appropriate; or where, due to the terminology that the UN Committee uses, the Commissioner's role will not be fully compliant:

- the legislation does not provide for the Commissioner to perform the mediation/conciliation role envisaged in paragraph 19(p);
- I do not think it is appropriate for the Commissioner to take on the inspection role envisaged in paragraph 19(s) as it is for the relevant inspectorates to undertake this function; and
- the Commissioner does not have powers of determination, so the role of the Commissioner in respect of paragraph 19(f) will be to 'encourage' rather than 'ensure'.

8 It should also be noted that while there is nothing to prevent the Commissioner assisting in the formulation of programmes for teaching about children's rights (paragraph 19(n)) or in delivering children's rights education

(paragraph 19 (o)), it is not intended that the OCC should take on a local delivery role in this regard, as it is not resourced to take on this function.

9 I welcome the Committee's conclusion that it would be unrealistic for the Children's Commissioner to take on the role of an ombudsperson with jurisdiction to hear individual complaints (as set out in paragraph 15 of UN General Comment No. 2) without a substantial increase in resources. As the Committee recognises, this is not an option in the current economic climate.

10 The Committee expresses the view that some of the wording of new section 2(3)(a) is weak in comparison to the changes to the Commissioner's primary function, and recommended a different formulation. I support the intention behind the proposed amendment to section 2(3)(a) and have asked Parliamentary Counsel to consider how best to amend the draft provision to address these concerns in the version of the Bill which is introduced before Parliament. I also agree that the Commissioner's ability to carry out investigations should be made clearer on the face of the Bill and have asked Parliamentary Counsel to consider how best to amend the relevant provisions accordingly.

11 The Committee recommended that the Commissioner's remit should include the ability to initiate or intervene in legal proceedings. It is the case that the Commissioner can in any event undertake this activity where it has sufficient interest in the matter before the courts and indeed has done so on a number of occasions – for example, intervening in court cases on: age disputes involving unaccompanied asylum seeking children; the use of restraint in youth custody; and the welfare of children in immigration detention centres. We consider that, particularly given the proposed change to the Commissioner's primary function, the Commissioner would continue to have a sufficient interest in relation to any matters before the courts which relate to children's rights.

12 Accordingly, our view is that there is no need to give the Commissioner an explicit statutory power in this regard. Moreover, I am conscious that if we did so, it could create an expectation and pressure on the Commissioner to take legal action in relation to children's rights issues that were brought to his or her attention. In his report, John Dunford gave an example of another Commissioner using such a power and incurring significant costs to the taxpayer in the process. I would not want to make any change that increased the Commissioner's risk or liability in this respect.

13 The Committee recommended that the provisions that relate to the Commissioner's ability to request information, and the requirements on public bodies to respond to the Commissioner's recommendations, should apply to private providers delivering contracted-out services. I share this view. I would not wish to differentiate between services provided directly by central or local government, and those that are contracted out to a private provider. We will ask Parliamentary Counsel to address this point in the draft clauses for Introduction.

14 The Committee asked for an explanation of how the exemption for private dwellings - which applies to the Commissioner's powers of entry - would operate in respect of services delivered from private dwellings, such as childminding and fostering services. The power of entry does not extend to private dwellings, and as such would not enable the Commissioner to enter private homes where fostering services or childminding is provided. However, our view is that it would potentially cover, for example, children's homes or boarding schools as these are not private dwellings (except those areas where staff have their private residences).

15 I believe this represents an appropriate balance between protecting the rights of individuals from unnecessary intrusion by the State and ensuring that the Commissioner has the powers that he or she needs to carry out the role effectively. I am also mindful that there are other bodies which can exercise a power of entry in relation to private dwellings in certain circumstances (such as local authority social workers and the police), and am therefore satisfied that it is not necessary to extend the Commissioner's power of entry to cover private dwellings.

#### Independence and Accountability

16 I note the Committee's view that the Non-Departmental Public Body (NDPB) model is not appropriate for human rights institutions. However, having looked at the alternative options, I am not persuaded that another model would be more appropriate.

17 I am confident that the legislation will give the Commissioner proper independence from Government. It will allow the Commissioner to investigate any children's rights issue he or she chooses and to make any recommendation that he or she deems appropriate.

18 The Commissioner also has significant powers: to request information relevant to his or her investigations; to enter premises (other than a private dwellings) for the purpose of interviewing children and observing standards of care; and to require that public bodies respond in writing to the Commissioner's recommendations within a timescale that they determine. We are removing the power that currently enables the Secretary of State to direct the Commissioner to undertake an inquiry and the obligation on the Commissioner to consult the Secretary of State before he or she launches an inquiry. The Commissioner's independence is therefore, in my view, not compromised by its relationship to the Department for Education (DfE) – and in many ways is strengthened by it.

19 There are, as the Committee has pointed out, some constraints on the OCC as a result of it being an NDPB. These constraints have not been imposed on OCC in particular, in an attempt to curb its independence. They are measures that have been applied to all NDPBs and the wider public sector in light of the pressure on all public funds. They are a pragmatic response to the prevailing economic conditions and, as such, may change over time.

20 The Committee asked that a draft framework agreement between DfE and OCC – that reflects how the relationship will operate under the new arrangements – be provided for the Bill’s committee stage. I will ask my officials to review the framework in light of the legislative proposals and the Committee’s comments and will make a copy of the resulting document available for scrutiny by Committee.

21 Having taken all of the points in paragraphs 17 to 20 above into account, I do not agree with the Committee’s recommendation that it is necessary to include a separate provision in the legislation that states that the OCC should be independent, as this will be secured through the changes to the legislation.

22 On funding, our intention is that the OCC will be effective and have impact. In order to do so, it will need sufficient resources. But the amount the OCC receives will always need to be in the context of the prevailing economic circumstances and competing priorities for public funding. On that basis, I do not believe the OCC’s budget is a matter on which we should legislate. I share the Committee’s view that the OCC should have its own premises and my officials are liaising with officials in Cabinet Office on issues relating to the OCC’s website as I appreciate the importance of this matter.

23 The Committee recommended that the legislation should make clear that the Commissioner is not required to respond to requests for advice from a Secretary of State. The draft legislation removes the existing provision that enables the Secretary of State to direct the Commissioner to undertake an inquiry. In my view, removing that provision makes it clear that any requests for advice from a Secretary of State would be at the discretion of the Commissioner and I do not think this needs to be stated explicitly on the face of the Bill.

24 The Committee also recommended that any advice provided by the Commissioner to the Government should automatically be made public. While I support the principle of accountability and transparency, I do not believe that it will always necessarily be in the public interest for the Commissioner to publish his or her advice to the Government. For example, sometimes that advice may relate to issues affecting individuals that may put them at greater risk, or advice may be given informally on new ideas or options that may never see the light of day. Of course, such advice would be subject to the usual principles regarding disclosure and freedom of information.

25 I welcome the Committee’s intention to hold an evidence session each year, to consider the Commissioner’s annual report to Parliament. This scrutiny will, I believe, lead to further improvements in the OCC’s effectiveness and impact. I also support the principle of increasing the Commissioner’s interaction with and accountability to Parliament. I will consider further with Parliamentary Counsel whether and how best to specify a reference to Parliament so as to make it clear that the Commissioner can

where appropriate engage directly with Parliament (in addition to the obligation to lay its annual report before Parliament). For reasons related to Parliamentary privilege, it may be preferable to indicate that this is the position in the explanatory notes, rather than in the draft clauses.

26 The Committee recommended that the Government should make a commitment to hold an annual debate on children's rights in Parliament. While I am not against this proposal, I am unable personally to make a commitment on behalf of the Government to hold one. This matter will need to be pursued separately with the Parliamentary Business Managers.

27 The Committee has asked for clarification on Parliament's involvement in the Commissioner's appointment and dismissal. I am very much in favour of Parliament being involved in the Commissioner's appointment. I would welcome the Committee's involvement in agreeing the job description/person specification for the post and holding a pre-appointment hearing with the preferred candidate prior to their formal appointment. However, ultimately it will be for the Secretary of State to decide who to appoint, having considered carefully any recommendations from the Committee. The process for deciding which public appointments should be subject to pre-appointment hearings is through agreement between the Government and the Liaison Committee. The current list of agreed posts – which includes the Children's Commissioner – is currently being updated, but it is my expectation that the Children's Commissioner will continue to be on the list in future.

28 On dismissal, I believe that the existing provisions are appropriate. The specified circumstances in which the Secretary of State could dismiss the Commissioner represent a high threshold for dismissal. A dismissal would potentially be subject to legal challenge and a decision could be overturned if it were found to have been made for inappropriate or unjustified reasons. It is also the case that reasons for dismissal may be confidential and therefore it may not be appropriate for the reasons for dismissal to be disclosed.

29 Finally, the Committee recommended that the draft clauses allowing the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill. I agree with the Committee's view, especially in light of the representations made by the four UK Commissioners, that we should not pursue this option. These provisions will be removed from the OCC clauses before the Bill is introduced.

#### Other changes

30 As well as considering the Committee's recommendations, I have also been reflecting on the evidence provided to the Committee by children's rights organisations. Many of the points made by those organisations were included in the Committee's report, but not all. In particular, the Children's Rights Alliance for England made the point that the requirement on the Secretary of State to involve children in the Commissioner's appointment was limited. We have asked Parliamentary Counsel to consider whether it would be possible to amend paragraph 3(2) of Schedule 1 to the Children Act 2004, so as to

require the Secretary of State to take 'reasonable steps' to involve children in the appointment of the Children's Commissioner.

31 Finally, the Committee's report asked that my reply include answers to any additional questions that were raised in your letter of 12 September. In general, those questions have been answered above. The one outstanding question was why we had opted for a single, six-year term – rather than the normal seven years for single-term appointments. This was an issue we consulted on, with the prevailing view being that a single, six-year term was the most appropriate choice. There are pros and cons for different terms, but on balance, I feel that six years is short enough to ensure that the Commissioner remains fresh in the role but long enough to avoid the upheaval of frequent appointment processes. The change in term also means that the Commissioner's recruitment will run on a different cycle to that of government elections. I should clarify that the draft clauses also provide that a Commissioner may only be appointed for one term.



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