



**The Government Response
to the
Constitutional Affairs
Select Committee Report:
Family Justice: the operation of
the family courts**



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Presented to Parliament
by the
Secretary of State for Constitutional Affairs and Lord Chancellor
by Command of Her Majesty
March 2005

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¹ HC 116-I, HC 116-II 2004-05

Introduction

1. The Government is grateful to the Constitutional Affairs Select Committee (CASC), and all those who gave evidence, whether written or oral, for the time and effort they gave to exploring the operation of the family courts. We warmly welcome the Report and the contribution it makes to raising awareness of the problems facing parents encountering relationship breakdown and their effects on their children.
2. The Department for Constitutional Affairs (DCA) and Her Majesty's Courts Service² (HMCS), an agency of the DCA, work closely with others involved in the family justice system – in particular, the Department for Education and Skills (DfES), the Home Office, the judiciary, the Legal Services Commission (LSC) and the Children and Family Court Advisory and Support Service (CAFCASS). The Department of Trade and Industry has also been closely involved in our work in this area.
3. The Committee primarily focused its Inquiry on the area of private law³, reaching a number of conclusions, and making recommendations to which we respond in detail below. We acknowledge the validity of many of the concerns expressed by the Committee. At the same time, we are grateful for the Committee's recognition that progress is being made in a number of areas.
4. The Government views the family court system as a key component of the range of services that support families experiencing relationship breakdown. We already have a considerable programme of work underway which is targeted at helping families who currently turn to the courts for help in resolving their disagreements, as well as those parents who work out arrangements for themselves.
5. In July 2004, the Government published a Consultation Paper⁴ on parental separation. The Response Paper⁵, *Next Steps*, was published in January of this year. It sets out a clear agenda for action with specific proposals. In February 2005, we published the Draft Children (Contact) and Adoption Bill⁶, which is undergoing pre-legislative scrutiny. We are now awaiting the report of the Joint Scrutiny Committee.
6. We have already taken steps to address the issues surrounding domestic abuse and safety; in particular, clarifying the legal definition of harm and introducing new "Gateway" forms which ask specific questions that will help to identify safety issues at the outset of proceedings.
7. The Government has acknowledged the practical problems faced by parties to family proceedings involving children, who wish to seek help and support. Last

² From 1st April 2005 the administration of all courts will be unified in a single body to be known as Her Majesty's Courts Service (HMCS)

³ Private law cases are those brought by private individuals, generally in connection with divorce, parental separation or arrangements for children following parental separation.

⁴ Parental Separation: Children's Needs and Parents' Responsibilities – CM 6273 (July 2004)

⁵ Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps – CM 6452 (January 2005)

⁶ CM 6462 (February 2005)

year the Government tabled an enabling amendment to the then Children Bill⁷ to allow the issue of disclosure to be addressed through rules of court. A Consultation Paper⁸ was subsequently published seeking views on the possible content of those rules. The Government is committed to ensuring that the rules of court are in place during summer 2005.

8. The Government is working actively with HMCS, the judiciary, CAFCASS and others to implement the changes set out in *Next Steps*, including the progressive rollout of in-court conciliation and a number of pilot schemes: the Family Resolutions Pilot Project; the Collaborative Law Project; a telephone helpline; development of the Family Advice and Information Service project. The progress of these changes and pilot schemes will be closely monitored, and where successful, we will be looking to roll them out across England and Wales, as rapidly as resources permit.

⁷ Section 62 Children Act 2004 – coming into force on 12th April 2005

⁸ Disclosure of information in family proceedings involving children – CP 37/04

Summary

9. The following pages give a detailed response to the Committee's recommendations and, as well as highlighting those areas where the Government has already initiated action, they include the Government's views on other recommendations. There are a number of initiatives underway including scrutiny of the Draft Children (Contact) and Adoption Bill, pilot schemes such as the Family Resolutions Pilot Project, and a Consultation Paper seeking public views on disclosure of information.
10. *Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps*, published on 18th January 2005, gave a clear and detailed statement of our strategy for changes to the way private law cases and children's contact with their parents are dealt with. In particular, *Next Steps* makes clear our commitment both to the continued delivery of tried and tested schemes such as mediation and in-court conciliation, and our willingness to test innovative approaches such as collaborative law.
11. We welcome the Committee's view that children involved in family proceedings should not be subjected to prescriptive arrangements for contact with their parents. We agree with the Committee that, provided it is safe to do so and in their best interests, children should have regular, good quality contact with both parents. This is already well established in case law. The Committee's recommendation that the welfare checklist be amended will receive ongoing consideration, although it is important to consider the potential impact on public law⁹ of such a change. Furthermore, we are conscious of the interest of the Joint Scrutiny Committee on this matter, and we are awaiting that Committee's report.
12. The Government has acknowledged that the range of measures available to the courts to facilitate contact and to enforce contact orders where a resident parent frustrates a non-resident parent's contact with a child is insufficient. We have published our proposals for giving the courts more effective measures for facilitation and enforcement in the Draft Children (Contact) and Adoption Bill which, as has already been noted in this response, is undergoing pre-legislative scrutiny.
13. We have worked closely with the new Board and the new Chief Executive of CAF/CASS to address the problems that the Committee considered in 2003¹⁰. CAF/CASS has a committed and effective management team in place that, with the increased resources that we have already made available, will be able to lead CAF/CASS through the major change process on which it has now embarked. CAF/CASS received an increase in funding of £12m in 2004-05, compared to 2003-04, and we have agreed to maintain this increased level into 2005-06. CAF/CASS has been working closely with the judiciary and has issued a joint memorandum¹¹ with the President of the Family Division giving advice to the courts and CAF/CASS practitioners on the role of reports.

⁹ Public law cases are those usually brought by local authorities or the NSPCC, and include matters such as care, supervision and emergency protection orders

¹⁰ HC 614-I, HC 614-II (2003)

¹¹ Memorandum from the President of the Family Division and the Chief Executive of CAF/CASS – 9th March 2005

14. We believe firmly that mediation has a key role to play in dealing with the problems surrounding the breakdown of relationships. To that end, we have been working closely with the Legal Services Commission and the judiciary, to give the strongest encouragement to parents involved in relationship breakdown to see mediation as a positive and effective way of resolving these situations. We do not believe that it is appropriate to force people into mediation. Mediation is only effective where both parties enter the process freely and willingly.
15. The Government has long recognised that delay in reaching a resolution can have the effect of benefiting the resident parent and thus weaken the position of the non-resident parent. The Government is pleased that the Committee acknowledges that, although this can give the impression of bias against fathers as they form the majority of non-resident parents, the courts are not gender biased. We are taking steps to remove as many cases as possible from the adversarial arena of the courts through initiatives such as mediation. We have given the President's Private Law Programme our full support as it marks the strength of the judiciary's commitment to take all necessary steps to prevent unnecessary or tactical delay. It will also tackle other problems with the process that the Committee noted: improving judicial continuity; moving as quickly as possible to dispute resolution.
16. The Committee highlights concerns over transparency in the family court system. As a result, in part, of concern expressed by Members of Parliament, legislation has now been amended. The Government has recently consulted on allowing greater disclosure of information in family proceedings in certain circumstances. These changes will help parties to family proceedings in seeking advice and support from others such as Members of Parliament. They will also enable a greater range of people to give help to parties without the risk of committing contempt of court or a criminal offence.

Detailed Response to Specific Recommendations

Enforcement

All of the Government's proposals now contained in the Draft Children (Contact) and Adoption Bill must be considered in the light of the five outcomes set out for children's services¹² and the policies designed to achieve those aims. (para 24)¹³

The range of enforcement methods to be used should not harm the interests of the children involved in the case; for example, imprisonment of a parent would generally harm the interests of a child, whereas the imposition of a community service order might not. We would expect that punishment would only be appropriate in cases of wilful refusal to obey the court and as a last resort in exceptional cases. (para 113)

17. The Government welcomes the Committee's comments and agrees that the Draft Children (Contact) and Adoption Bill needs to be considered in the wider context of the Every Child Matters agenda and the five outcomes set out in the Children Act 2004.
18. However, the Draft Children (Contact) and Adoption Bill is undergoing pre-legislative scrutiny, and the report of the Joint Scrutiny Committee is due to be published by 26 May. We would not want to pre-empt that Committee's findings at this stage, and look forward to receiving their comments.

Safety issues

... The Department should follow up the introduction of "Gateway" forms by examining the proportion of cases where the courts conclude that violent or abusive conduct has actually occurred. (para 129)

... A wider range of options such as children's centres and extended schools would provide more opportunities for contact and supervised contact. There should be greater focus on creative and cost effective solutions, such as those involving grandparents. (para 131)

19. The Government is clear that contact should only take place where it is safe to do so, and that concerns about safety should be fully explored by the courts before decisions about contact are made.

¹² Section 10 Children Act 2004

¹³ The paragraphs numbers refer to the CASC Report: Family Justice: the operation of the family courts

20. The new Gateway forms to identify safety issues, which were introduced in January 2005, will be evaluated independently by June 2006. The information from these forms will be analysed to establish whether the objectives of the new procedures have been achieved. This should improve our evidential base and inform future policy and operational improvements.
21. We agree that the focus should be on creative and cost effective solutions. We will develop options for a wider range of services to support contact, which will include services delivered through child contact centres. We will look also at the possibilities offered by extended schools and children's centres. We know that members of the wider family can play a valuable role in helping agreement to be reached, both in families whose circumstances become the subject of court proceedings, and the much greater number of families who do not make court applications.
22. Funding of £7.5m is to be made available to support child contact services for 2006-07 and 2007-08. This is in addition to £3.5m allocated for the period 2003-04 to 2005-06, part of which was used to support an expansion in the number of supervised child contact centres in England and to improve capacity in the sector. The DfES is currently considering how best to utilise the additional resources that will be available in 2006-07 and 2007-08.

CAFCASS

One major cause of delay is reliance on long reports from CAFCASS in too many cases. ... There is scope for a much more focused CAFCASS investigation which need not culminate in an over-detailed report. Judges and CAFCASS, together, need to consider more effective and less cumbersome alternatives to the full-blown enquiry. ... (para 83)

... We believe the emphasis should be placed on overcoming problems through CAFCASS intervention and education programmes, rather than by the traditional means of enforcing court orders through a system of punishments. This will involve CAFCASS monitoring the way in which court orders are carried out and fully engaging in questions of enforcement where necessary. ... (para 111)

... Given the problems suffered by CAFCASS, on which we reported in 2003¹⁴, it is essential that the Government provides CAFCASS with sufficient resources to enable the success of its new role. ... (para 122)

23. The Government agrees with the thrust of these recommendations, which echo those within *Next Steps*. CAFCASS plans to move away from report writing to a stronger focus on problem solving and working with families to achieve resolutions that are in the child's best interests. Where reports are necessary, however, CAFCASS is committed to providing shorter reports that focus on the key issues at stake while ensuring the best interests of the child are taken into

¹⁴ HC 614 (2003)

account. As mentioned earlier, the President of the Family Division has issued a joint memorandum with the Chief Executive of CAFCASS that includes advice on reports to judges and all CAFCASS practitioners and managers.

24. The role of CAFCASS in facilitating and monitoring contact orders and, where appropriate, their enforcement, is being addressed through measures in the Draft Children (Contact) and Adoption Bill. As explained under "Enforcement" above, this draft Bill is undergoing pre-legislative scrutiny, and we would not want to pre-empt the report of the joint committee that is considering the Bill in detail. That Committee is due to report by 26th May. Very broadly, the role of CAFCASS in supporting court ordered contact, which is underpinned by the provisions of the draft Bill, is one aspect of the changing role of CAFCASS towards a more active problem-solving approach.
25. We are not aware that the Board members resigned as a result of the Committee's earlier Report in 2003 into the operation of CAFCASS. We can confirm that the former Chief Executive did not resign.
26. The Government believes that it is providing CAFCASS with sufficient resources for the new service. In 2004-05, the resource budget for CAFCASS was increased by £12m to £107m and the Government has now decided to maintain funding for CAFCASS at £107m for 2005-06. We will work with CAFCASS to monitor the position as CAFCASS extends its service during the year.

Compulsion to consider mediation

... Where it is safe to do so (and subject to the court's discretion), we believe that all parties should be required to attend a preliminary meeting with a mediator on the basis described in section 13(1) Family Law Act 1996. (para 94)

... We emphasise the need for adequate resources to be dedicated to the pilot project [FRPP] and that the results be published at the earliest opportunity. It is disappointing that the potential of the "Florida Model" remains untested in the UK. (para 103)

27. The Government is taking forward a number of initiatives to strongly encourage people to use family mediation and other alternatives to court proceedings. As *Next Steps* proposes, we intend to encourage greater use of mediation, and we will consider changes to rules of court or Practice Directions. We do not believe, however, that a highly prescriptive requirement that all parties attend a meeting to consider the benefits of mediation will necessarily be effective in all cases in diverting a larger number of disputes away from the courts. For some, such a requirement may simply increase delay in reaching a conclusion.
28. This approach of referral to an information meeting about mediation, or including information about mediation, may be appropriate in some cases. It is our intention to allow the courts to direct parties in contact cases to attend such meetings through the Draft Children (Contact) and Adoption Bill, which is

undergoing pre-legislative scrutiny. Any decision to refer parties to such sessions will be governed by the principle that the welfare of the child is paramount.

29. The Government is piloting the Family Resolutions Pilot Project (FRPP) from September 2004, in Brighton, Sunderland and Inner London. A full evaluation of the pilot is being carried out with the outcome expected to be published by March 2006. The outcome of the evaluation will inform the subsequent decision about whether to roll the project out nationally.
30. The Early Interventions (EIP) proposals were taken into account when the FRPP was designed, with relevant aspects of the experience of other jurisdictions, including Florida's, informing the design of the FRPP. In particular, the aspects of compulsion and prescription that are features of some other jurisdictions were felt not to be suitable in this jurisdiction.

Amendment of the welfare checklist

We recommend the insertion of a statement in section 1(3) of the Children Act 1989 (the Welfare Checklist) indicating that the courts should have regard to the importance of sustaining a relationship between the children and a non-resident parent. (para 47)

A change should be made in the law so that grandparents are granted the right to apply to the court for contact with their grandchildren, without having to apply for permission. (para 64)

31. The Committee noted that "*the present law already regards it to be in a child's best interest to sustain a full relationship with both parents, unless there is a good reason to the contrary.*" The Government believes that the principles contained in the Children Act 1989, together with case law, already support the principle of a continuing relationship with both parents where it is in the best interests of the child to do so.
32. We are keen to emphasise our support for that principle, and to signal that support wherever it is appropriate. We will consider the Committee's recommendation to amend s1(3) of the Children Act 1989, normally referred to as the welfare checklist, though there are some difficulties with the proposed approach. Amending the welfare checklist would not change the legal position as regards a parent seeking contact with a child in a private law case. But such an amendment would apply to many other types of cases where it may not be necessary or appropriate, including private law specific issue and prohibited steps cases, and public law cases for care and supervision orders. We are aware also that the Committee carrying out pre-legislative scrutiny of the Draft Children (Contact) and Adoption Bill has been interested in this, and we will consider the matter further in the light of its report.
33. The Government recognises and values the important role that wider family members, including grandparents, can play in children's lives. For instance, many grandparents are already involved with the care of their grandchildren,

and most children see their grandparents as important figures in their lives, who frequently have a stabilising influence. The steps we are taking to improve contact between parents are also intended to enable children to have continuing relationships with other family members, including grandparents.

34. Whilst grandparents may seek permission from the court to apply for contact, the Government believes that it is usually more fruitful for parents and grandparents to work co-operatively to ensure that children have ongoing contact, whenever it is in their best interests.
35. The Government will consider whether any changes to guidance and secondary legislation might be necessary to ensure that the process of an application for permission to apply for a contact order is as simple as possible. We will also consider the Committee's recommendations on grandparents as part of that review.

Shared parenting and the views of children

Many agreements settled outside court amount, in effect, to shared parenting arrangements; these are usually the best course. We support agreements in which parents spell out how they will share parental responsibility. (para 59)

The concept of a pre-determined statutory template for the division of time a child is to spend with each parent is not one that we favour. The welfare of the individual child should be the paramount consideration in each case. ... An arbitrary "template" imposed on all families, whatever the needs of the child, would relegate the welfare of the individual children to a secondary position. (para 60)

... There has to be provision for the views of the children to be taken into account, especially as they grow older. (para 61)

36. The Government welcomes and shares the views of the Committee on the unsatisfactory nature of a pre-determined template for the division of a child's time. We do not see any need to change the current legal position that the welfare of the child is the court's paramount consideration when determining a question with regard to that child's upbringing. The current edition of the Parenting Plan highlights the types of problems parents need to be aware of when they plan how to make arrangements work.
37. A revised draft Parenting Plan was published for consultation on 18th January 2005 and the consultation closes on 7th April. The revised edition will be published following consideration of consultation responses. It will be made widely available, including through mediation and advice centres, extended schools, children's centres and solicitors' offices.
38. The Government agrees that whatever arrangements are made, provision must be focused on meeting the needs of children. Parents and families should be supported to enable them to develop contact arrangements that are practicable

and flexible enough to adapt to children's changing needs, particularly as they grow older.

39. The Government agrees with the Committee that a simplistic approach that splits a child's time 50:50 between the two parents is not in the best interests of most children. In many separated families, such arrangements simply would not work for practical reasons such as living arrangements, work commitments or educational arrangements. Additionally, enforcing such a split of time would not be what many children want and could have a damaging impact on some of them.

Delay

... We recommend the following: first, there should be a clear and unequivocal commitment to move as many cases as possible from the court system altogether; secondly, parents who do apply to the court should be given every encouragement and opportunity to resolve their differences through negotiation; and third, when there is no viable alternative to court resolution, the courts should be responsible for ensuring that the case is effectively managed and that delays are kept to a minimum. (para 54)

... We find it hard to believe that tactical delay is not sometimes used to the advantage of the resident parents. ... (para 70)

The courts themselves have a continuing duty to ensure that parties and their legal advisers do not unnecessarily delay proceedings. Children's interests are frequently harmed by such delay. Legal advisers have a professional obligation to avoid unnecessary delay. (para 71)

... It is essential that the Government provides sufficient resources to enable the Private Law Programme to succeed. (para 82)

40. The Government understands that delay in reaching a resolution can have the effect of establishing a "*status quo*" which may be of benefit to the resident parent and serve to weaken the position of the non-resident parent who has applied for contact. We agree with the Committee that, as the majority of non-resident parents are fathers, this can give the impression of gender bias against fathers by the courts. As we have explained above, we are taking steps to remove as many cases as possible from the adversarial arena of the courts and encourage parties to consider alternatives, such as mediation or collaborative law.
41. The courts take every possible step to prevent unnecessary or tactical delay. In particular, members of the judiciary try to ensure that legal practitioners do not attempt to introduce tactical delay. The President of the Family Division, when appearing before the Committee, said: "*... if there is the slightest view by the judiciary that someone is trying to spin it out, then [...] you are going to stop it ...*" The Government fully endorses this stance.

42. The Government recognises that delay in the court system is a significant issue and steps have already been taken to address delay in public law proceedings. This approach has now been extended to private law proceedings with the introduction of the Private Law Programme. The President of the Family Division issued the Private Law Framework on 21st July 2004. This was followed by the issue of specific guidance on 18th January 2005. The Private Law Programme applies to magistrates' courts (family proceedings courts), county courts and the High Court, and will be phased in across England and Wales. A monitoring and reporting system is now being developed which will include changes to the HMCS IT systems. Additionally, a cross-departmental strategy group, chaired jointly by Ministers from DCA and DfES, will monitor closely the success of the programme.

Judicial resources

... We think that more effort should be made to recruit specialist judges who actively want to do family work; family work should not simply be an extra burden for those who wish to become judges. (para 77)

43. Judges are not generally recruited to particular jurisdictions. There are a small number of single jurisdiction judges, for example civil-only recorders, but, in the main, it is necessary for judges to be able to sit in a number of jurisdictions for business flexibility purposes. The Government is currently looking at the number of available judges, particularly in the fee-paid offices, with a view to ensuring both that we have the right mix of judges for current business purposes and also that we can more accurately forecast future judicial resource needs. The forecasting process will, in future, need to take more account of the different needs of different jurisdictions.
44. The Government is aware that there is a range of opinions among the senior judiciary on the benefits of judicial specialisation. However, we intend to consider the possibility of recruiting judges to a specific jurisdiction as part of our work towards improving the forecasting of future judicial needs. It will, of course, be necessary to have established robust mechanisms for forecasting prior to the establishment of the Judicial Appointments Commission in April 2006 to enable the Commission to operate effectively.

Transparency

A greater degree of transparency is required in the family courts. An obvious move would be to allow the press and public into the family courts under appropriate reporting restrictions, and subject to the judge's discretion to exclude the public. Anonymised judgments should normally be delivered in public unless the judge in question specifically chooses to make an order to the contrary. ... (para 144)

45. The Government recognises that there is a growing consensus that the family courts lack transparency and that this lays the system open to unfounded accusations of bias and injustice. It also believes that there is a need for a better understanding of the way the system works and in particular, the way decisions are reached. As the situation currently stands, the system is open to criticism, and the privacy of proceedings fuels the criticism further because accusations cannot be easily refuted. There is a clear need to ensure that these accusations can readily be rebutted through greater openness of the family courts.
46. While some moves towards increased transparency are favoured by the senior judiciary, the Committee and others, any changes would need to be carefully balanced between the need to ensure the continued protection through anonymity of the family, particularly children and other vulnerable people; and the wider public interest. The rules governing the magistrates', county courts and the High Court will be reviewed as part of the wider harmonisation work being undertaken by the Family Procedure Rule Committee.
47. The interests of the children involved in family proceedings are, and must remain, paramount. We will not take any steps to increase transparency in the family courts unless we are certain that children are protected.

Disclosure

... We think that the simplest approach is that the restriction on the discussion of their cases by parents should be removed entirely (unless a specific order is made to the contrary). The press should continue to be restricted to publishing those matters which have been made public by the court. (para 148)

48. The Committee has welcomed the legislative changes brought forward in the Children Act 2004 to deal with the publication of information in family proceedings. Section 62 will come into force on 12th April 2005. This section restricts the criminal offence in s97(2) of the Children Act 1989 so that publication of information identifying, or likely to identify, a child (his school or his address) as being involved in family proceedings is only a criminal offence when it is made to the general public, or any section of the general public. This will enable people involved in proceedings to identify their child (his school or address) as being involved in proceedings to other individuals. Section 62 Children Act 2004 also amends various statutes to make clear that it would not be a contempt of court to publish information where rules of court allow such a publication to take place.
49. The issue of what information and documents may be published automatically by whom and to who by virtue of rules of court is the subject of a public consultation exercise. The Government gave a commitment to consult during the passage of the then Children Bill in 2004. The consultation ended on March 23rd and we are now considering the nature of the responses. As with the transparency of the court process, there is a need to balance the legitimate access to information and documents for specific purposes, against the need to ensure the appropriate level of privacy for children and other vulnerable people

involved in the court proceedings, particularly bearing in mind the very private and personal nature of some of the information in question.

50. As part of the consultation, the Government has also considered how best to ensure that proper constraints on the disclosure of information do not impede the carrying out of legitimate academic research. The Government intends to lay the new rules during the summer.

Family Justice strategy

... A coherent statement of the Government's overall strategy is needed combining established initiatives, such as mediation, with experimental approaches. ... (Conclusions, para 33)

51. The Consultation Paper on relationship breakdown published in July 2004 set out the Government's proposals for dealing with these issues. We have now published *Next Steps*, which sets out our strategic agenda for action, drawing together improvements to established services with pilots of other innovative schemes covering many of these issues. We also published, in February 2005, the Draft Children (Contact) and Adoption Bill which is undergoing pre-legislative scrutiny. The Government believes that, taken together, the latter two documents provide a clear statement of our current strategy. However, we will keep under review the need to issue further updates to this strategy.



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