Ministry of JUSTICE

Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts

October 2011

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Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

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Overview

1. The Government welcomes the Justice Select Committee's Report on the Operation of the Family Courts. We fully recognise the need for reform and the Family Justice Review is undertaking a comprehensive examination of the current operation of family justice in England and Wales. It is due to report before the end of the year.

2. Much of the analysis in the Select Committee's report chimes with the emerging findings from the Review, and is similar in its diagnosis of underlying issues and areas for improvement in the current system. However, it would be wrong at this stage to pre-empt the findings of the Family Justice Review. The Government awaits the final report of the Review, to which we will respond in due course.

3. There are, however, areas in which the Government has already started work to address some of the main themes identified in the Committee's Report, in particular promoting greater use of mediation, and work to improve the quality of data on the performance of the family justice system. This Response provides further information on the work currently underway, the progress we have already made and the further work planned.

4. The following sections of this Response set out the Government's detailed responses to each of the Committee's recommendations and conclusions.

The current system and the case for change

Overview of the current system

Comparing the number of cases between years should be a simple exercise that would allow the Ministry of Justice to at least begin to assess the impact of policy and legislative changes on the family court system. We are therefore surprised that neither the current nor the previous administration has acted to provide a robust evidence base for the formation of policy. (Paragraph 13)

Data

This Committee and its predecessor committees have repeatedly highlighted the need for robust data gathering to allow the development of evidence-based policy. We were extremely disappointed by the serious gaps in data that we and the Family Justice Review found during our inquiries. It is a concern to us that major changes to the system are being contemplated when there are such gaps in the evidence base. The Ministry of Justice, in particular Her Majesty's Courts and Tribunals Service, and the Department for Education must begin to improve data collation now; without such evidence, reform of the family justice system could be fatally undermined before it has even begun. We think the Ministry of Justice should take the lead on data collation, and we wish to see a report on progress by the end of 2011. (Paragraph 27)

5. We acknowledge that there are significant limitations with the current administrative data systems, as highlighted by the Family Justice Review, although there have been some recent improvements. For example, high level statistics for all Family Proceedings Courts (FPCs) have been collected since 2007 and in 2010 there was an upgrade to Her Majesty's Courts and Tribunal Service's (HMCTS) case management system for family proceedings (Familyman SUPS) which means all FPCs now use FamilyMan, and family justice data is now more complete and based on a single source. In 2010, Ministry of Justice (MoJ) also introduced a new compilation methodology for public law and private law applications statistics which includes processes designed to remove the double counting of cases transferred between courts.

6. In 2010, the UK Statistics Authority (UKSA) assessed MoJ's published court activity statistics, following which they were designated as "National Statistics" meaning they comply with the statutory Code of Practice for Official Statistics. As part of the assessment, users and the wider public were invited to comment on the statistics. No specific concerns about the accuracy of the family court high level summary statistics were highlighted either by UKSA or other contributors.

7. In addition to improving the administrative data, we have also undertaken bespoke research projects in support of the Family Justice Review, due to be published alongside the review, and are developing models to help predict the volume of family cases, as well as the administrative and judicial time associated with processing cases. We are also working with HMCTS to improve fee recovery calculations.

8. MoJ and the Department for Education (DfE) will carefully consider the recommendations of the Family Justice Review in light of the available evidence, and where we accept their recommendations we will prepare and publish Impact Assessments and Equality Impact Assessments setting out the evidential base, as well as highlighting where evidence is limited.

9. MoJ has started to develop a Family Justice Evidence and Analysis Strategy, in consultation with DfE, Cafcass and HMCTS, which will further address some of the issues identified by the Committee and Family Justice Review. This will include our approach to improving data availability and quality, as well as the wider research evidence base, and will address some of the weaknesses. A progress report will be included as part of the Government response to the Family Justice Review.

The Family Justice Review Interim Report

The focus of the interim report

We welcome the work of Sir David Norgrove and the Family Justice Panel. While the need for reform of the family justice system is clear, the evidence that we have heard on the most appropriate structure for the family justice system is limited. We therefore remain neutral as to the Panel's detailed proposals on the creation of a Family Justice Service, while taking a close interest in responses to the consultation. (Paragraph 35)

We welcome the focus of the Interim Report on the needs of the child. However, we are disappointed that the Interim Report did not look in more detail at how the family courts might cope with an increase in the number of litigants in person resulting from the Government's proposed changes to legal aid. We hope that the Panel can address this issue in more detail in its final report. (Paragraph 36)

10. The Government broadly accepts the issues covered in these recommendations, and we will be providing a detailed response following the publication of the Family Justice Review's final recommendations in November 2011. The issue of litigants in person, and the impact an increase may have on the conduct and outcome of proceedings is considered further at paragraph 61.

Costs

We agree with Ministers that there are potential savings from implementing the proposals in the Interim Report. We are concerned that the Family Justice Review has been unable to cost its proposals and we look to Ministers to ensure the Review has all the information it needs fully to inform its final report. (Paragraph 44)

The Government's response to the Interim Report

Undertaking changes to legal aid and implementing the recommendations of the Family Justice Review at the same time will be difficult. The Department must look carefully at the interactions between the two sets of proposals, and the cumulative impact on the different elements of the family justice system. The Department must monitor the situation carefully and intervene quickly if problems emerge. The Committee will return to this matter in the light of early experience of the legal aid changes. (Paragraph 46)

11. Work is already underway to improve costs data, including modelling work, as set out in paragraph 7 above. MoJ is working with DfE, Cafcass and HMCTS to improve the basis on which we can estimate the costs, the potential savings and any wider benefits of reform. This information will be used as the basis for the Impact Assessments which we will produce at the time of the Government response.

12. We accept the Committee's observations about implementing changes to legal aid alongside those to the family justice system. We will look carefully at the interactions and the combined effects of both sets of reforms when developing implementation plans for the Family Justice Review's recommendations. It should be noted that some of the Government's legal aid changes will be introduced in advance of the implementation of the recommendations of the Family Justice Review.

Underpinning principles

Our evidence

The evidence shows that courts rarely deny contact between child and parent. Most applications that result in no contact are abandoned by the applicant parent. In our view this reflects the reality of the cases that come before the court. In the majority of cases it will be in a child's best interests to have meaningful contact with both parents. In cases where a parent constitutes a danger to his or her child, either directly or through failing to protect them from others, the courts must remain free to refuse, or specify the arrangements for, contact in order to protect the child. (Paragraph 65)

The Australian experience of introducing a shared parenting presumption shows that it does not contribute to children's well-being, which, in our view, must be the paramount aim and objective of the family courts. We believe therefore that the best interests of the child should remain the sole test applied by the courts to any decision on the welfare of children in the family justice system. (Paragraph 66)

13. We fully recognise the importance of the issues discussed in these recommendations, and we will consider the Committee's views in parallel with the Family Justice Review's conclusions. In relation to contact orders, it should be noted that currently under the provisions of the Children Act 1989 the court can refuse any application made for an order. Furthermore the court is required at all times to ensure that the welfare of the child is its paramount consideration. Whilst the Committee is right that it is rare for the court to refuse an application or make an order for no contact, such orders or refusals are made when this is appropriate. For example, Judicial and Court Statistics 2010[1] shows that a total of 300 applications for contact were refused and in a further 840 applications no order was made.

[1] See: http://www.justice.gov.uk/publications/statistics-and-data/courts-and-sentencing/judicial-annual.htm

The Family Justice Panel's recommendations

We do not see any value in inserting a legislative statement reinforcing the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from harm, into the Children Act 1989. Such a statement is not intended to change the current position as the law already acknowledges that a meaningful, engaged relationship with both parents is generally in a child's best interests. The Panel has concluded that the family court system is allowing contact in the right cases; in our view nothing should be done that could undermine the paramount importance of the welfare of the child. (Paragraph 71)

We welcome the intention behind the Family Justice Panel's recommendation that there be a statutory six-month time limit on care and supervision proceedings, but question, on the evidence we have heard about delay, whether such a time limit would be feasible, even with the creation of a Family Justice Service. The average public law case currently takes over a year, despite the court's obligation to make decisions with as little delay as possible. It is not envisaged that the Family Justice Service will have greater resources than the current system: the aim is that it will use rather less. In these circumstances it may be that a statutory six-month time limit is unenforceable. (Paragraph 73)

14. The question of shared parenting is one which is being considered by the Family Justice Review. The terms of reference for the review include consideration of how the positive involvement of both parents following separation should be promoted, and we await the Review's final recommendations.

15. We acknowledge that delays in public law cases are at unacceptable levels, and that such delay is not in the interests of the children involved. We await publication of the Family Justice Review, and are keen to see the Panel's recommendations for reducing delay.

16. As an interim measure, MoJ has already established a network of Local Performance Improvement Groups (based around care centres – 42 in total across England) to identify and initiate locally based solutions to address the problem of delay. A National Performance Partnership has also been established to provide strategic oversight and identify and spread best practice. MoJ and DfE will continue to work closely with the President of the Family Division to ensure the reasons for delay are tackled effectively.

17. In 2011-12, HMCTS again sustained the allocation of 4,000 extra family sitting days, repeating the measure first taken in 2010-11. Maintaining this increased allocation continues to support the positive trend of increasing the overall number of disposals in care proceedings cases and reducing the backlog of older cases. During 2010–11, the courts disposed of 30% more care proceedings cases than in 2009–10.

Mediation and other means of preventing cases from reaching court

Number of cases reaching court

Cafcass, the Education Minister, and the MoJ all told us that it is not the case that too many care cases are coming before the courts. However, because of problems with the statistics it is not possible to tell if the proportion of cases in which the courts agree with the local authorities' assessment has changed. We note that in the past it has been necessary to commission research to calculate the proportion of applications resulting in various types of orders. There may be a need for further such research in future if there appears to be a significant shift in the proportion of cases in which the courts reject the assessments of local authorities. (Paragraph 81)

18. Research supports the assertion that cases are rarely brought to court without proper cause, and that the threshold for care is met in the vast majority of cases.[2] Familyman SUPS does provide basic information on what order the local authority applied for, and what order was granted by the court. However, further research into the specific reasons why the final order made in particular cases may not have been the order the local authority was originally seeking may be merited. MoJ has already undertaken a case file review study which will provide some information on the extent to which final orders differ from the original application. This will be published alongside the final report of the Family Justice Review. Options for future Government funded research will be considered as the implementation plan for the Family Justice Review recommendations is developed.

Family Group Conferences

Family Group Conferences are a way to enable parents to make necessary changes in order to retain care of their children, or to enable children to remain with the extended family. In cases where it is not possible for the child to remain with the family, they can help reduce delays once the case reaches court. Given the high costs of court cases, legal aid and the high costs of keeping children in care, the potential saving from even a small reduction in the number of care cases is considerable. We were very impressed by the account of Family Group Conferences in Liverpool. It is a matter of regret that a service with an apparent 100% success rate is being cut back. (Paragraph 88)

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[2] Cafcass study (unpublished).

19. Family Group Conferences (FGCs) are planning meetings designed to identify those in the wider family who may be able to support the parents or offer to care for the children. They may be used at different stages of Local Authority involvement with the family and so are not solely used to identify alternatives to formal care proceedings. The use of FGCs varies and is a matter for individual local authorities. The Family Justice Review's Interim Report suggested they can be useful and we will consider what further evidence-gathering on their effectiveness might be needed after the Review has finalised its recommendations.

Other means of diverting public law cases from court

We agree with the Interim Report that further research is required on a range of measures which could potentially help parents to make changes which could resolve public law cases without taking children into care, or without proceedings. We are particularly interested in the wider use of "letters before proceedings". However, the Department has no data on how often they are used, what the barriers are to their wider use, or how effective they are. Given that receiving a letter before proceedings confers entitlement to non-means-tested legal aid we find this lack of any evidence base particularly surprising. We recommend that the Government should commission such research. (Paragraph 91)

20. The need for a Letter before Proceedings, or the circumstances in which one may not be necessary, is set out in the Children Act 1989 statutory guidance along with a template letter. However, anecdotal evidence suggests that such letters are used sporadically and that different local authorities have different approaches. Although the Legal Services Commission (LSC) has reported that the uptake of free pre-proceedings legal advice has been relatively low and variable across the country, MoJ recently published a leaflet and full form versions of a 'parents pack' for use by local authorities to encourage the take-up of pre-proceedings advice by parents. Research on the pre-proceedings process, which will include the use of Letters before Proceedings, is currently being undertaken by Professor Judith Masson at the University of Bristol (funded by the Economic and Social Research Council) and the results are expected in summer 2012. Options for future Government funded research will be considered as the implementation plan for the Family Justice Review recommendations is developed.

Number of cases reaching court

We received evidence that a large number of private law cases that currently reach court involve families with multiple problems. A high percentage of cases involve domestic violence or other child protection concerns. Care must be taken that any measures to divert cases from

court only seek to do so where that is in the best interests of the child. This will be more complex than simply screening for domestic violence. (Paragraph 97)

21. We agree with the Committee's conclusions and agree that suitable measures should be in place to safeguard vulnerable groups. Only a small proportion of separating parents look to court to resolve their disputes about contact and the Government recognises that these are often the families with the most complex problems.[3] In taking forward reforms to family justice, the Government will take full account of the need to safeguard children.

22. We accept that mediation may not be suitable in every case. Legal aid will remain available for cases where there is evidence of domestic violence and cases where a child is at risk of abuse to safeguard vulnerable groups. Currently 71% of clients who attempt publicly funded mediation reach a full or partial agreement.[4] The Pre-application protocol for Mediation Information and Assessment meetings does not require people to mediate, but to attend, separately to the other party, a meeting during which they learn about mediation, and their case is assessed for suitability. Where domestic violence or child protection issues are present, clients will either be exempt from the need to consider mediation or they are likely to be found unsuitable for mediation following an assessment by a mediator. If a case has been assessed as suitable, it is for the parties to decide whether they want to go ahead and mediate their dispute.

Signposting

More support for separating parents could reduce the number of cases reaching court and reduce the negative impact of separation on children. However, there is currently a lack of evidence as to which early interventions are most effective. There is also the risk that some of the numerous cases where one parent has no contact could be diverted into court. We are not clear to what extent the proposals in Strengthening Families are proposing a referral and signposting service or a service which itself provides additional help. We call on the Government to clarify this. (Paragraph 106)

Currently only one in ten separating parents resolves their disputes in court. The evidence we received is that a large number of these parents have multiple problems. This means that they are unlikely to be diverted from court by anything other than intensive intervention. In addition,

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[3] See: Hunt J and Macleod A (2008) *Outcomes of applications to court for contact orders after parental separation or divorce*. Briefing Note. Oxford Centre for Family Law and Policy Department of Social Policy and Social Work, University of Oxford.

[4] Legal Services Commission, management information.

there are many cases involving safeguarding concerns which should not be diverted from court. Some parents could be diverted from court by low-level intervention, but the Government should be realistic about the impact of any proposals on the number of private law cases reaching court. (Paragraph 107)

23. The proposals in the Green Paper: *Strengthening families, promoting parental responsibility: the future of child maintenance*[5] set out the Government's vision for reform of the child maintenance system, including proposals for joining up the information and support available to separating and separated parents to make it easier for parents to access help following separation.

24. MoJ is currently working with the Department for Work and Pensions (DWP), the Child Maintenance and Enforcement Commission (CMEC) and the Department for Education (DfE) to ensure our policies and operational services are synchronised as far as possible, particularly in the context of the programme of reform arising from the child maintenance reform plans and the Family Justice Review. We hope that this work will result over time in a more co-ordinated approach to support services to families which can help separating parents make their own arrangements in the best interests of their children.

25. DWP has appointed a Steering Group, made up of academics and experts from the voluntary and community sector, to help shape the proposals for integrating family support services outlined in the Green Paper published in January. The Steering Group will assist in building a robust evidence base about what support is most effective in helping separating and separated parents. We will continue to work with DWP to ensure that we are closely linked into the work of their expert Steering Group and to ensure our own plans following the Family Justice Review are suitably aligned with DWP's work.

26. The Government recognises the complex nature of many of those cases which come to court, but we believe that our plans to help parents reach their own agreements are realistic, in particular about the volumes of cases we expect to be diverted, and those which will need to be brought before the courts. Further details are set out at paragraphs 38 and 39.

27. We recognise that court processes can be emotionally and financially draining for those involved. However, research[6] has questioned whether those who make court applications necessarily view their disputes as having been 'resolved' through the court process, even though the courts do determine the outcome of applications.

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[5] See: http://www.dwp.gov.uk/consultations/2011/strengthening-families.shtml

[6] Trinder, L. (2008) Conciliation, the Private Law Programme and children's wellbeing: Two steps forward, one step back? *Family Law*, 38, 338-342

28. For this reason, it is the Government's intention to support parents in reaching agreements themselves which are sustainable in the long term and beneficial to the child and parents. Families should be aware of alternative dispute resolution as an option. Increasing their awareness and understanding of mediation as an alternative to court may help them to avoid a long drawn out court battle.

29. We agree there is a lack of robust evidence on which early interventions are effective and for whom. Options for future Government funded research into this will be considered as the implementation plan for the Family Justice Review recommendations is developed.

Resources

The wider funding to accompany any signposting service will be crucial. There is no point in referring parents to services which have no capacity to cope with additional demand. However, we know that resources are scarce and that it is unrealistic to make demands for widespread increased Government spending in the current climate. We heard during our previous inquiry into legal aid that the Big Society Bank will be a potential source of capital for charities and social enterprises, by means of social impact bonds and other financial products. We call on the Government to confirm that such bodies which provide early intervention for families which need assistance would potentially be eligible for such capital and to ensure that those bodies understand how they can become involved. We also think that the Government should consider whether the payment-by-results principle which it is championing elsewhere might be applicable here, with financial incentives available for organisations which have a successful impact providing effective support for families. Our predecessor Committee's report on Justice Reinvestment made the case for more funding to be spent on early intervention, with consequential reductions in the need for expensive prison spaces at a later date; we support that approach as a longer-term aspiration for criminal justice policy. (Paragraph 111)

30. The Government agrees that it is important to improve awareness of opportunities for voluntary organisations to access funding. We also agree that payment by results can be an effective means of making sure that public funding is utilised with optimum effect. To introduce such a system effectively at the present time would require a mature market for mediation services. This is currently not the case, as providers are in a period of growth and there are competing priorities to be addressed, such as ensuring standards of service whilst building capacity. We do believe that in the future it may be possible to introduce a payment by results approach, provided that it does not increase burdens upon services.

31. Support from the Big Society Bank - now renamed Big Society Capital group (BSC) – will aim to help social enterprises, charities and voluntary organisations access the investment they need. BSC will be a 'social investment wholesaler', which means that it will provide finance to social investment intermediary organisations which give financial or other support to frontline social sector organisations. BSC was launched on 29 July 2011 but will only be capitalised and become operational once state aid approval from the European Commission has been secured and it has been authorised by the Financial Services Authority. It is envisaged that this will be by the end of April 2012. BSC will not be allowed according to legislation (set out in the Dormant Bank and Building Society Accounts Act 2008) to invest directly in frontline organisations as this is the role of the intermediaries. It will however invest in and support the growth of the intermediaries so that they are better able to provide frontline social sector organisations with the appropriate and affordable finance that they need. Frontline social sector organisations, such as those providing early intervention for families, which need assistance will be able to apply to social investment intermediary organisations for investment and other support. BSC will publish details of social investment intermediary bodies that it invests in. Frontline organisations will be able to approach social investment intermediaries for investment as appropriate.

Mediation

We broadly welcome the Practice Direction. The previous system, where people on legal aid had to consider mediation but those who could afford to pay their own fees did not, was patently unfair. The Practice Direction will ensure that all parties have considered mediation, which will reduce the burden on the courts. We also welcome the fact that the Practice Direction is not limited to mediation but includes other forms of dispute resolution. (Paragraph 118)

We note that the Practice Direction uses a definition of domestic violence similar to that in the legal aid Green Paper. In its response to the consultation on the Green Paper the Government adopted a broader definition and encompassed safeguarding concerns. We recommend that the Practice Direction is changed accordingly. (Paragraph 119)

32. We welcome the committee's endorsement of the Pre-application protocol. We envisage that there may be a need to revise the pre-application protocol to take account of the recommendations of the Family Justice Review. We are also receiving feedback from mediators and operational staff on how the pre-application protocol could be further improved.

33. At the same time, we will consider whether we need to update the Practice Direction to take into account the changes to the availability of legal aid, which are due to commence in October 2012.

Training

Poor privately-funded mediation is bad for parents (who have to pay for it), children (who are impacted by the delays it causes and by agreements which do not consider their needs) and also for the tax payer. While the tax payer does not have to pay for the mediation, the public purse bears the cost when mediation fails and cases reach court that could have been resolved by better trained mediators. We are very concerned that there are currently no minimum qualifications for privately-funded mediators. We agree with the Interim Report and recommend that privately-funded mediators should have to meet the current requirements for legally aided mediators set by the Legal Services Commission. (Paragraph 126)

34. The Family Mediation Council (FMC) has been working towards ensuring that the qualifications of those carrying out the work are of an acceptable standard. The FMC's members are the UK's national family mediation organisations, all of which ensure their family mediator members work to agreed minimum professional and training standards. The FMC can be described as being 'self-regulatory', developing its own rules of performance, which it also monitors and enforces. The FMC was set up with the aim of harmonising standards for family mediation, with its members maintaining registers of family mediator members who meet those standards. As a result of the introduction of the pre-application protocol, the FMC has been considering how the work can be managed if there is a shortage of capacity in the short-term due to a surge in demand for mediation services. On 15 February, the FMC agreed the minimum requirements for mediators carrying out information and assessment meetings. This is a transitional arrangement for accreditation of mediators which must be reviewed after twelve months. We understand that the FMC intend that there will eventually be a single accreditation available that will allow those who have it to undertake both publicly funded and privately funded mediation.

Potential for greater use of mediation

Voice of the child

Hearing the voice of the child during mediation is vital. It is also important to ensure that agreements do not break down. We welcome that fact that LSC mediators need qualifications to meet children. However, we are concerned by evidence that some mediators do not see children. Children should be able to meet mediators or otherwise be involved in mediation and have their views taken into account, where they so wish. In cases where children have not been involved in the mediation process, steps must be taken by the mediator to ensure that the agreement is in their best interests, and that they are kept informed about what is happening. (Paragraph 151)

There is clear evidence that mediation can be effective, with a high proportion of parties reaching agreements or narrowing the issues in dispute. This avoids the use of the courts, with considerable savings for legal aid, Cafcass and the courts service. It can also be faster and less traumatic for families. We therefore share the Government's belief that there is scope for greater use of mediation. However, in developing its policies on the use of mediation, the Government needs to recognise that: some types of mediation appear more effective than others, and it is imperative that scarce public funds are used to best effect; and mediators need to be professionally trained and know how to recognise and handle sensitive cases where there are accusations of domestic violence or safeguarding concerns. We call on the MoJ, in its response to this Report, or sooner, to spell out how those principles will inform the greater use of mediation which it is seeking to encourage. (Paragraph 152)

35. We accept the Committee's recommendation on the importance of ensuring that the voice of the child is heard during mediation and we will continue to work with the FMC to make sure that all mediators are made aware of the benefits of listening to the child. There are already a number of provisions in place to ensure that children's voices are taken into account during mediation. It is currently against mediators' code of practice to support a one-sided resolution, or to ignore the best interests of the child. The system also promotes the involvement of the child. If the parents and the child and the mediator agree, children can speak to the mediator themselves. In addition, some mediators are specially trained to talk to children. For example, mediators within National Family Mediation have to be trained specifically to work with children and be qualified mediators before they can apply to train to undertake child inclusive work. All mediators are checked to enhanced level with the Criminal Records Bureau.

36. We welcome the Committee's support for the Government's plans to make greater use of mediation in family matters.

37. We agree that public funding should be used to provide high quality mediation services and there are measures in place to ensure mediators providing services to individuals in receipt of public funding have sufficient professional training and are able to recognise and handle effectively sensitive cases where there are safeguarding concerns. There are currently two tiers of standards that apply to becoming a recognised family mediator. Firstly there is a standard which is recognised by the FMC which allows mediators to undertake privately funded mediations and secondly a higher threshold outlined in the Legal Service Commission (LSC) Mediation Quality Mark Standard which is required for mediators to undertake publicly funded family work. In order to work with clients who qualify for public funding (legal aid) a mediator, in addition to the standards set out above, must also be competence assessed through one of the following two routes:

- the mediator will need to complete a portfolio, demonstrating their skills as a mediator, which requires them to have mediated in at least five cases that have reached agreement. The portfolio will provide evidence of their skills and the practices they have adopted and will be assessed by the FMC; or
- the mediator will need to obtain Practitioner membership of the Law Society Family Mediation Panel.

Proposed changes to legal aid

We are concerned that the Government may not have budgeted for enough additional mediations in its legal aid proposals. With more than 200,000 people losing eligibility for legal help and representation, the Department's prediction that only 10,000 extra mediations will be required seems low (albeit more realistic than their initial estimate of 3,300). We welcome the Government's assurance that it will pay for mediation for all eligible people. However, to help manage the Department's budget we call on it to re-examine the figures and bring forward more realistic estimates. (Paragraph 156)

38. Family Legal Help currently assists people with a range of family breakup issues, and people will approach providers for help at different stages of their problems. Roughly half of the reduction in Legal Help will therefore include cases where mediation would be unnecessary because of the nature of the problem (stand-alone divorce, nullity, wills or name changes for example), or where mediation would not be needed because the parties have mended their relationship. In thinking about mediation volumes, it is also important to remember that one case represents two people. Before people can enter mediation, they must be suitable and agree to conduct mediation. Assuming the current level of suitability but an increase in people's willingness to enter mediation leads the Government to its figure of approximately 10,000 extra cases. This should be viewed in the context of the current volume of around 15,000 mediations provided.

39. The Government accepts that forecasting is not an exact science. The likely additional costs of mediation (£10 million) should however be considered in the context of a legal aid budget that currently stands at over £2 billion per annum, and within which particular elements are not ring-fenced.

Cafcass

Delays

While the exact figures are disputed, it is clear that Cafcass has made substantial progress in reducing the number of unallocated and duty allocated cases in public and private law. We welcome this progress and hope that it can be maintained. It continues to be a cause for concern, however, that Cafcass was unable to reassure us that, in the 221 cases allocated to managers, those managers were working actively on all those cases. We call on Cafcass to measure and monitor the amount of work carried out by managers in cases allocated to them in order to ensure that genuine progress is made and that these cases are not simply moved off the unallocated list to make those performance statistics look more acceptable. We expect Cafcass to report back to us on this point at the earliest reasonable opportunity. (Paragraph 173)

40. Cafcass regularly monitors the amount of casework being undertaken by all of its staff including, in particular, managers (the latest figures are set out at paragraph 47 below). It is not Cafcass's practice to leave cases unallocated for any longer than the minimum possible length of time. Similarly, it is Cafcass's policy that cases should only be substantially allocated to those staff who are available to undertake the necessary work in a timely way. Duty allocated cases may be held by staff (including managers) where it is not possible, or necessary, to allocate them on a substantive basis.

41. The definitions of 'unallocated'; 'duty allocated'; and 'allocated are as follows:

    Unallocated – brand new cases only.

    Duty allocated – cases where Cafcass will both react to incoming information and also take pro-active steps at appropriate points in time to review the status, needs and level of priority of the case.

    Allocated – (substantive or fully allocated) cases where the named worker will both react to incoming information and take appropriate pro-active steps and, in addition, will undertake the work that is set out in the case plan, and also in accordance with the court's requests and directions. A substantive allocation includes the production of the case plan and any required reports for the case. A substantive allocation also includes allocation to an appointment of Children's Guardian by the court in s31 care, supervision and other relevant Public Law cases.

42. The Committee expressed concern that a small proportion of cases (currently 0.7% of the total number of open, substantively allocated cases) is allocated to managers. The Government wishes to point out that these cases include those held by managers who have recently been promoted

and who have continued to work on their existing cases to ensure that practitioner continuity is maintained. It is also often valuable for managers to retain a small caseload in order to maintain a direct connection with frontline practice. A further small tranche of cases will often be held on a duty basis by managers before being fully allocated to a named practitioner. Managers undertake the triage of these cases, which is an important first step once the case has been received.

We share the concerns of the Committee of Public Accounts about the ability of Cafcass to sustain its recent progress given that there is no sign of a future fall in the number of care applications. We are also concerned about the ability of Cafcass to cope with a range of potential future stresses, including any restructuring of itself or of the court system, any additional delays in the court system, and cuts to local authority budgets (which could lead to more poorly prepared cases reaching court).

43. The Government recognises that Cafcass has continued to absorb further significant increases in public law work in particular and that it is changing its working practices further in order to continue to be able to deal with all incoming work. In doing so, it has demonstrated its resilience as an organisation. Nevertheless, the Government accepts that this continuing pressure on resources poses a strategic risk to Cafcass's performance.

44. Both the Government and Cafcass will continue to keep the situation under regular review, and will reappraise it when the final report of the Family Justice Review is available. Cafcass's Chief Executive has quarterly meetings with the Parliamentary Under-Secretary of State for Children and Families; in addition there are regular meetings between senior Departmental officials and Cafcass. Departmental officials also meet monthly with the Cafcass management team.

45. The Department also receives monthly performance reports from Cafcass demonstrating its performance against the agreed Key Performance Indicators (KPIs) which are:

- KPI 1 (Public Law): 97 % of the public law workload should be allocated when taken as a snapshot.
- KPI 2 (Private Law): 97 % of the private law workload should be allocated when taken as a snapshot.
- KPI 3 (Safeguarding and promoting welfare): The quality of practice in safeguarding is rated overall as satisfactory or above in more than 97% of cases.
- KPI 4 (Public Law) Cafcass will allocate (on an ongoing, not a duty basis) all care cases by CMC (Case Management Conference), measured as 45 calendar days from application date, in 97% of cases.

- KPI 7 (Private Law): Cafcass should provide at least 97% of private law reports to court within the agreed filing times, for:
  - multiple issue section 7 reports;
  - single issue section 7 reports;
  - risk assessment section 7 reports; and
  - wishes & feelings section 7 reports.

46. Performance against these indicators is published in Cafcass's Annual Report.[7]

Management

We are puzzled and concerned by Cafcass's continued aversion to the use of self employed guardians, especially when the amount it spends on agency social workers has more than doubled in a year. Self-employed guardians are cheaper than agency staff and no more expensive than directly employed staff. At the same time they offer greater flexibility, and their expertise is valued by the judiciary. Cafcass should be making considerably greater use of self-employed staff, particularly in the geographical areas where it has difficulty recruiting. (Paragraph 180)

47. The majority of self-employed contractors (SECs) are London-based and Cafcass continues to offer work to them. SECs currently hold 1,240 care cases – about 10% of Cafcass's care workload. In other parts of the country where SECs are not available or have not chosen to take on the work offered to them, Cafcass has employed agency staff to help tackle backlogs on a time-limited basis; this is partly as a result of the additional one-off funding it received from Government during 2010-11. This increased agency spend in 2010-11 will be reduced in 2011-12. However, Cafcass will continue to use a mixed economy of staff, including employed staff, SECs and agency staff, in order to keep pace with demand and maintain its current levels of allocation. It is for Cafcass to determine the most appropriate staffing structure to fulfil its statutory functions, taking account of resource constraints.

48. The Government notes the Committee's concern and agrees that employed staff are best able to undertake the full range of Cafcass work, while other staff are less flexible. For example, agency staff, whose assignments with Cafcass are time-limited, are generally unsuitable to work as children's guardians in care cases, the average duration of which is more than a year. However, self-employed contractors are generally

[7] See: http://www.cafcass.gov.uk/news/2011/2010-11_annual_report.aspx

unwilling to deal with short term pieces of private law casework which are, in numerical terms, by far the most common type of Cafcass case.

Proposed changes to the family justice system in the Interim Report will, if implemented, make demands on Cafcass in terms of change management. It will be crucial for management to deliver that change in ways which support the staff (and self employed and agency workers) to deliver the necessary services for children. The recent experience of Cafcass managing staff, communicating with stakeholders, and the production of the very imperfect draft Operating Manual all indicate that Cafcass management needs urgently to take steps to improve the way they communicate with staff and with others working in the family justice system. (Paragraph 185)

49. The Government agrees that careful and measured change management is pivotal to the successful implementation of the changes that may flow from the recommendations of the Family Justice Review. The recently (July 2011) completed MoJ/DfE survey of the impact of the President's Interim Guidance and the September 2010 'Agreement' provided a clear, positive endorsement of the improved level of communications between Cafcass and its partners. A copy of the survey has been published alongside this Government response.[8]

50. The Operating Manual continues to be developed as a draft, which takes full account of the perspectives offered by the Justice Committee (see paragraph 55 below for further information about the Operating Manual).

Whilst we recognise the need for Cafcass to be a managed service and for its staff to be supported, the appointment of experienced social workers could justify a lighter touch in management, allowing professional staff more discretion about the way they carry out their role than the detailed and process driven Operating Manual would suggest. This is the future for social workers Professor Munro has set out in her report. Cafcass should look at the lessons that it can learn from her report and adopt Professor Munro's proposed approach. (Paragraph 186)

51. The Government agrees that Cafcass should look closely at the Government's response to the Munro report with a view to applying the steps being taken by Government to its specialist family court social work service, to the fullest extent possible. Cafcass has indicated that it intends to continue its policy of appointing only experienced social workers to Family Court Adviser posts.

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[8] http://www.justice.gov.uk/publications/corporate-reports/moj/index.htm

Service Cafcass provides to children

The entire family justice system should be focused on the best interests of the child. Cafcass as an organisation is not. We accept that Cafcass has had to make difficult decisions in order to reduce delays and the number of unallocated and duty allocated cases. However, in order to make progress Cafcass has had to offer a "safe minimum" service, and the amount of time that Cafcass workers currently spend with children is unacceptable in the long term. Cafcass needs to give its workers the opportunity to do what they want to do: spend more time with children. This will involve a change in management culture, and the wholesale re-writing of the draft Operating Manual to focus on identifying and meeting the needs of individual children. Cafcass will also have to re-examine its staff's workload. The current median workload may well be too high to enable Cafcass workers to spend enough time with children. This should not be done at the expense of letting delays escalate, however. There is no doubt that some of the time spent in managing the system could be redeployed to spending more time with children. (Paragraph 199)

52. The Government agrees with the Committee that the child's best interests must always be the focus of family justice. Cafcass is seeking to operate as a child-focused service by ensuring that all of the children to whom it provides services receive the optimum level of service that can be provided within the limits of its available budgets. In managing its resources, it must strike a balance between 'management of the system' and direct casework activity. The 'substantial progress' in tackling backlogs, which the Committee recognises, has been achieved by the combined application of managerial and casework effort, and against the background of continuing increases in the volume of care cases.

53. The Government shares the Committee's concern about rising caseloads which are evident across the social care landscape. Cafcass is working with its trade unions to reach a new workloads agreement using a weighting system, in which different case stages attract a points score, based on the amount of work that has to be undertaken. This is a transparent system in which the workload and capacity of each individual is discussed in supervision. However, as a result of the surge in cases, Cafcass has adopted a proportionate model of working to allow it to absorb greater demand. Cafcass practitioners are now carrying higher numbers of cases than in the past but they are not routinely expected to undertake some of the discretionary work (such as attending finding of fact hearings) which has previously been undertaken.

54. Cafcass faces a huge challenge in seeking to keep both the number of unallocated cases, and the caseloads of staff, at acceptable levels, particularly in light of the continuing high number of care applications and a limited budget. The Committee's report recognises these constraints.

55. The Government notes the Committee's comments about Cafcass's draft Operating Manual. Cafcass has consulted widely with staff on the Manual and is using this feedback to develop the final version. The development of such a manual has been welcomed by Cafcass's staff, who have requested clear and concise guidance on its work. It is Cafcass's aim that the Operating Manual should also serve as a transparent and user-friendly document for service users and stakeholders, outlining the level of service which the organisation is able to provide within its current resources. It will be seeking to ensure that the final Manual consolidates and simplifies many of its policies, thereby reducing the bureaucratic burden on staff.

The case for major change

We agree with the Interim Report that Cafcass should be made part of the proposed new Family Justice Service. However, we believe that in itself, this will not be enough. It needs to be the first step in a series of reforms designed to transform Cafcass into a less process-driven, more child-focused, and integral part of the family justice system. (Paragraph 206)

We call on the Family Justice Review to address directly the detailed future structure of Cafcass in its final report. We were interested in the suggestions we heard in oral evidence about the development of a wider range of providers, together with a more localised service (perhaps linked to the proposed new Local Family Justice Boards). Any future proposals will have to take into account that Cafcass operates a cash limited system and has to be able to deliver a timely and consistent service to all children, regardless of changes in the volume of cases, over which it does not have control. (Paragraph 207)

56. The Government will consider carefully the Family Justice Review's final recommendations when they are published. In the meantime, Cafcass is continuing to take steps to reduce its bureaucracy and paperwork to the safe minimum level for its professional function. It has already responded to earlier criticisms by simplifying many of its policies and processes. For example, MoJ's recent survey[9] showed that local agreements between Cafcass and the judiciary had led to improvements in case management and joint working.

[9] See footnote 8 above.

57. Cafcass has made considerable strides working with HMCTS in reducing the time taken to process court applications prior to the First Hearing Dispute Resolution Appointment (FHDRA) in private law cases. The time taken to turn around Level 1 police checks has also reduced considerably, from 16.7 working days in March 2011 to 6.0 working days in August 2011[10] demonstrating effective integrated working between Cafcass, the courts and the police. These are steps which all need to be taken urgently, regardless of the establishment of a new Family Justice Service, as a result of the operational pressure facing the whole system.

58. The Government agrees with the Committee that future proposals for the structuring of the family justice system will need to take account of the constraints within which Cafcass operates. Cafcass has made steady progress in the last 18 months to absorb a much higher number of cases, and to increase its productivity. The Family Justice Review may put forward recommendations which, if accepted, are likely to mean that Cafcass will need to manage new incoming work whilst at the same time undergoing a well-managed transition. Budget constraints mean that Cafcass must continue to make year-on-year efficiency savings, whilst striving to deliver consistent performance in line with its Key Performance Indicators.

[10] Cafcass management information.

Courts

Case management

Judicial continuity not only allows for effective case management and efficient use of judicial time but is also an important signal to parties, above all children, that their case is being treated with the respect it deserves. We welcome the President of the Family Division's recognition of this issue, and willingness to reconsider the current approach to assigning the judiciary to cases. Further, we welcome the senior judiciary's commitment to improving case management in the family courts more generally. (Paragraph 211)

59. We acknowledge that judicial continuity is a key issue, and are already striving to achieve this. HMCTS and MoJ continue to work in liaison with the President of the Family Division to ensure that judicial continuity, in accordance with the Public Law Outline, is improved across England and Wales. The President issued specific guidance on judicial continuity (following consultation with HMCTS and the Lord Chief Justice) in April 2011 which emphasised the need for judicial continuity, efficient case management and timely allocation. The National Performance Partnership also continues to promulgate best practice examples to the Local Performance Improvement Groups, many of which highlight the importance of judicial continuity as a crucial factor in reducing delay.

60. The Family Justice Review is examining these issues in greater depth and we look forward to receiving their final recommendations to inform future action.

Litigants in person

The removal of legal aid from applicants in most private family law cases will increase the number of litigants in person in the family courts. It is self-evident that parents are unlikely to give up applications for contact, residence or maintenance for their children simply because they have no access to public funding. We are concerned that the Ministry of Justice does not appear to have appreciated that this is the inevitable outcome of the legal aid reforms. (Paragraph 224)

It is evident that non-lawyers accessing the family courts can find it a confusing and frustrating experience. While we accept that some steps have been taken by voluntary organisations to assist litigants in person, more clearly needs to be done and we welcome the fact that the Government is reviewing the available support system. We believe that the family court will need to become more attuned to dealing with parties representing themselves; and this will require procedures and guidance

developed to accommodate the challenges posed by larger numbers of litigants in person. (Paragraph 237)

61. As set out in *Legal Aid Reform in England and Wales: the Government Response*,[11] the Government accepts that the legal aid reforms will mean an increase in unrepresented litigants and potentially some worse outcomes for them. Resources are scarce and we have had to make some tough choices about where best to target legal aid. We are prioritising those family cases where there is the greatest risk of harm: cases involving domestic violence or child abuse.

62. Whilst unrepresented litigants have always been a feature of the justice system, the Government agrees that both the civil and family justice systems will need to become simpler to navigate and more responsive to the needs of unrepresented users of the system. This will come about in part through the results of the Family Justice Review. The Government also accepts that procedures and guidance will need to be reviewed and improved in advance of the legal aid reforms taking effect. We are starting this work now.

63. For example, Directgov[12] hosts a number of articles that provide some support and guidance to people who may be divorcing or attending a family court without representation:

    - Divorcing without using solicitors;
    - Applying for court orders to settle disputes over children;
    - What happens after you apply for a court order about children;
    - Attending family courts;
    - Child welfare during court proceedings.

64. We are reviewing this content and are in the process of developing a series of more specific guides for litigants in person that detail court processes. As part of this work we are also considering how best to work with voluntary and other organisations in producing these guides.

65. In addition, the DWP Green Paper *Strengthening families, promoting parental responsibility: the future of child maintenance*[13] proposed a radical re-shaping of the child maintenance system. This complements the proposal in the Family Justice Review's Interim Report for the creation of an integrated online hub of information. If implemented, the proposals for reform of child maintenance would provide an opportunity to join up services for separating parents, making information, guidance and support easily accessible.

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[11] See: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

[12] http://www.direct.gov.uk/en/index.htm

[13] See footnote 5 above.

66. The Government also welcomes the fact that the Civil Justice Council has set up a working party to look at how to improve access to justice for litigants in person. This is due to report at the end of October. Whilst this is not looking specifically at users of the family courts, we anticipate that some of their recommendations will be applicable to the family justice system.

We welcome the Family Justice Panel's recommendations on the creation of a two-track system in the family courts for simple and complex cases. We urge the Panel, however, to develop these proposals with unrepresented litigants in mind. In our view, this is the only realistic approach for robust reform of the family courts given the pending changes to legal aid in private law cases. (Paragraph 241)

67. We recognise the importance of the issues raised in the Committee's recommendation and we await the Family Justice Review's final recommendations.

Cross examination by litigants in person where there are allegations of sexual abuse

The increase in litigants in person will give rise to more cases in which an alleged abuser cross-examines the person he or she is alleged to have abused. We recommend the Ministry of Justice considers allowing the court to recommend that legal aid be granted to provide a lawyer to conduct the cross-examination in such cases. (Paragraph 244)

68. Cross-examination of victims by an unrepresented perpetrator of abuse is an issue that can arise at present. Judges have powers and are trained to manage situations such as this. For example, they can intervene to prevent inappropriate questioning, or have questions relayed to the witness, rather than asked directly. Additionally, where there is evidence of domestic violence, legal aid will continue to be available to the victim to provide funding for a legal representative who could assist in addressing any inappropriate conduct on the abuser's part.

69. We understand that the issue of cross-examination by litigants in person where domestic violence is alleged, or confirmed, is also under consideration as part of the Family Justice Review, and we await the Panel's findings.

Expert witnesses

Unnecessary reports

We are convinced that there are unnecessary expert reports in some family cases. We note the Minister's comments that greater use could be made of non-expert witnesses, including foster carers. However, foster carers have a distinct role from that of experts, and while they can be a valuable source of information they cannot replace experts in those cases where there is a genuine need for expertise. (Paragraph 258)

Case management and expert witnesses

It is clear to us that a lack of case management by judges is leading in some cases to too many expert reports. We are very interested in the practice direction that Mr Justice McFarlane, Family Division Liaison Judge on the Midland Circuit, has issued prohibiting the use of expert witnesses who cannot report within three months. We call on the Department to monitor the success of this practice direction. (Paragraph 269)

We agree with the Interim Report that judges should take more responsibility for the instruction of experts. However, judges do not generally have support staff who are able to draft letters or to ring round checking experts' availability. They also do not currently have the knowledge of the market to instruct experts. A simpler solution is for the parties' solicitors to continue to do the initial work, but for judges to provide much more rigorous oversight; requiring clear explanations of why additional assessments are needed, ensuring the parties' solicitors find another expert if there is a waiting list, and asking the parties' solicitors to work together to reduce the number of questions for the expert. More generally, the Government needs to examine whether—as was put to us by some witnesses—there is a shortage of expert witnesses in some locations and in some specialisms, and work with other interested parties to tackle any such shortfalls. (Paragraph 270)

70. Further detailed examination of the issues raised about the use of experts is underway as part of the Family Justice Review. The Government fully recognises the need for more consistency in the use of expert witnesses. We await the Review's final recommendations, and we will respond in due course. Similarly, MoJ's case file review research, conducted in support of the Family Justice Review, will give an indication of number of expert reports commissioned, and links to case length. The report is due to be published alongside the final report of the Family Justice Review.

Legal Services Commission

We recommend that the Legal Services Commission moves to paying expert witnesses directly. We understand that this would be an administrative burden for the LSC, but it needs to be balanced against the potential savings. (Paragraph 273)

71. The points made by the Committee in this recommendation were also raised by respondents to the proposals for reform set out in the consultation, *Proposals for the Reform of Legal Aid in England and Wales*.[14] In the Government's response to that consultation, we confirmed that we would not be considering contracting with, or paying, experts direct in the short term because it would be likely to lead to additional administrative costs to the LSC.

72. Nevertheless, the Family Justice Review is considering alternative arrangements for the payment of expert witnesses as part of its work to look at improvements to public law family proceedings. The Review is considering a range of options for commissioning expert witnesses. We will consider its recommendations, which will be set out in the final report.

[14] See: http://www.justice.gov.uk/consultations/legal-aid-reform.htm

Media and public access to the family courts

The Children, Schools and Families Act 2010

We recognise the need for transparency in the administration of family justice, and the equally important need to protect the interest of children and their privacy. However, our witnesses were united in opposing implementation of the scheme to increase media access to the family courts contained in Part 2 of the Children, Schools and Families Act 2010. While their reasons for doing so differed, and were sometimes contradictory, such universal condemnation compels us to recommend that the measures should not be implemented, and the Ministry of Justice begin afresh. We welcome the Government's acknowledgement that the way the legislation was passed was flawed, and urge Ministers to learn lessons from this outcome for the future. (Paragraph 281)

Increasing public confidence in the family court system

There is a tension between allowing the media to publish even limited information about cases in the interests of increasing public confidence and a child's right to keep personal information about them and their experiences private. There is a danger that justice in secret could allow injustice to children, or a perception of injustice. We believe the underpinning principle of the family court system, that all decisions must be made in the best interests of the child, must apply equally to formation of Government policy on media access to the family courts. (Paragraph 294)

73. The Government accepts the recommendation that Part 2 of the Children, Schools and Families Act 2010 should not be commenced at this time. Ministers advised Parliament in October 2010 that no decision would be taken on commencement of these provisions before the outcome of the Family Justice Review. However, in light of the committee's findings, we have decided to bring forward that decision.

74. We are grateful for the work of the Committee in gathering evidence that shows that whilst there are divergent views on how to increase the transparency and accountability of the family courts, there is a general consensus that the status quo is unsatisfactory.

75. The Government agrees, but we believe that this complicated and sensitive area of law needs to be reviewed carefully, including gathering the views of children who have experience of the family courts. Therefore, we will not be bringing forward further legislative change in the near future. We will instead look at measures that can increase the amount of publicly available information about the work of the family courts, including encouraging judges to publish more family court judgments. In particular, Ministers will examine the results of the family court information pilot, which trialled the online publication of family court judgments in an anonymised form.

Conclusion

76. The Government is grateful to the Committee for its helpful contribution to the reform of family justice services. The Family Justice Review is expected to publish its final report later this year, setting out its recommendations for the reform of family justice.

77. The Government will consider the Review's recommendations carefully, and we will publish our response, setting out our programme of reform, in due course.

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