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Family Justice (Transparency, Accountability and Cost of Living) Bill

Bill No 13 of 2012-13

RESEARCH PAPER 12/60 **25** October 2012

This briefing has been prepared for the Second Reading debate on the *Family Justice (Transparency, Accountability and Cost of Living) Bill* on 26 October 2012. The Bill, which was published on 23 October 2012, is sponsored by John Hemming MP, who was sixth in the 2012-13 ballot for Private Members' Bills.

The Bill has three parts. Part 1 deals with transparency and accountability in connection with cases concerning children and proceedings in the Court of Protection. Part 2 contains other provisions relating to the administration of justice; and Part 3 deals with the cost of living and measures to achieve lower fuel bills.

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The *Family Justice (Transparency, Accountability and Cost of Living) Bill* is sponsored by John Hemming MP, who came sixth in the 2012-13 ballot for Private Members' Bills. The Bill had its First Reading on 20 June 2012 and was published on 23 October 2012. It is due to have its Second Reading debate on 26 October 2012.

The Bill deals with a range of issues including matters related to:

- family group conferences
- help for litigants-in-person
- disclosure of information about proceedings in the Family Court and the Court of Protection for the purposes of academic research
- participation of grandparents and other relatives in care proceedings
- grandparents' contact with grandchildren
- placement of children near their home authority
- investigation of complaints of serious harm made by children in care
- criminal records
- recognition of being or having been subject to a care order for the purposes of the *Equality Act 2010*
- giving reasons for dispensing with parental consent in adoption cases
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- right to report wrongdoing
- abolishing the offence of scandalising the court
- listing on the internet persons imprisoned for contempt of court
- costs in judicial review proceedings
- the Official Solicitor
- recording of hearings
- mental capacity and litigation
- cost of living and measures to achieve lower fuel bills.

1 Introduction

The *Family Justice (Transparency, Accountability and Cost of Living) Bill* is sponsored by John Hemming MP, who came sixth in the 2012-13 ballot for Private Members' Bills. The Bill had its First Reading on 20 June 2012 and was published on 23 October 2012. It is due to have its Second Reading debate on 26 October 2012.

The Bill has three parts, dealing respectively with transparency and accountability; the administration of justice; and the cost of living and measures to achieve lower fuel bills.

The Bill would extend to England and Wales only.

2 Part 1 Transparency and accountability

2.1 Family group conferences

A family group conference has been described in statutory guidance as:

> a decision making and planning forum in which the wider family group makes plans and decisions for children and young people who have been identified either by the family themselves or by service providers as being in need of a plan that will safeguard and promote their welfare. The child is directly involved in the process, and the family plan that is devised must take account of any stipulations made by the referring agency (typically the local authority) for it to be agreed.[1]

Background: current position

Key principles underpinning care and supervision proceedings

Section 1 of the *Children's Act 1989* sets out the overarching welfare principle to be applied in all proceedings under the Act. In deciding any question about a child's upbringing and the administration of his/her property, the court must treat the welfare of the child as its paramount consideration.

A child may be taken into care without a parent's permission only if a court has made "a care order" in respect of the child. Only local authorities and persons authorised under the *Children Act 1989* can apply to the courts for an order to take a child into care.[2] The court will make a care order only if it is satisfied that the criteria in section 31(2) of the Act are satisfied, namely that:

> (a) the child concerned is suffering, or is likely to suffer, significant harm; and
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> (b) the harm or likelihood of harm, is attributable to –
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control.[3]

Before proceeding with an application, the local authority should always obtain and consider legal advice on whether, in the circumstances of the case and in the light of the available evidence, the court is likely to be satisfied:

- that the section 31(2) criteria are met; and

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1 Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities*, 2010, accessed on 23 October 2012

2 Section 31(9), *Children Act 1989.* Currently the only authorised persons are the NSPCC

3 Section 31(2), *Children Act 1989*

- that an order is in the best interests of the child and that making a care order would be better for the child than making no order at all.[4]

Guidance issued under the *Children Act 1989* sets out the procedure local authorities and authorised persons must follow before making an application to the court for a care order. As a matter of routine, all children in need will be assessed in accordance with the Department of Health's *Framework for the Assessment of Children in Need and their Families* in order to ascertain the needs of the child and whether they are at risk of significant harm.[5]

Volume 1 of the *Children Act Guidance and Regulations* provides guidance, primarily for local authorities and their staff, about the court-related provisions set out in the Act.[6] Local authorities should, except in exceptional circumstances, follow the guidance when exercising their social services functions.[7]

The guidance sets out the key principles on which the scheme for care and supervision proceedings is founded which include:

- The local authority can intervene in the care and upbringing of a child without the parents' agreement only if the authority obtains a court order following proceedings in which the child, his parents and others who are connected with the child are able fully to participate. The proceedings should establish what action, if any, is in the child's interests, and the procedure must be fair to all concerned.[8]

- The local authority has a general statutory duty, under section 17 of the *Children Act*, to promote the upbringing of children in need by their families so far as this is consistent with its duty to safeguard and promote the welfare of children, in particular through the provision of family support services to children in need and their families. This means that voluntary arrangements for the provision of services to the child and his family including the consideration of potential alternative carers should always be fully explored prior to making an application for a care order, provided that this does not jeopardise the child's safety and welfare. The local authority must consider the capacity and willingness of the wider family to provide care for the child on a short or a longer-term basis.[9] The guidance refers to the potential importance of "family group conferences":

  > 3.8 A family group conference (FGC) can be an important opportunity to engage friends and members of the wider family at an early stage of concerns about a child, either to support the parents or to provide care for the child, whether in the short or longer term. In either case, FGCs can reduce or eliminate the need for the child to become looked after. In presenting a care plan to the court in any application for a care order, the local authority will be required to demonstrate that it has considered family members and friends as potential carers at each stage of its decision making.[10]

Information on local authority duties to consider family and friends carers is available on the Department for Education website.[11] Statutory guidance for local authorities, *Family and*

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4 The 'no order' test under section 1(5) of the *Children Act 1989.*

5 *Framework for the Assessment of Children in Need and their Families*, a joint publication from the Department of Health, the (then) Department for Education and Employment and the Home Office; 2000, accessed 23 October 2012

6 *The Children Act 1989 Guidance and Regulations Volume 1 Court Orders,* 2008, accessed 23 October 2012

7 *Local Authority Social Services Act 1970,* section 7

8 *Ibid* p31

9 *Ibid*

10 *Ibid*

11 Department for Education website*, Family and friends carers,* accessed on 23 October 2012

Friends Care, recommends that family group conferences should be considered as an effective method of engaging the support of wider family and friends at an early stage of concerns about a child who may not be able to live with their parents:

> They promote the involvement of the wider family in the decision-making process to achieve a resolution of difficulties, and offer a way of ensuring that all resources within the family's wider social networks have been engaged for the benefit of the child".[12]

An explanation of FGCs is contained in Annex C to the guidance.

Social services duties in relation to children on protection plans

The "at risk" or Child Protection Register no longer exists in England. The current equivalent is children who are the subject of a "child protection plan" with the focus on establishing an agreed plan to safeguard and promote their welfare.

The *Working Together to Safeguard Children* guidance provides that where there are concerns about a child, there should be an initial child protection conference bringing together family members, the child (where appropriate) and those professionals most involved with the child and family, in order to determine the best course of action for the child.[13] It provides for the involvement of the child and family members and the provision of information to them:

> 5.86 Before a conference is held, the purpose of a conference, who will attend and the way in which it will operate, should always be explained to a child of sufficient age and understanding, and to the parents, and involved family members. Where the child/family members do not speak English well enough to understand the discussions and express their views, an interpreter should be used. The parents (including absent parents) should normally be invited to attend the conference and helped to participate fully. Children's social care staff should give parents information about local advice and advocacy agencies and explain that they may bring an advocate, friend or supporter. The child, subject to consideration about age and understanding, should be invited to attend and to bring an advocate, friend or supporter if s/he wishes. Where the child's attendance is neither desired by him/her nor appropriate, the local authority children's social care professional who is working most closely with the child should ascertain what his/her wishes and feelings are and make these known to the conference.
>
> 5.87 The involvement of family members should be planned carefully. It may not always be possible to involve all family members at all times in the conference, for example, if one parent is the alleged abuser or if there is a high level of conflict between family members. Adults and any children who wish to make representations to the conference may not wish to speak in front of one another. Exceptionally, it may be necessary to exclude one or more family members from a conference, in whole or in part. The conference is primarily about the child and while the presence of the family is normally welcome, those professionals attending must be able to share information in a safe and non-threatening environment. Professionals may themselves have concerns about violence or intimidation, which should be communicated in advance to the conference chair.
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> 5.88 LSCB [Local Safeguarding Children Board] procedures should set out criteria for excluding a parent or caregiver, including the evidence required. A strong risk of violence or intimidation by a family member at or subsequent to the conference,

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12 Department for Education, *Family and Friends Care: Statutory Guidance for Local Authorities,* 2010, accessed on 23 October 2012

13 HM Government, *Working Together to Safeguard Children – A guide to inter-agency working to safeguard and promote the welfare of children*, March 2010, accessed on 23 October 2012

> towards a child or anybody else, might be one reason for exclusion. The possibility that a parent/caregiver may be prosecuted for an offence against a child is not in itself a reason for exclusion although in these circumstances the chair should take advice from the police about any implications arising from an alleged perpetrator's attendance. If criminal proceedings have been instigated the view of the Crown Prosecution Service (CPS) should be taken into account. The decision to exclude a parent or caregiver from the child protection conference rests with the chair of the conference, acting within LSCB procedures. If the parents are excluded, or are unable or unwilling to attend a child protection conference, they should be enabled to communicate their views to the conference by another means.[14]

The child protection conference is chaired by an independent professional. The responsibilities of the chair include meeting the child and family members in advance, to ensure that they understand the purpose of the conference and what will happen.[15]

Where appropriate, both the parents and the child should be provided in advance with a copy of the report prepared for the conference. The guidance also specifies that the contents of the report should be explained and discussed with the child and relevant family members in advance of the conference itself, in the preferred language(s) of the child and family members.[16]

The child protection plan should take into account the wishes and feelings of the child, and the views of the parents, insofar as they are consistent with the child's welfare:

> The lead social worker should make every effort to ensure that the child and parents have a clear understanding of the planned outcomes; that they accept the plan and are willing to work to it. If the parents are not willing to co-operate in the implementation of the plan the local authority should consider what action, including the initiation of family proceedings, it should take to safeguard the child's welfare.[17]

The *Working Together to Safeguard Children* guidance also includes some non-statutory practice guidance which covers, among other things, family group conferences (FGCs) which are described as:

> a decision making and planning process whereby the wider family group makes plans and decisions for children and young people who have been identified either by the family or by service providers as being in need of a plan that will safeguard and promote their welfare.

FGCs do not replace or remove the need for child protection conferences, which should always be held when the relevant criteria are met.[18]

Children and families may be supported through their involvement in safeguarding processes by advice and advocacy services, and the guidance states that they should always be informed of services that exist locally and nationally.[19]

The local authority has a responsibility to make sure children and adults have all the information they require to help them understand the processes that are followed when there

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14 *Ibid* pp163-4
15 *Ibid* p164
16 *Ibid* p166
17 *Ibid* p175
18 *Ibid* p284
19 *Ibid* p285

are concerns about a child's welfare. The guidance states that information should be clear and accessible and available in the family's preferred language.[20]

Information for parents

The Ministry of Justice Care Proceedings Programme has published a *Parent's Pack* about care proceedings.[21]

House of Commons Justice Committee report

On 14 July 2011, the House of Commons Justice Committee published its report, *Operation of the Family Courts*.[22] Among other things, this considered whether the use of family group conferences (FGCs) might prevent cases reaching court. The Committee set out its understanding of what a FGC might do. The family would draw up a plan, with support, and the local authority would decide whether or not to accept it:

> They originate from New Zealand and aim to support families (including extended family members and friends) to draw up a plan to enable the child to remain with the immediate or extended family. FGCs are voluntary, but the families are aware that if nothing is agreed the child may be taken into care. The family, and often the child, meet with a social worker and a co-ordinator who may be from a charity or a separate part of social services. The plan is constructed by the family (in private) but must address the local authority's concerns. The local authority can set conditions, for example stipulating that the child cannot live with a particular person. The family can ask for support as part of the plan. The local authority then chooses whether or not to accept the plan. Depending on the details of the case and the plan it may avoid the need for proceedings, or the plan may need to be confirmed by court orders. The Interim Report noted that there were a variety of commissioning models and that the use of the technique varies between local authorities. It said that FGCs were "usually seen as a means to avoid proceedings" rather than as a form of mediation whose conclusions could be confirmed by the court.[23]

In evidence to the Committee, the Family Rights Group had explained the potential benefits of FGCs, and the British Association of Social Workers was also very supportive of this approach. Barnardo's said that it would like to see an entitlement to FGCs in care proceedings, and did not consider that FGCs would add to delays. The Committee reported that the Family Rights Group claimed that 90% of FGCs reached an agreement that the local authority accepted, and that this prevented children being taken into care in 32% of cases and prevented proceedings in 47% of cases.[24] The Committee also noted, however, that not all cases in an area were referred to FGC, and that the families were carefully selected: "If FGCs were rolled out to all cases, the success rate could well fall."

The Committee concluded that FGCs could potentially save costs and reduce delays:

> 88. 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,

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20 *Ibid* p286

21 This is a booklet for parents who may be about to be taken to court by a local authority because of concerns over the safety and welfare of their child. It gives parents information in a clear and straightforward manner about what is involved in court proceedings and the various stages in the process. It is intended that parents should receive this information from local authorities at the stage at which a Letter before Proceedings is issued: Ministry of Justice website, *Your child could be taken into care Here's what you need to know*, October 2010, accessed on 23 October 2012

22 House of Commons Justice Committee, *Operation of the Family Courts,* 14 July 2011, HC 518

23 *Ibid* pp27-8

24 *Ibid* p29

> 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.[25]

Family Justice Review

The Family Justice Review was originally commissioned by the previous Government in early 2010 and was led by a panel of experts with an independent chair, David Norgrove. The Review published an interim report[26] in March 2011 and a final report[27] in November 2011.

The Review considered FGCs and concluded that "the benefits of family group conferences should be more widely recognised and their use should be considered before proceedings".[28] It also considered that more research was needed on how they could best be used, their benefits and the costs:

> We see real potential for FGCs to add value. Statutory guidance already identifies FGCs as a useful tool and local authorities are expected to indicate in an application to court whether an FGC has been considered and held. We recommend again that research on effectiveness, quality and cost is required to cover also what works best in which circumstances. Stronger guidance must await that research but meanwhile we recommend that government and judiciary encourage them.[29]

As a separate issue, the Family Justice Review also found that children and adults were confused about the family justice system:

> Children and families often do not understand what is happening to them. As the availability of legal aid is limited in private law proceedings the number of people who represent themselves will increase and this issue will become more acute.[30]

Family Rights Group guidance

The Family Rights Group has recently reviewed their 2008 guidance on the use of family group conferences. The Family Justice Council has endorsed both the original guidance and the updated guidance, *Family Group Conferences in the Court Arena*.[31]

The Bill

Clause 1 would require a Children's Services Authority[32] which is considering care proceedings relating to a child it considers to be at risk or who is about to become "looked after, to designate a person -"the referrer"- who would offer the family a family group conference. This obligation would not apply if emergency action is required to protect a child. **Clause 6** defines "a family group conference" as:

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25 *Ibid* p29

26 *Family Justice Review Interim Report*, March 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Assembly Government

27 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government

28 *Ibid* p19

29 *Ibid* p130

30 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, p43

31 Family Rights Group, *Family Group Conferences in the Court Arena*, September 2011, Judiciary of England and Wales website, viewed on 23 October 2012

32 *The Local Education Authorities and Children's Services Authorities (Integration of Functions) Order 2010* (SI 2010/1158) removed the terms 'local education authority' and 'children's services authority' from primary legislation and replaced them with the single term 'local authority'. The *Local Education Authorities and Children's Services Authorities (Integration of Functions) (Local and Subordinate Legislation Order 2010* (SI 2010/1172) made the same changes to local and subordinate legislation

> a family-led, decision-making meeting, convened by an independent co-ordinator, who is a person with at least three years experience in this field, in which a plan for the child is made by the family, involving the child (if old enough), the parents, and potentially extended family members and friends which addresses any concerns about the child's future safety and welfare.

If the offer is accepted, the family would have six weeks to propose a family plan. The plan would be agreed in principle and implemented by the referrer unless the referrer considers that it would put the child at risk of significant harm, in which case the referrer would be obliged to give reasons for this opinion and to seek agreement with the family on an alternative plan. There would be a right of appeal, to the relevant scrutiny or appeal committee of the Children's Services Authority, within three months, for the child or his family against a referrer's decision.

Clause 1(5) provides that any child or parents or other relatives of the child attending a family group conference must be given in advance a publication explaining the childcare system and how it may affect them in the future, and must be referred to an independent advice and advocacy organisation.

There would be no obligation to invite a member of the child's wider family who might intimidate any other person at the conference.

Effectively, this clause would provide for statutory procedures in place of procedures currently set out in statutory and non-statutory guidance.

2.2 Proceedings in the Family Court and Court of Protection

McKenzie friends

What is a McKenzie Friend?

A person representing him(her)self in civil and family litigation is referred to as a "litigant-in-person". A litigant-in-person may be accompanied by an assistant or friend and this person is often known as a "McKenzie friend". McKenzie friends have no right to act as advocates or to carry out the conduct of litigation.[33]

In July 2010, the Master of the Rolls and the President of the Family Division issued new guidance on McKenzie Friends in light of the increase in litigants-in-person in all levels of the civil and family courts.[34]

The guidance sets out what McKenzie Friends (MFs) are permitted to do, and what they may not do:

> What McKenzie Friends may do
>
> 3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.
>
> What McKenzie Friends may not do
>
> 4) MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

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[33] The term "McKenzie friend" takes its name from a divorce case, *McKenzie v. McKenzie* [1970] 3 All E.R. 1034

[34] *Practice Guidance: McKenzie Friends (Civil and Family Courts)*, 12 July 2010, accessed on 23 October 2012

The guidance also makes clear that, while litigants ordinarily have a right to receive reasonable assistance from MFs, the court retains the power to refuse to permit such assistance: "where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance".

Where proceedings are in closed court - that is, the hearing is in chambers, is in private, or the proceedings relate to a child - the litigant is required to justify the MF's presence in court. The guidance states that "the presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one".

A litigant may be denied the assistance of a MF where this might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are:

> i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.

The Bill

Clause 2(1) of the Bill would give any party to proceedings in the Family Court or Court of Protection the right to have a "Friend" and a "McKenzie Friend" present and provides that these persons would be subject to the same rules of confidentiality as the party to the proceedings.

Clause 6 defines "a Friend" as "a person who will accompany and support the party in the case"; and "a McKenzie Friend" as "a person who may not be a lawyer but can advise or assist or advocate on behalf of the party in the case". This definition is wider than the current definition, because, at present, McKenzie friends have no right to act as advocates.

Clause 2(1) would effectively remove the discretion of the court to decide whether or not to allow the litigant to have the assistance of an MF.

Academic research

Confidentiality in the Family Courts and Court of Protection

Cases in the family courts involving children are not open to the public in order to protect the identity of the children concerned, and reporting on such cases is limited. Section 97(2) of the *Children Act 1989* makes it a criminal offence to publish, to the public at large or to any section of the public, any material which would identify, or which would be likely to identify, a child as being involved in family courts proceedings (unless a specific order has been made dispensing with this provision). In addition, under section 12 of the *Administration of Justice Act 1960,* it may be a contempt of court to publish information relating to certain proceedings affecting children where the county court or High court is sitting in private. Publication covered by section 12 is not confined to communication through the media. A person found guilty of contempt of court will be liable to a term of imprisonment and/or a fine.[35]

The provisions requiring privacy in the family courts have been criticised. Following calls for the press and public to be allowed to attend family proceedings, changes were made to court rules, effective from April 2009. Duly accredited media representatives (but not the wider public) are now able to attend certain family proceedings held in private, subject to a power for the court to direct their exclusion. The court rule changes did not alter the statutory

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[35] *Contempt of Court Act 1981,* s 14

reporting restrictions for family proceedings, meaning that the media are able to report only limited information about the proceedings they are now able to attend. Further information is set out in a Library standard note, *Confidentiality and openness in the family courts.*[36]

The *Family Procedure Rules 2010* permit the communication of information concerning private proceedings between specified individuals in limited circumstances.[37] In these circumstances, the communication will not amount to a contempt of court. The Rules provide that, subject to any direction of the court, a party, any person lawfully in receipt of information or a proper officer may communicate to a person or body conducting an approved research project any information relating to the proceedings for the purpose of an approved research project.[38]

Part 13 of the *Court of Protection Rules 2007* provides that, in general, hearings should be in private to ensure that the privacy of the person who lacks capacity is safeguarded. The court is able to admit the media and members of the public where it considers it is appropriate to do so. The court has power to authorise publication of information about proceedings and may order that a hearing should be held in public. Part 13 is supplemented by *Practice Direction PD 13A (Court of Protection: Reporting restrictions).*[39]

The Bill

Clause 2(2) of the Bill would introduce a statutory provision to enable any person to give information regarding any proceedings in the Family Court or the Court of Protection "to any person carrying out academic research regarding such proceedings who is a member of, or operating on behalf of, an academic institution that has experience and expertise in carrying out such research". Published research would have to remove all identifying details; and it would be a contempt of court to disclose such details.

John Hemming has previously set out in debate how he believes that disclosure of information to academic researchers could improve accountability:

> First, academic scrutiny is key. We have had only one report so far, by Professor Jane Ireland, who found that about two thirds of the psychologists' reports that she encountered were rubbish: if the judge had relied on them, the decision would have been unreliable and should have been challenged through the appellant system. We have only one report because they must be authorised, but there is no reason why academic researchers should not have de facto, anonymous access to expert evidence in the family courts.
>
> I was lucky to be drawn sixth in the private Member's Bills ballot, and one proposal in my Bill will be to allow academic access to secret proceedings, so that in both the family courts and the Court of Protection, which is really a family court, expert evidence can be challenged. The Daubert procedure in the US is used to appeal expert opinion to experts, and that is a good process. Professor Ireland, with other professors, has recommended that for the UK. It would be one way of starting to get some quality into the decision making based on expert opinion, but we are some distance away from that.
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> A good example, published recently in the Daily Mail, is Lucy Allan. The same psychologist produced two reports on her. One, without seeing her, was for the local authority; in another, having seen her, she said completely contradictory things about

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36 SN/SP/6102, 22 May 2012
37 SI 2010/2955
38 Practice Direction 12G and Practice Direction 14E, Ministry of Justice website, accessed on 23 October 2012
39 Judiciary of England and Wales website, *Court of Protection,* accessed on 23 October 2012

> the same person. In one she said, without seeing her, that the mother was a great danger to her child; in the other, she said that the mother was perfectly okay—that was because she was being paid to say that. Information from that psychologist was used to make a life-changing decision, and that is an absolute scandal.
>
> Academic access to expert reports should not be subject to a complex and expensive approval process. It should happen almost de facto. Our care system does not do well, and other countries' care systems do far better. Our system does not do well because of lack of accountability—not just public accountability, but academic accountability.[40]

The research report by Professor Jane Ireland referred to by John Hemming is available online.[41]

Grandparents and other family members participating in proceedings

Court orders under section 8 of the *Children Act 1989* (often called section 8 orders) settle areas of dispute about a child's care or upbringing. A "residence order" determines with whom a child should live and a "contact order" requires the person with whom a child lives to allow the child to visit or stay with the person named in the order, or for that person and the child to have other contact with each other.

Leave to apply to court for a residence or contact order

Under the *Children Act 1989,* grandparents, siblings of the child's parents and adult siblings of the child normally require leave of the court to apply for a residence or contact order in relation to a child. The *Children Act 1989* sets out some exceptions to this rule including:

- any person with whom the child has lived for a period of at least three years is entitled to apply for a residence or contact order;[42] section 10(10) states this period 'need not be continuous but must not have begun more than five years before, or ended more than three months before, the making of the application';

- a relative of a child is entitled to apply for a residence order with respect to the child if the child has lived with the relative for a period of at least one year immediately preceding the application.[43]

A Library standard note, *Children: Residence and contact related matters for parents, grandparents and others after separation,* includes further information.[44] Another Library standard note, *Family Justice Review update: Contact and other issues for parents following separation* provides a brief overview of the Family Justice Review's proposals relating to child contact issues and Government's response to them, as well as the subsequent steps being taken.[45]

The issue of removing the leave requirement for grandparents was examined by the *Family Justice Review*, which did not recommend changing the current law: "We do not believe that

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40 HC Deb 24 May 2012 cc154-5WH
41 Professor Jane Ireland, *Evaluating Expert Witness Psychological Reports: Exploring Quality*, Summary report, February 2012, accessed on 23 October 2012
42 *Children Act 1989* section 10(5)
43 *Ibid*, s 10(5B)
44 SN/SP/3100, 1 July 2010
45 SN/SP/6335, 10 September 2012

courts refuse leave unreasonably or that seeking leave is slow or expensive for grandparents".[46] The Review concluded:

> **The need for grandparents to apply for leave of the court before making an application for contact should remain**. This prevents hopeless or vexatious applications that are not in the interests of the child.[47]

This was accepted by the Government: "We want to encourage and support grandparents, like parents, to settle their differences outside of the court process".[48]

The Bill

Clause 2(3) would entitle grandparents, siblings of the child's parents, and adult siblings of the child who are not parties to a case, "to participate" in any part of the proceedings which involves considering whether or not the child should be placed with them. Grandparents would be permitted to participate in proceedings "if they have had long term involvement with their grandchildren and have information which will be helpful to the outcome of the case", subject to the judge exercising powers to try to ensure that children are able to give evidence without feeling intimidated or inhibited from so doing.

Grandparents' contact with grandchildren

Current position

Grandparents do not have an automatic right to contact with their grandchildren. As noted above, grandparents may apply to court for leave to apply for a contact order (unless an exception to the requirement to obtain leave applies).

A Library standard note, *Children: Residence and contact related matters for parents, grandparents and others after separation,* includes information about the circumstances in which contact may be supervised.[49] Another Library standard note, *Family Justice Review update: Contact and other issues for parents following separation* provides a brief overview of the Family Justice Review's proposals relating to child contact issues and Government's response to them, as well as the subsequent steps being taken.[50]

The *Family Justice Review* considered the issue of grandparents having contact with their grandchildren. Although the Review recommended that the requirement to seek leave to apply for a contact order should remain, it also recognised the importance to children of relationships with their grandparents and recommended that this be emphasised in the process of making an agreement about their future care.[51] In accepting the Review's recommendation, the Government also stressed its commitment to ensuring children have meaningful relationships with family members:

> The Government agrees with the Review's conclusions that the leave requirement should remain because it acts as an important safeguard for children and their families. This is consistent with the principle that the court's paramount consideration must be the welfare of the child.

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46 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, p143. Information about the Family Justice Review is set out in section 2.1 of this paper, above

47 *Ibid,* p21

48 *The Government Response to the Family Justice Review: A system with children and families at its heart,* p22, accessed 23 October 2012

49 SN/SP/3100, 1 July 2010

50 SN/SP/6335, 10 September 2012

51 *Family Justice Review Final Report*, November 2011, published on behalf of the Family Justice Review Panel by the Ministry of Justice, the Department for Education and the Welsh Government, p143

> However, the Government is committed to ensuring that children have meaningful relationships with family members who are important to them following family separation, where it is in their best interests and safe. As a matter of good practice, supporting a child's ongoing relationships with their grandparents and wider family members should be considered when making arrangements for a child's future.
>
> The Government supports the Review's recommendation that the importance of relationships children have with other family members should be emphasised in the process of making Parenting Agreements. The Government will also ensure that a child's relationship with their grandparents is considered in the bespoke parenting classes for separating parents.[52]

The Bill

Clause 2(4) would provide that grandparents "shall be permitted to have reasonable direct and indirect contact with their grandchildren if the child so wishes without this contact being supervised unless it is not in the interest of the welfare of the child".

Placement of children near home authority

Since April 2011, section 22C of the *Children Act 1989* has required that, unless "it is not reasonably practicable", local authorities must place a looked-after child within the local area where the child cannot be placed with a parent or other person with parental responsibility. However, this is only one of a number of factors a local authority must take into account when placing a child.

The Act also requires local authorities to ensure that there is sufficient accommodation in the local area to fulfil the duty (under new section 22G). There is statutory guidance to assist local authorities in complying with the requirement.[53] This states:

> 2.15 Section 22G does not require local authorities to provide accommodation within their area for every child they look after. In fact, there may be a significant minority of children for whom it is not 'reasonably practicable' to provide a certain type of accommodation within the area. Instead, local authorities must take steps to ensure that they are able to provide accommodation within their area, so far as reasonably practicable, for those children for whom it would be consistent with their welfare to do so.
>
> 2.16 When the local authority takes steps to secure accommodation, a local authority should not assume that it is 'not reasonably practicable' to secure appropriate accommodation simply because it is difficult to do so or because they do not have the resources to do so. Any constraining factors should not be taken as permanent constraints on the local authority's requirements to comply with the sufficiency duty.

The guidance puts the section 22(G) duty into the context of other relevant provisions:

> 2.17 The local authority's duty in section 22G has to be understood in the context of their duty in section 22C of the 1989 Act. In accordance with section 22C(5), the overriding factor is that the placement must be the most appropriate placement available. Next, the local authority must give preference to a placement with a friend, relative or other person connected with the child and who is a local authority foster parent [section 22C(7)(a)]. Failing that, the local authority must, so far as reasonably practicable, in all circumstances find a placement that:

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52 *The Government Response to the Family Justice Review: A system with children and families at its heart,* p67

53 Department for Children, Schools and Families, *Sufficiency Statutory guidance on securing sufficient accommodation for looked after children,* 2010

- is near the child's home [section 22C(8)(a)];
- does not disrupt his education or training [section 22C(8)(b)];
- enables the child to live with an accommodated sibling [section 22C(8)(c)];
- where the child is disabled, is suitable to meet the needs of that child [section 22C(8)(d)]; and
- is within the local authority's area, unless that is not reasonably practicable [section 22C(9)].

> 2.18 There is no order of priority within the categories listed in the bullet points above. All of these are factors that have to be taken into account. For example, as a result of the factors set out in section 22C, if placing the child within his/her area conflicted with placing the child near home or with a sibling, or which disrupted his/her education, the local authority could justifiably place the child out of area if this met his/her needs more effectively than a placement within the area.
>
> 2.19 When a local authority places a child, their overriding aim, in accordance with section 22C, is to secure the most appropriate placement for the child, in order to safeguard and promote his/her welfare. For the majority of looked after children, the 'most appropriate placement' will be within the local authority area. For those children who require highly specialist services, or children for whom there is a safeguarding issue, authorities may consider it more appropriate for them to be placed in a neighbouring local authority area.
>
> 2.20 When making decisions about the most appropriate placements for children requiring more specialised provision, local authorities must consider, alongside the other factors set out in section 22C, the issue of proximity to the home area. Section 22C(8)(a) provides that the placement must be such that it allows the child to live near the child's home. Wherever possible, children requiring such provision should be placed as close to their existing family networks and support systems as is possible and appropriate.[54]

The guidance also sets out examples of factors which local authorities, working with their Children's Trust partners,[55] may wish to take into account when assessing whether they are doing all that is 'reasonably practicable' to secure sufficiency.[56]

Tim Loughton, then Parliamentary Under-Secretary of State for Children and Families, made a written ministerial statement on 3 July 2012, following the conviction of nine members of a network responsible for child sexual exploitation in Rochdale which raised serious concerns about the safety of young people in residential care, and reports from the Office of the Children's Commissioner and the All-Party Parliamentary Groups for Runaway and Missing Children and Adults and for Looked-after Children and Care Leavers. He said that the Government was taking immediate action, including in connection with out-of-area placements:

> Help children be located nearer to their local area by establishing a "task and finish group" to make recommendations by September on strengthening the regulatory framework on out-of-area placements. While there may be good reasons for placing a

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54 *Ibid,* p14

55 Children's Trusts are local partnerships which bring together the organisations responsible for services for children, young people and families in a shared commitment to improving children's lives: Department for Children Schools and Families, *What is a Children's Trust?,* 2008

56 *Ibid,* p15

> child or young person at some distance from their home area, it is difficult to accept that nearly half of all children in children's homes benefit from such distant placements. Both reports are clear about the problems that can arise. We will consult on changes in the autumn.[57]

The Bill

Clause 2(5) would replace the words "reasonably practicable" in section 22C (7)(c) with "it is not in the interest of the welfare of the child". Section 22C would then require the local authority, when determining the most appropriate placement for a child, to ensure that the child is provided with accommodation within the local authority's area unless that is not in the interest of the welfare of the child. It appears that the other provisions in section 22(C) would continue to apply, so that this would remain only one of the factors to be taken into consideration.

2.3 Children in care

Investigation of complaints of serious harm

Concerns about a child's safety

Statutory guidance, *Working Together to Safeguard Children* sets out how organisations, including social services, health professionals and teachers should work together where there are any child protection concerns.[58] If a local authority suspects that there is an immediate risk of serious harm to a child, it must alert the police or take other steps to secure the safety of the child.

In September 2012, the Parliamentary Under-Secretary of State for Children and Families said that local authorities must take action where they suspect that a looked after child is not being safeguarded in their current placement:

> The actions that they can take include initiating enquiries under section 47 of the 1989 Children Act, and convening a review of the plan for the child's care, chaired by the child's Independent Reviewing Officer. The purpose of a review in this context would be to consider whether or not the care provided to the child by their placement continues to be effective in keeping them safe.[59]

A written ministerial statement on 3 July 2012 set out measures being taken to ensure that young people placed in children's homes are properly protected and safely located.[60]

Independent reviewing officers and advocacy

Sections 25A to 25C of the *Children Act 1989* (as amended) make provisions about independent reviewing officers (IROs) who are appointed to ensure a looked after child's wishes and feelings are given due consideration by the local authority. Further information is set out on the Department for Education website.[61]

The *Adoption and Children Act 2002*,[62] amended the *Children Act 1989* to place a legal duty on local authorities to appoint an IRO for each case of a looked after child.[63] The *Children*

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57 HC Deb 3 July 2012 cc45-7WS

58 HM Government, *Working Together to Safeguard Children – A guide to inter-agency working to safeguard and promote the welfare of children*, March 2010

59 HC Deb 3 September 2012 c96W

60 HC Deb 3 July 2012 cc45-7WS

61 Department for Education website, *Independent reviewing officers (IROs),* accessed on 23 October 2012

62 Section 118

63 Section 25A

and Young Persons Act 2008 made further amendments to the 1989 Act clarifying the IRO's functions. [64]

In March 2010, the Government issued new statutory guidance for local authorities and independent reviewing officers on care planning and reviewing arrangements for looked after children. The IRO handbook provides guidance to IROs about how they should discharge their distinct responsibilities to looked after children.[65] It also provides guidance to local authorities on their strategic and managerial responsibilities in establishing an effective IRO service. The aim is to give all looked after children the support and services that they require to enable them to reach their potential.[66]

The IRO handbook includes a section which deals with the right of a child to have an advocate:

> 3.14 When meeting with the child before every review, the IRO is responsible for making sure that the child understands how an advocate could help and his/her entitlement to one. Advocacy is an option available to children whenever they want such support and not just when they want to make a formal complaint. Some children will feel sufficiently confident or articulate to contribute or participate in the review process without additional help. Others may prefer the support of an advocate. This could be a formal appointment from a specialist organisation or might be an adult already in the child's social network.
>
> 3.15 Every child has the right to be supported by an advocate. The local authority must have a system in place to provide written, age appropriate information to each looked after child about the function and availability of an advocate and how to request one.[67]

An IRO can refer a case to a Cafcass (Children and Family Court Advisory and Support Service) officer.[68]

A 2012 case, *A and S (Children) v Lancashire County* considered the role of the IRO and the IRO service.[69] The Court granted declarations, on an application made by two brothers freed for adoption by Lancashire County Council in 2001, that both the Council and the Independent Reviewing Officer had breached a number of the boys' rights under the European Convention on Human Rights. The Court held that, over the years, the local authority defaulted on its duties towards the children and its independent reviewing system did not call it to account; the matter was never returned to court as it should have been and as a result the local authority's actions did not come under independent scrutiny.[70]

Mr Justice Peter Jackson said that the case suggested a pressing need for the independent reviewing system to work more effectively. He highlighted the effect of the failings suffered by the two boys:

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64 Section 10

65 Department for Children, Schools and Families, IRO Handbook Statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children, 2010

66 Department for Education website, *Independent reviewing officers (IROs),* accessed on 23 October 2012

67 *Ibid* p15

68 *Children Act 1989* section 25B(3). Cafcass stands for Children and Family Court Advisory and Support Service and was set up on 1st April 2001 under the provisions of the *Criminal Justice and Court Services Act* . It is a non-departmental public body accountable to the Secretary of State for Education. Cafcass looks after the interests of children involved in family proceedings.

69 [2012] EWHC 1689 (Fam) accessed on 23 October 2012

70 *Ibid* para 2

> These boys have suffered real, lifelong damage and they are now entitled to demand an effort of understanding. This has become important to A, who attended the hearing in the hope that lessons might be learned for the benefit of other children. When he was recently asked what improvements he thinks could be made to the system in which he spent his childhood, he replied: "FOR THE IMPORTANT PEOPLE TO LISTEN TO US."[71]

The Family Justice Review also considered the role of the IRO and concerns about their independence, and concluded that the IRO should remain within the local authority:

> 3.112. We have noted already the widespread distrust - often ill-founded - of local authority ability and willingness to implement a care plan in the best interests of the child.
>
> 3.113. This was associated with discussion of the role of the IRO and concern about workloads and independence from their employer, the local authority.
>
> > *For as long as the IRO is employed by the local authority there is the possibility that their independence will be compromised and this will be detrimental to the welfare of the child… The role of the IRO is pivotal to ensuring that appropriate care plans are agreed and delivered, their independence is essential and can only be guaranteed if the role is moved outside of the local authority.*
> >
> > *National Youth Advocacy Service, consultation response*
>
> 3.114. We discussed the IRO in our interim report (paragraphs 4.262 – 4.270). The notion of independence we understand was always intended to mean independent of day to day local authority case management, rather than independent of the authority itself. Our view was and is that to take the IRO service out of the local authority would leave a gap that the local authority would need to fill under another name. The priority should be to improve the quality of the function rather than to create a new quasi inspectorate. Children themselves have said that they prefer the IRO should remain within the authority.
>
> > *Out of the children who chose where they thought IROs should work, the clear majority view was that in the future IROs should carry on working for the local council that provides children's services. [Survey of 1530 young people, Children's Rights Director (2011) Children on Independent Reviewing Officers, OFSTED]*
>
> 3.115. We do share the concern that IRO workloads may sometimes be too high in some local authorities. We recommend that local authorities should review the operation of their service to ensure it is effective...
>
> 3.116. That said the work of IROs and their impact needs to be more clearly seen and understood.

The Review recommended that "there need to be effective links between the courts and Independent Reviewing Officers and the working relationship between the guardian and the Independent Reviewing Officer needs to be stronger".[72]

The Family Justice Review also concluded that more should be done to allow children to have a voice in proceedings:

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71 *Ibid* para 10

72 *Family Justice Review Final Report*, November 2011, p117

> Even though a child's view may be different from the judgement of a professional on what is in their best interests, children need to understand what is happening, to have the opportunity to put their views forward and to know that, although decisions might be taken that are not what they want, their voices have been heard.[73]

In a written answer in October 2011, Lord Hill of Oareford, Parliamentary Under-Secretary of State for Schools, set out information about counselling services for children in care:

> Local authorities have statutory duties to ensure that children in their care are supported by a social worker, an independent reviewing officer as well as an entitlement to an independent advocate if they wish one.
>
> These practitioners have clearly defined responsibilities in listening to, advising and promoting the interests and welfare of the child as well as representing their views. Looked-after children are also entitled to the services of independent visitors, who are volunteers who befriend and support looked-after children. It is for local authorities to ensure that they have adequate provision of a range of services to meet the individual needs of their children.[74]

Children's guardians

Under section 12 of the *Criminal Justice and Court Services Act 2000*, in family proceedings in England in which the welfare of children is or may be in question, it is the function of Cafcass to:

- safeguard and promote the welfare of children
- give advice to any court about any application made to it in such proceedings
- make provision for the children to be represented in such proceedings
- provide information, advice and other support for the children and their families.

The representation of children in both private and public law proceedings is covered by Part 16 and Practice Direction 16A of the *Family Procedure Rules 2010.*[75] This provides for the appointment of a Children's Guardian for a child who is a subject of and a party to specified proceedings unless there is a reason not to do so. When appointing a Children's Guardian the court will consider the appointment of anyone who has previously acted as a Children's Guardian of the same child.[76]

Rule 16.17 provides that where the court is appointing a Children's Guardian, it will appoint a Cafcass officer or a Welsh family proceedings officer.

Litigation friends

A child (person under the age of 18) and a protected party (someone who lacks the requisite mental capacity to conduct their own proceedings) are unable to represent themselves or to instruct others to represent them in legal proceedings. In these circumstances, court rules specify that the proceedings should be conducted through a "litigation friend".

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73 *Ibid* p43
74 HL Deb 18 October 2011 c46WA
75 SI 2010/2955
76 Rule 16.3

Where a child is a party to proceedings but not the subject of those proceedings, the child must have a "litigation friend" to conduct proceedings on the child's behalf.[77] Rule 16 sets out who can be a litigation friend.

The Bill

Clause 3(1) would require the Secretary of State to establish a process and procedure for the investigation and determination by an independent body of a complaint of serious harm made by a child in the care of an authority; and for the appointment of a litigation friend from an organisation which has not previously employed a guardian at litem[78] for the child in previous proceedings. Until this process is established, a person with day to day contact with the child might, if the child so wishes, apply to be the child's litigation friend and the court would have to accept the application if satisfied that the child is suffering in the care of the authority and the court's attention is needed (**Clause 3(2))**.

Criminal records

The current law

Criminal records information is held on two main systems: the Police National Computer (PNC) and the Police National Database (PND).

An individual who is convicted of, or cautioned, reprimanded, warned or arrested for, a recordable offence will have a 'nominal record' of that conviction placed on the PNC. The retention of nominal records on the PNC is governed by the ACPO *Retention Guidelines for Nominal Records on the Police National Computer* (March 2006). These provide that an individual's nominal record should be retained on the PNC until his 100th birthday.[79] It can only be deleted ahead of this date in extremely limited circumstances, for example where the original arrest is found to have been unlawful.[80]

Operating alongside the PNC is the PND. While the police use the PNC to record convictions, cautions, reprimands, warnings and arrests, they use the PND to record 'soft' local intelligence: for example details of allegations or police investigations that did not lead to arrest or charge. The review, retention and disposal of material held on the PND is governed by the *Guidance on the Management of Police Information*.[81] The legal framework is set out in section 7 and Appendix 4 of the guidance. This applies to information held on any police systems other than the PNC. This intelligence will generally be retained for a minimum of six years, longer if it relates to allegations of a serious offence or if the individual concerned is considered to pose an ongoing risk.

Under the *Rehabilitation of Offenders Act 1974*, convictions,[82] cautions, reprimands and warnings become 'spent' after a certain period of time. Once a record becomes spent it does not usually need to be declared to employers or voluntary organisations.

However, if a person applies for a so-called 'excepted position', then the prospective employer is entitled to ask for details of both spent and unspent convictions, cautions,

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77 Rule 16.5

78 A guardian ad litem is appointed to represent the child in the proceedings and the guardian may appoint a solicitor. *The Family Proceedings Rules 2010* do not use the term "guardian ad litem" and instead refer to a "Children's Guardian" and to "litigation friends"

79 ACPO, *Retention Guidelines for Nominal Records on the Police National Computer*, March 2006. Please note that the 'step down' procedure referred to in the Retention Guidelines is now obsolete; it was suspended in October 2009 following a decision by the Court of Appeal in *Chief Constable of Humberside Police & Ors v The Information Commissioner & Anor* [2009] EWCA Civ 1079

80 Ibid, Appendix 2, pp11-12

81 National Policing Improvement Agency, 2nd edition, 2010

82 Other than convictions resulting in a prison sentence of more than two and a half years, which are currently excluded from the scope of the 1974 Act and can therefore never become spent

reprimands and warnings by way of a criminal records check. Excepted positions cover (for example) work with children or vulnerable adults or roles in certain licensed occupations or positions of trust (e.g. police officers, solicitors). The Criminal Records Bureau (CRB) has published a full list of excepted positions in respect of which a criminal records check can be sought: please see *CRB Checks: Eligible positions guidance*, September 2012.

Two levels of check are issued by the CRB, "standard" and "enhanced". A standard check contains details of all spent and unspent convictions, cautions, reprimands and final warnings (as held on the PNC), however old or minor the offence. An enhanced check includes the same information as a standard check together with local police intelligence held on the PND. Disclosure of such information is not automatic but is done on a case-by-case basis following the exercise of police discretion. Under section 113B(4) of the *Police Act 1997,* the test the police use when deciding whether to disclose non-conviction information is whether the chief officer 'reasonably believes it to be relevant' for the purpose of the check and whether in his or her opinion it ought to be included.

For a more detailed overview of the current law on criminal records, please see Library Standard Note 6441 *The retention and disclosure of criminal records*.[83]

The Bill

Clause 3(3) of the Bill would provide that the criminal records of a child in care 'shall only contain information that would have been included had that child not been in care'.

Protected characteristics under the Equality Act 2010

The *Equality Act* renders unlawful discrimination against another because of a 'protected characteristic'. The Act lists the protected characteristics in section 4. They are:

- age;
- disability;
- gender reassignment;
- marriage and civil partnership;
- pregnancy and maternity;
- race;
- religion or belief;
- sex;
- sexual orientation.

The Act distinguishes between direct and indirect discrimination. The key distinction between these is that direct discrimination is less favourable treatment because of a protected characteristic, whereas indirect discrimination concerns a measure applied to all which particularly disadvantages persons with a protected characteristic.[84]

In addition to direct and indirect discrimination, the *Equality Act* indentifies two further forms of prohibited conduct: harassment and victimisation.

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83 SN/HA/6441, 18 October 2012

84 See the *Equality Act 2010*, sections13 and 19

Harassment is where a person engages in unwanted conduct related to a relevant protected characteristic which has the purpose or the effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the person with the protected characteristic.[85]

Victimisation is defined as subjecting a person to detriment because that person has decided to avail themselves of protection under the Act, eg by bringing proceedings in an employment tribunal.[86]

Clause 3(4) provides that being or having been subject to a care order at any point in childhood shall be a protected characteristic for the purposes of the *Equality Act 2010.*

2.4 Adoption

Dispensing with parental consent

Under section 1 of the *Adoption and Children Act 2002*, the court or adoption agency must have the child's welfare throughout his/her life as its paramount consideration when making a decision in relation to adoption. The court or adoption agency must also have regard to the adoption welfare checklist in section 1(4), which includes having regard to other relatives (paragraph (f)):

> (a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
>
> (b) the child's particular needs,
>
> (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
>
> (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
>
> (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
>
> (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
>
> > (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
> >
> > (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
> >
> > (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

Dispensing with parental consent to adoption is covered by section 52 of the *Adoption and Children Act 2002*:

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85 ibid, section 26
86 ibid, section 27

> (1)The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—
>
> (a) the parent or guardian cannot be found or is incapable of giving consent, or
>
> (b) the welfare of the child requires the consent to be dispensed with.

In 2008, in a case where the trial judge had dispensed with the mother's consent and approved the adoption agency's plans, the Court of Appeal considered what test should be applied when dispensing with parental consent for making a placement order.[87] Lord Justice Wall held that the language of section 52 should be interpreted so that the judge has to consider whether the welfare of the child requires the adoption:

> Section 1(1) plainly applies when the court is deciding whether or not to dispense with parental consent to a placement order. Such a decision is manifestly "a decision relating to the adoption of a child". In these circumstances, section 1(2) of the 2002 Act requires the court (the word is the mandatory "must") in these circumstances to treat "the child's welfare throughout his life" as its "paramount consideration". "Paramount consideration" as Lord MacDermott classically held in J v C [1970] AC 668 at 711 means a consideration which "rules upon and determines the course to be followed".[88]

The Court stressed the importance of giving reasons for the decision to dispense with parental consent. Lord Justice Wall quoted from a decision in a case on special guardianship on this point:

> (i) In view of the importance of such cases to the parties and the children concerned, it is incumbent on judges to give full reasons and to explain their decisions with care. Short cuts are to be avoided. It is not of course necessary to go through the welfare check-list line by line, but the parties must be able to follow the judge's reasoning and to satisfy themselves that he or she has duly considered it and has taken every aspect of it relevant to the particular case properly into account.
>
> (ii) Provided the judge has carefully examined the facts, made appropriate findings in relation to them and applied the welfare check-lists contained in s 1(3) of the 1989 Act and s 1 of the 2002 Act, it is unlikely that this court will be able properly to interfere with the exercise of judicial discretion, particularly in a finely balanced case.[89]

Lord Justice Wall said that similar considerations would apply in relation to decisions to dispense with parental consent in adoption cases:

> In our judgment, similar considerations apply to applications under section 52(1)(b) of the 2002 Act. The guidance is, we think, simple enough. The judge must, of course, be aware of the importance to the child of the decision being taken. There is, perhaps, no more important or far-reaching decision for a child than to be adopted by strangers. However, the word "requires" in section 52(1)(b) is a perfectly ordinary English word. Judges approaching the question of dispensation under the section must, it seems to us, ask themselves the question to which section 52(1)(b) of the 2002 gives rise, and answer it by reference to section 1 of the same Act, and in particular by a careful consideration of all the matters identified in section 1(4).

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87 *P (A Child)* [2008] EWCA Civ 535, accessed on 23 October 2012
88 *Ibid* para 114
89 *Ibid* para 115

> In summary, therefore, the best guidance which in our judgment this court can give is to advise judges to apply the statutory language with care to the facts of the particular case. The message is, no doubt, prosaic, but the best guidance, we think, is as simple and as straightforward as that. Moreover, it very much echoes what this court said in Re S in relation to special guardianship orders.[90]

The Bill

Clause 4 would amend section 52 of the *Adoption and Children Act 2002* to make it a statutory requirement for any judge, who decides that parental consent may be dispensed with pursuant to subsection (1)(b), to explain how he has considered the welfare checklist in section 1(4); and then only make an order placing a child in the care of a local authority after considering whether it is possible and in the interest of the welfare of the child to place the child with one of his/her relatives.

2.5 Children and parents: duties of local authorities and other bodies

Welfare of the child

Some statutes require the child's welfare to be the paramount consideration when decisions are made about the child, including for example, section 1 of the *Adoption and Children Act 2002*[91] and section 1 of the *Children Act 1989.*[92]

For some other decisions, the requirement to consider the welfare of the child is worded differently. For example, section 17 of the *Children Act 1989* imposes a general duty on local authorities (in addition to their other duties):

> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families
>
> by providing a range and level of services appropriate to those children's needs.

Clause 5(1) of the Bill would require a local authority or other body when carrying out any functions or making any decisions in connection with the upbringing of a child, to have the child's welfare as the paramount consideration.

Shared parenting

The *Children Act 1989* provides that the court's paramount consideration, when determining an issue in relation to the upbringing of a child, including residence and contact related matters, must be the child's welfare.[93] More information is set out in a Library Standard Note, *Children: Residence and contact related matters for parents, grandparents and others after separation*.[94] Another Library standard note, *Family Justice Review update: Contact and other issues for parents following separation* provides a brief overview of the Family Justice Review's proposals relating to child contact issues and Government's response to them, as well as the subsequent steps being taken.[95]

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90 *Ibid* paras 116-7
91 Discussed above at section 2.4 of this paper
92 Discussed above at section 2.1 of this paper
93 *Children Act 1989,* s 1
94 SN/SP/3100, 1 July 2010
95 SN/SP/6335, 10 September 2012

After the breakdown of the relationship between a child's parents, maintaining a relationship with both parents is a relevant consideration to be taken into account when determining questions in relation to the child's welfare. However, there is no presumption of shared parenting time in law. In appropriate cases, the court can order that residence be shared between the separating parents, where to do so would be in the best interests of the child.

Proposals for change

In its *Programme for Government*, the Government stated its support for shared parenting, and stated that "we will conduct a comprehensive review of family law in order to increase the use of mediation when couples do break up, and to look at how best to provide greater access rights to non-resident parents and grandparents".[96]

The Family Justice Review Panel was asked to explore if better use could be made of mediation and how best to support contact between children and non-resident parents and grandparents. The Review's final report confirmed the recommendation in the interim report that there should not be a legal presumption of shared parenting.

As the final report highlighted, there had been "a large response in consultation" on the issue of shared parenting, with mixed views being expressed:

> 4.24 … Charities, legal and judicial organisations and academics (including Professors Helen Rhoades, Liz Trinder, Rosemary Hunter and Judith Masson and the Network on Family Regulation) supported the panel's stance.
>
> > *I am encouraged that the Review has opted against a shared care presumption. That is entirely consistent with the research evidence on what works for children.*
> >
> > Professor Liz Trinder, consultation response
>
> 4.25. Against this, many individuals – typically grandparents, fathers and unidentified respondents – said that a presumption of shared parenting is necessary in order to ensure that both parents remain involved with their children post separation. It was argued that decisive steps are required and a clear message needs to be sent.
>
> > *There MUST be an assumption of shared parenting from the outset. It has been proven that children have a better outcome if both parents remain involved in their upbringing.*
> >
> > Grandparent, consultation response
>
> 4.26. Many contributors took strong positions, citing gender imbalance, bias and institutional wrongdoing within family justice; others maintained that there is insufficient evidence against shared parenting to suggest that it should not be the primary consideration of the court.[97]

While opposing shared parenting, the interim report had recommended "that there should be a statement in legislation to reinforce the importance of the child continuing to have a meaningful relationship with both parents, alongside the need to protect the child from

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96 Cabinet Office, *Programme for Government*, May 2010, p20

97 Ministry of Justice, *Family Justice Review Final Report*, November 2011, pp138–139

harm".[98] However, in its final report the review panel decided against this proposal, citing evidence it had received, particularly from Australia.[99]

The final report of the Family Justice Review concluded that, "the core principle of the paramountcy of the welfare of the child is sufficient and that to insert any additional statements brings with it unnecessary risk for little gain. As a result, we withdraw the recommendation that a statement of 'meaningful relationship' be inserted in legislation":

> The child's welfare should be the court's paramount consideration, as required by the Children Act 1989. No change should be made that might compromise this principle. Accordingly, **no legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents.** For that reason and taking account of further evidence we also do not recommend a change canvassed in our interim report that legislation might state the importance to the child of a meaningful relationship with both parents after their separation where this is safe. While true, and indeed a principle that guides court decisions, we have concluded that this would do more harm than good.[100]

The panel stressed that, although it had been reluctant to change its initial recommendation, the decision to do so was a clear one:

> We are aware that some will be disappointed by our decision to recommend against a legal presumption around shared parenting and to step back even from the recommendations we made in this respect in our interim report. The evidence we received showed the acute distress experienced by parents who are unable to see their children after separation. This is an issue we know countries around the world try to tackle, and fail. Our conclusion was reached reluctantly but clearly. The law cannot state a presumption of any kind without incurring unacceptable risk of damage to children. Progress depends on a general social expectation of the full involvement of both parents in the lives of their children before separation, not on changes in the law.[101]

The panel was of the view that encouraging shared parenting was best achieved not by legislative change but by "parental education and information combined with clear, quick processes for resolution where there are disputes".[102]

The Review panel's final recommendations were that:

- Government should find means of strengthening the importance of a good understanding of parental responsibility in information it gives to parents.
- No legislation should be introduced that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents.[103]

The House of Commons Justice Committee also stated its opposition to inserting a legislative statement reinforcing the importance of the child continuing to have a meaningful relationship with both parents.[104]

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98 Ministry of Justice, *Family Justice Review Interim Report*, March 2011, p21, para 108
99 Ministry of Justice, *Family Justice Review Final Report*, November 2011, Annex G, pp215–224
100 *Ibid* p21, para 109
101 *Ibid* p4
102 *Ibid* p4
103 *Ibid* pp141-142, para 4.40

However, in its February 2012 response to the Family Justice Review, the Government stated that it believed "that there should be a legislative statement of the importance of children having an ongoing relationship with both their parents after family separation, where that is safe, and in the child's best interests". It had therefore "established a working group of Ministers to develop proposals for legislative change, which will be brought forward for wide debate and consultation later this year".[105]

The Government provided further information about its intentions:

> 62. The Government is mindful of the lessons which must be learnt from the Australian experience of legislating in this area, which were highlighted by the Review and led them to urge caution. We will therefore consider very carefully how legislation can be framed to avoid the pitfalls of the Australian experience, in particular that a meaningful relationship is not about equal division of time, but the quality of parenting received by the child.
>
> 63. Any changes will be complementary to, not in conflict with, the principle in the Children Act 1989 that the welfare needs of the child are the paramount consideration in any decisions made by the court; this remains the 'gold standard.' The changes will make it clear that the court should consider an ongoing relationship with both parents as something that in most cases will contribute to the child's welfare – and should look at the question through this lens, of what is best for the child – rather than as a 'right' for the parents.
>
> 64. The aim of any presumption of shared parenting will be to enhance the prospect of an agreement between parents which is in the best interests of their child, without recourse to often damaging and protracted adversarial action in the courts, which clearly is not in the child's interests. We have taken the same approach, focusing primarily on the needs of the child, with regard to contact and maintenance.[106]

The Queen's Speech 2012 set out the Government's intention to introduce legislation "to ensure that, where it is safe, and in the child's best interests, children have a relationship with both their parents after family separation".[107] The proposals were included as part of a wider *Children and Families Bill* which is expected in 2013.

On 13 June 2012, the Department for Education and Ministry of Justice published a consultation paper, *Cooperative parenting following family separation: Proposed legislation on the involvement of both parents in a child's life*. The consultation closed on 5 September 2012.

Four options were set out in the consultation, but the Government's preferred option is the "presumption" approach (option 1), which would "require the court … to act on a presumption that a child benefits from the involvement of both parents in the child's upbringing, unless it can be shown that this is not the case".[108]

On 11 July 2012, Sir Alan Beith, Chair of the Justice Select Committee, wrote to the Prime Minister and others to set out the Committee's opposition to the insertion in law of a legislative statement changing the present responsibility to safeguard the rights of the child in an attempt to promote shared parenting:

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104 House of Commons Justice Committee, *Operation of the Family Courts,* 14 July 2011, HC 518

105 Department for Education and Ministry of Justice, *The Government Response to the Family Justice Review: A system with children and families at its heart,* February 2012, p18, para 61

106 *Ibid* pp18–19

107 Cabinet Office, *The Queen's Speech 2012 - briefing notes,* accessed on 23 October 2012

108 Department for Education and Ministry of Justice, *Cooperative parenting following family separation: Proposed legislation on the involvement of both parents in a child's life*, para 10.2

> We have yet to be provided with any evidence or argument that properly counters the evidence we and the Family Justice Review considered before concluding that there should be no changes to the current legislation.
>
> We do not consider that the current draft clauses avoid the pitfalls of the Australian experience. It appears that the Department for Education considers that avoiding words such as "equal time" or "meaningful relationship" is enough in itself; we disagree.
>
> On 13 June 2012 the Parliamentary-Under Secretaries of State for Justice and Education appeared before our Committee to discuss shared parenting and other issues relating to the family courts. We were extremely concerned that insufficient consideration appeared to have been given to how the presumption in favour of shared parenting would be rebutted, despite the failure to effectively filter out cases involving safety fears being a key failing of the Australian reforms.
>
> We remain of the view that the introduction of a statement will simply lead to confusion, and will risk undermining the central principle of the Children Act 1989 that the welfare of the child is paramount. It remains unclear to us how the Government intends that the two tests will work in tandem in the difficult cases that end up before the Courts. The Consultation Paper and information we have received so far makes no effort to engage with the criticisms of shared parenting, nor properly explain how the pitfalls of the Australian experience will be avoided, beyond stating that they will be.

Sir Alan also said, "We remain extremely concerned that clearly expressed and well researched conclusions of our Committee and the Family Justice Review are being ignored".[109]

The Bill

Clause 5(2) would provide that "the local authority or other body must act on the presumption that the child's welfare is best served through having access to and contact with both parents and grandparents sufficient to enable him to have a meaningful relationship with both parents and grandparents unless in the opinion of the court such contact is not in the interests of the welfare of the child; and that information about the child should be provided to both parents".

3 Part 2 Other provisions relating to the administration of justice

3.1 Right to report wrongdoing

Clause 7 of the Bill would introduce a new provision to protect those who disclose 'wrongdoing' to a law enforcement agency or regulator, Member of Parliament or other elected official from contempt of court proceedings.

The current law

Those who wish to disclose 'wrongdoing' are currently protected to a certain extent by various existing provisions.

For example, the *Public Interest Disclosure Act 1998* provides protection again victimisation or dismissal to 'whistleblowers' who raise concerns about serious fraud or malpractice at their place of work, provided they have acted in a responsible way in dealing with their concerns. Full details on the 1998 Act's provisions are set out in Library Standard Note 248 *Whistleblowing: The Public Interest Disclosure Act*. It does not make any specific mention of

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[109] House of Commons Justice Committee, *Letter from the Chair of the Committee to the Prime Minister - The Operation of the Family Courts,* 11 July 2012, accessed on 23 October 2012

protecting whistleblowers from contempt of court proceedings; the focus of this legislation was instead to protect whistleblowers from employment proceedings.

With specific reference to contempt, subsection 12(1) of the *Administration of Justice Act 1960* provides that the publication of information relating to proceedings before any court sitting in private shall not itself be contempt of court, except in the following cases:

> (a) where the proceedings—
>
> (i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;
>
> (ii) are brought under the Children Act 1989 or the Adoption and Children Act 2002; or
>
> (iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;
>
> (b) where the proceedings are brought under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983 authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or a county court;
>
> (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
>
> (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
>
> (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

Subsection 12(4), however, provides:

> Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

So the publication of information relating to private court proceedings involving any of the matters listed in subsection 12(1) will not be punishable as contempt where it has been authorised by rules of court.

In relation to family proceedings, Parts 12 and 14 of the *Family Procedure Rules 2010, SI 2010/2955* authorise the disclosure of information relating to private court proceedings in certain circumstances. Part 12 deals with proceedings relating to children except parental order proceedings and proceedings for applications in adoption, placement and related proceedings. Part 14 of the *Family Procedure Rules 2010* deals with procedure for applications in adoption, placement and related proceedings.

Rule 12.73 provides:

> For the purposes of the law relating to contempt of court, information relating to proceedings held in private (whether or not contained in a document filed with the court) may be communicated –

> (1) (a) where the communication is to–
>
> (i) a party;
>
> (ii) the legal representative of a party;
>
> (iii) a professional legal adviser;
>
> (iv) an officer of the service or a Welsh family proceedings officer;
>
> (v) the welfare officer;
>
> (vi) the Legal Services Commission;
>
> (vii) an expert whose instruction by a party has been authorised by the court for the purposes of the proceedings;
>
> (viii) a professional acting in furtherance of the protection of children;
>
> (ix) an independent reviewing officer appointed in respect of a child who is, or has been, subject to proceedings to which this rule applies;
>
> (b) where the court gives permission; or
>
> (c) subject to any direction of the court, in accordance with rule 12.75 and Practice Direction 12G.

Rule 12.73 goes on to make it clear that this does not permit 'the communication to the public at large, or any section of the public' of information relating to the private proceedings.

Rule 12.75 provides as follows:

> (1) A party or the legal representative of a party, on behalf of and upon the instructions of that party, may communicate information relating to the proceedings to any person where necessary to enable that party –
>
> (a) by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings;
>
> (b) to engage in mediation or other forms of alternative dispute resolution;
>
> (c) to make and pursue a complaint against a person or body concerned in the proceedings; or
>
> (d) to make and pursue a complaint regarding the law, policy or procedure relating to a category of proceedings to which this Part applies.

A person to whom a communication is made under Rule 12.75(1)(a) may not communicate that information any further. A person to whom a communication is made under Rule 12.75(1)(b), (c) or (d) may communicate that information to a further recipient (and that further recipient to another recipient, and so on) provided that the person who initially communicated the information consents and the further communication is made only for the purpose(s) for which he or she made the initial communication.

Further guidance is set out in Practice Direction 12G which accompanies the rules.

Rule 14.14 makes similar provision to Rule 12.73 in respect of adoption proceedings. It permits the communication of information relating to proceedings in private to any class of

person listed in Rule 14.14, or with the leave of the court, or in accordance with Practice Direction 14E.

Practice Direction 14E provides that, subject to a direction of the court, a party may communicate to an elected representative or peer the text or summary of the whole or part of a judgment given in the proceedings, to enable the elected representative or peer to give advice, investigate any complaint or raise any question of policy or procedure.

These Rules permitting the communication of information relating to private family proceedings were first introduced in April 2009.[110] They have been described as

> ...implementing a profound change in the law in relation to rights of access to family proceedings and allowing for more extensive disclosure without leave of information from proceedings relating to children.[111]

The Bill

Under **clause 7** of the Bill it would not be a contempt of court (notwithstanding any court order or statute) for any person:

> (a) to report wrongdoing to a law enforcement agency or regulator, Member of Parliament or other elected official; and
>
> (b) for such a regulator, law enforcement agency, Member of Parliament or other elected official to investigate the allegation of wrongdoing.

In addition, it would be an offence to threaten any person in order to prevent them from reporting such wrongdoing.

The clause does not provide any further definition of 'wrongdoing'; it would therefore extend beyond the current provision made by the *Family Procedure Rules 2010, SI 2010/2955* as it would not be limited to disclosures of information relating to family court proceedings.

3.2 Matters relating to court proceedings

Scandalising the court

The current law

'Scandalising the court' is a centuries-old form of contempt of court that is committed by publishing material likely to undermine the administration of justice or public confidence therein. This might include, for example, publishing abuse towards a judge or suggesting that he or she is corrupt or impartial.

The last recorded successful prosecution for scandalising the court in England and Wales was in 1931,[112] and in 1985 Lord Diplock referred to the matter as 'virtually obsolescent'.[113] However, it received renewed attention in March 2012 when the Attorney General for Northern Ireland (John Larkin) was granted permission to bring proceedings for scandalising the court against former cabinet minister Peter Hain. The proceedings were based on comments Mr Hain had made criticising Lord Justice Girvan's handling of a judicial review case in Northern Ireland.[114] An Early Day Motion tabled by David Davis called for the Northern Ireland Attorney General to 'end this serious attack on free speech by withdrawing

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[110] *The Family Proceedings (Amendment) (No.2) Rules 2009, SI 2009/857*
[111] *Arlidge, Eady & Smith on Contempt*, 4th edition, 2011, para 8-136
[112] *Colsey*, The Times 9 May 1931
[113] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 at 347A
[114] "Peter Hain faces contempt case over book's criticism of judge", *Guardian*, 27 March 2012

the proceedings for contempt'; it was signed by a total of 153 Members.[115] The case against Mr Hain was set aside in May 2012 after he wrote to Mr Larkin to clarify his comments and to make clear that they were not intended to undermine the administration of justice in Northern Ireland or the independence of the Northern Ireland judiciary.[116]

In the wake of this affair Lord Lester of Herne Hill, Lord Pannick, Lord Bew and Lord Mackay of Clashfern tabled an amendment to the Government's *Crime and Courts Bill* that read:

> The offence of scandalising the judiciary under the common law of England and Wales and the common law of Northern Ireland is abolished.

The amendment received cross-party support when it was debated.[117] In response, Justice Minister Lord McNally said:

> The Government are sympathetic, but we would like to consider the issue further and consult others, particularly the judiciary and the devolved Administrations, before taking a final view. To allow time for such consultation, I ask the noble Lord to withdraw his amendment at this stage on the understanding that we can come back to this matter on Report.[118]

The amendment was withdrawn on this understanding.

The Law Commission had been planning to review the offence of scandalising the court as part of a wider review of contempt that it is currently undertaking.[119] However, it brought forward its review of the offence to tie in with the Government's commitment to look at it ahead of Report stage for the *Crime and Courts Bill*. It issued a consultation paper in August 2012 that sought views on its provisional proposal that the offence should be abolished without replacement.[120] The consultation closed on 19 October 2012. No response has yet been published.

The Bill

Clause 8(1) of the Bill would abolish the common law offence of scandalising the court. **Clause 15(3)** provides that the Bill extends to England and Wales only.

Persons imprisoned for contempt

The current law

The principal sanctions for contempt of court are imprisonment, a fine, or seizure of goods under a writ of sequestration. In some cases the court may take the view that the mere fact of being found in contempt is in itself sufficient punishment.

Under section 14 of the *Contempt of Court Act 1981*, the maximum term of imprisonment a court may impose when committing a person to prison for contempt is two years in the case of committal by a superior court (which for these purposes includes county courts), or one month in the case of committal by an inferior court.[121]

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115 Early Day Motion 2984, Session 2010-12

116 "Peter Hain contempt case will not proceed", *Independent*, 17 May 2012

117 HL Deb 2 July 2012 cc 555-566

118 HL Deb 2 July 2012 c564

119 Law Commission website, *Areas of Law: Criminal - Contempt* [accessed 23 October 2012]

120 Law Commission Consultation Paper No 207, *Contempt of Court: Scandalising the Court – A Consultation Paper*, August 2012

121 For these purposes a superior court includes the Supreme Court, the Court of Appeal, the High Court, the Crown Court and the county court. An inferior court includes the magistrates' court.

Detailed procedure for committal hearings relating to contempt is set out in the *Civil Procedure Rules 1998, SI 1998/3132*. Committal hearings should usually take place in public, although in certain circumstances they may take place in private as set out in Rule 6 of *Schedule 1, RSC Order 52: Committal*:

> (1) Subject to paragraph (2), the court hearing an application for an order of committal may sit in private in the following cases, that is to say –
>
> > (a) where the application arises out of proceedings relating to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
> >
> > (b) where the application arises out of proceedings relating to a person suffering or appearing to be suffering from mental disorder within the meaning of the Mental Health Act 19832;
> >
> > (c) where the application arises out of proceedings in which a secret process, discovery or invention was in issue;
> >
> > (d) where it appears to the court that in the interests of the administration of justice or for reasons of national security the application should be heard in private;
>
> but, except as aforesaid, the application shall be heard in public.
>
> (2) If the court hearing an application in private by virtue of paragraph (1) decides to make an order of committal against the person sought to be committed, it shall in public state –
>
> > (a) the name of that person;
> >
> > (b) in general terms the nature of the contempt of court in respect of which the order of committal is being made; and
> >
> > (c) the length of the period for which he is being committed.

Even if a committal hearing takes place in private, therefore, the effect of this provision is that the court must subsequently make a public statement as to the identity of the person who has been committed to prison, the nature of the contempt in respect of which they were committed and the length of time for which they had been committed.

The Bill

Clause 8(2) of the Bill would make it mandatory for courts to publish on the internet a list of persons imprisoned for contempt, the term of imprisonment and the reasons for their imprisonment.

Although the courts are currently required to announce these matters in public (even if the committal hearing itself has taken place in private) as outlined above, they are not currently under any obligation to publicise this information any further. If there do not happen to be any members of the press or public in court when a public committal hearing takes place or when the court makes a public statement on the outcome of a private committal hearing, then the outcome of the hearing may not be publicised beyond the walls of the court.

Judicial review

Clause 8(3) relates to proceedings for judicial review. Judicial review is a legal procedure. It allows individuals, businesses or groups (such as Non-Governmental Organisations) to challenge in court the lawfulness of decisions taken by Ministers, Government Departments

and other public bodies. These bodies include local authorities, the immigration authorities, and regulatory bodies. If a public body makes a decision in breach of any principle of public law, then that decision may be challenged in the High Court. The *Tribunals Courts and Enforcement Act 2007* also granted the 'Upper Tribunal' jurisdiction to hear certain claims for judicial review (although this power is subject to conditions).

Applications for judicial review are subject to a 'permission stage' which is designed to filter out those claims which have no prospect of success. In practice this means that before a claimant may proceed to a full hearing of a claim, he or she has to obtain the permission of the Administrative Court and demonstrate that the claim is arguable; has been brought expeditiously and within the relevant time limits.

The clause provides that where any person has been granted leave to bring a judicial review the court shall make an order restricting the costs for which the applicant may be liable unless there are compelling reasons as to why this should not happen. Currently, while legally-aided litigants may benefit from costs protection, those people who are self funding will normally also be liable to pay the costs of the other side, if they lose their case. The effect of the clause would therefore be to transfer the cost of this type of litigation to public authorities whose decisions are challenged (if the courts determine that the claimant has made an arguable case at first instance).

3.3 The Official Solicitor

The work of the Official Solicitor

The Official Solicitor is appointed by the Lord Chancellor under section 90 of the *Senior Courts Act 1981* and is an independent statutory office holder. The OSPT is an arms length body of the Ministry of Justice that exists to support the work of the Official Solicitor and the Public Trustee.[122] The Official Solicitor acts for people who, because they lack mental capacity and cannot properly manage their own affairs, or are minors, are unable to represent themselves and no other suitable person or agency is able and willing to act. The Ministry of Justice website sets out information about the role of the official Solicitor:

> The Official Solicitor, by providing front line services, provides access to the justice system to those who are vulnerable by virtue of minority or lack of mental capacity where that is needed. In so doing the Official Solicitor mitigates
>
> - the disadvantage that his clients experience because of their disability or age.
> - the vulnerability of his clients to social exclusion.
>
> The Official Solicitor and the Public Trustee provide last resort trustee, executorship and deputyship services.
>
> (...)
>
> One of his purposes is to prevent injustice to the vulnerable by
>
> - acting as last resort litigation friend, and in some cases solicitor, for adults who lack mental capacity and children (other than those who are the subject of child welfare proceedings) in court proceedings because they lack decision making capacity in relation to the proceedings.
> - acting as last resort administrator of estates and trustee.

[122] Ministry of Justice website, *Official Solicitor and Public Trustee*, accessed on 23 October 2012

- acting as last resort property and affairs deputy in relation to Court of Protection clients.

As an office holder of the Senior Courts he also

- acts as advocate to the court providing advice and assistance to the court; and under Harbin v Masterman making enquiries on behalf of the court.

And he also

- through the International Child Abduction and Contact Unit (ICACU) carries out in England and Wales the operational functions of the Lord Chancellor, who is the Central Authority under the Hague and European Conventions on Child Abduction.
- through the Reciprocal Enforcement of Maintenance Orders (REMO) Unit carries out in England and Wales the operational functions of the Lord Chancellor who is the Central Authority for international maintenance claims.
- is appointed, in place of a parent, to act as the registered contact in the administration of the Government's Child Trust Fund scheme for those children in care in England and Wales when there is no other suitable person to do so.
- as directed by the Lord Chancellor, reviews cases of people sent to prison for contempt where the:
  - case has been referred to his office or
  - the prison term is more than 4 weeks.

However changes in procedures and law, now mean the Official Solicitor rarely takes action other than to remind those sent to prison for contempt of their right to apply to remove their contempt.[123]

The current appointee to the office of the Official Solicitor to the Senior Courts is Alastair Pitblado. The working relationship between the Official Solicitor and the Ministry of Justice is set out in a Memorandum of Understanding dated 5 May 2010.

On 21 February 2012, the Official Solicitor issued a note to explain the Official Solicitor's current general position when invited to act as litigation friend in Court of Protection healthcare and welfare cases, "in order to correct some misconceptions which he has become aware are in circulation".[124] The note sets out the Official Solicitor's long-standing acceptance criteria. Those are:

- that there is evidence (or the court has made a finding) that the party (or intended party) lacks capacity to conduct the proceedings or is a child (or in Court of Protection proceedings evidence or a finding with regard to P's lack of relevant decision making capacity)
- that, on the basis of the information available to him, there is no one else suitable and willing to act as litigation friend
- that there is security for the costs of legal representation of the protected party or P or the case falls in one of the classes in which, exceptionally, he funds the litigation

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[123] *Ibid*

[124] Official Solicitor, *Official Solicitor: Court of Protection: Acceptance of Appointment as Litigation Friend,* 21 February 2012, accessed on 23 October 2012

> services out of, or partially out of, his budget, in accordance with long standing practice.

The note states that the Official Solicitor wrote to the President of the Court of Protection on 15 December 2011 to inform him that he had reached the limit of his resources with regard to Court of Protection welfare cases, meaning that his available staff to manage this class of case were unable to take on any more of these cases. The Official Solicitor said that he would be able to accept invitations to act only in the most urgent cases. Other cases which met the acceptance criteria would be placed on a waiting list.

Westminster Hall debate

In a Westminster Hall debate on litigation friends in March 2012, John Hemming raised concern that it was difficult to challenge the appointment of the Official Solicitor:

> The big problem for anyone for whom the Official Solicitor has been appointed is finding any way to challenge such a decision. Most firms of solicitors simply refuse to act for someone without litigation capacity. The civil procedure rules do not really allow people to challenge the appointment of a litigation friend. CPR rule 21.9 states:
>
> "(2) Where a protected party regains or acquires capacity to conduct the proceedings, the litigation friend's appointment continues until it is ended by court order."
>
> The assumption is that litigation friends cannot be wrongly appointed.[125]

John Hemming also raised concerns about the office of the Official Solicitor:

> The Official Solicitor's office is an unaccountable place. He has told me that he is not accountable to Parliament on the basis of individual cases. Furthermore, he is not subject to the Freedom of Information Act, or at least not within this area, but he is subject to it in other areas of his activity. Instead, the Official Solicitor is accountable to individual secret court hearings. That really is not good enough. There must be some accountability beyond a few people in suits who have a common interest in concealing malpractice.[126]

In response, Jonathan Djanogly, the then Parliamentary Under-Secretary of State for Justice, set out information about the role of the Official Solicitor:

> My hon. Friend also queried the role of the Official Solicitor as a litigation friend. The Official Solicitor is an independent office holder of the senior courts whose duties include acting as a last-resort litigation friend to those who lack the capacity to conduct their own litigation. He is not accountable to Ministers or to the Ministry of Justice for his decisions in individual cases, nor are Ministers or the Ministry responsible for those decisions. The Official Solicitor will conduct the litigation on behalf of the person for whom he is acting as litigation friend fairly, competently and in their best interests.[127]

John Hemming pressed for a reply to his question: "how do we know that the Official Solicitor is doing his job properly?" Jonathan Djanogly replied that that question could be asked of any lawyer who has a relationship with his client. The exchange continued on the role of the Official Solicitor:

> **John Hemming**: The Official Solicitor may be legally qualified, but his role is not that of a lawyer: his role is to make decisions and to instruct lawyers. Normally, the Official

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125 HC Deb 21 March 2012 c245WH
126 HC Deb 21 March 2012 c246WH
127 HC Deb 21 March 2012 c250WH

> Solicitor instructs another firm to act. The question is: how do we know that the Official Solicitor is doing his job properly?
>
> **Mr Djanogly**: The Official Solicitor is an independent appointment, and my hon. Friend could ask the same question about a judge, for example. How do we know that a judge is doing his job properly?
>
> **John Hemming**: It obviously comes back to the question of secrecy and monitoring of the legal system. If there is transparency, one can have some comfort that people are doing their job properly. I see many examples of people apparently not doing their job properly.[128]

The Bill

Clause 9 would require the Secretary of State to make regulations, under the negative resolution procedure, "to establish a process and procedure whereby the work of the Official Solicitor is subject to wider scrutiny".

3.4 Recording of hearings

The current law

Under subsection 9(1) of the *Contempt of Court Act 1981*, it is a contempt of court:

> (a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;
>
> (b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or any section of the public, or to dispose of it or any recording so derived, with a view to such publication;
>
> (c) to use any such recording in contravention of any conditions of leave granted under paragraph (a).

Under subsection 9(4), the above does not apply to the making or use of sound recordings for the purpose of making an official transcript of proceedings.

Leave under subsection 9(1)(a) may be granted or refused at the discretion of the court, and if granted may be subject to such conditions as the court thinks proper with respect to the use of any recording made. It may withdraw or amend any leave granted.

Rule 16.9 of the *Criminal Procedure Rules 2012, SI 2012/1726* and Part I.2 of the *Consolidated Criminal Practice Direction* provide further guidance on the grant of leave in criminal proceedings. The latter states:

> The discretion given to the Court to grant, withhold or withdraw leave to use tape recorders or to impose conditions as to the use of the recording is unlimited, but the following factors may be relevant to its exercise: (a) the existence of any reasonable need on the part of the applicant for leave, whether a litigant or a person connected with the press or broadcasting, for the recording to be made; (b) the risk that the recording could be used for the purpose of briefing witnesses out of court; (c) any possibility that the use of the recorder would disturb the proceedings or distract or worry any witnesses or other participants.

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[128] HC Deb 21 March 2012 c251WH

For civil proceedings, the relevant guidance is set out in paragraph 6 of *Practice Direction 39A – Miscellaneous Provisions Relating to Hearings*. This indicates that at any hearing, whether in the High Court or a county court, the proceedings will be tape recorded unless the judge directs otherwise.

The Bill

Clause 10 of the Bill would permit anyone who is a party to a hearing in court to record that hearing for the purposes of producing a transcript. Any recording and any transcript produced from it would be subject to 'the same rules of confidentiality' as apply to a transcript that would have been provided by the court.

3.5 Mental capacity and litigation

If a person is deemed to lack the necessary mental capacity to conduct their own litigation, it is necessary to appoint someone ("a litigation friend") to manage the litigation, and to make all relevant decisions related to the conduct of the case.

Current position

The *Mental Capacity Act 2005* (the Act) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. It established a new Court of Protection, with jurisdiction to deal with decision-making for adults (and in certain circumstances persons under the age of 16) who lack mental capacity.[129]

Section 1 of the Act sets out a list of principles which apply for the purposes of this Act:

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

The *Mental Capacity Act 2005 Code of Practice* provides guidance on the Act. Chapter 2 sets out information about how the principles should be applied, including in connection with the principle that a person is not to be treated as unable to make a decision merely because he makes an unwise decision:

> 2.10 Everybody has their own values, beliefs, preferences and attitudes. A person should not be assumed to lack the capacity to make a decision just because other people think their decision is unwise. This applies even if family members, friends or healthcare or social care staff are unhappy with a decision.[130]

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[129] *Mental Capacity Act 2005,* section 45

[130] *Mental Capacity Act 2005, Code of Practice*, pp24-5 accessed on 23 October 2012

The Court of Protection makes decisions and appoints deputies to make decisions in the best interests of those who lack capacity to do so. Among other things, it has power decide whether a person has capacity to make a particular decision for themselves.

Chapter 4 of the *Code of Practice* deals with how capacity should be assessed. It also includes information about how someone can challenge a finding of lack of capacity, including:

> 4.65 It might be possible to get a second opinion from an independent professional or another expert in assessing capacity. Chapter 15 has other suggestions for dealing with disagreements. But if a disagreement cannot be resolved, the person who is challenging the assessment may be able to apply to the Court of Protection. The Court of Protection can rule on whether a person has capacity to make the decision covered by the assessment (see chapter 8).

In a Westminster Hall debate, John Hemming raised concerns about the difficulty of overturning a finding that a person does not have the mental capacity to conduct litigation:

> One of the reasons why I have ended up helping to get rid of the Official Solicitor, as people might put it, or to remove their litigation friend is that it is almost impossible to find a way of doing so. People who are often quite bright go around phoning up firms of solicitors and saying, "Oh, the Official Solicitor is acting for me," and the firms reply, "Well, we can't deal with you." Even then, there is still the matter of legal aid.
>
> I tend to get involved because people must be aware of my concerns about how the litigation friend system operates and come to me. I have talked to other hon. Members who have encountered difficult situations as well, but people often get excited about the being made into a non-person thing. I do not blame them for that, but they get quite angry, and when they present themselves to other hon. Members, they do so in quite an angry state, yet that is in part because the system is simply not responding to them. As described by Thomas Hammarberg, they are treated as non-persons and their decisions have no legal force.[131]

In response, Jonathan Djanogly set out the test for capacity to litigate and the way in which litigation friends are appointed:

> The capacity to litigate is based on a common law test of capacity set down by the courts. My hon. Friend is aware of the Masterman-Lister case which makes it clear that the presumption is that all adults are competent to manage their property and affairs; it is for the person alleging incapacity to displace that presumption and to prove incapacity, not for an adult to prove his own capacity; and it is a fundamental right of a person to conduct proceedings. That presumption is not removed lightly. The assessment of litigation capacity is a matter for the court in the individual case to decide and—this is important—not for an expert giving evidence on capacity. I confirm to my hon. Friend that the legislation in force in England and Wales supports individuals to make their own decisions, as called for in the commissioner's article.
>
> My hon. Friend also questioned how litigation friends are appointed. The appointment of a litigation friend is governed by procedural court rules. The duty of a litigation friend is set out in rules and associated practice directions. The courts would not wish people to be deprived of their autonomy or prevented from conducting their own proceedings in the absence of cogent evidence that they lack the mental capacity to do so.[132]

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131 HC Deb 21 March 2012 c247-8WH
132 HC Deb 21 March 2012 c250WH

On 9 October 2012, the European Court of Human Rights ruled in the case of *R.P. and others v United Kingdom,*[133] and considered the role of the Official Solicitor in making decisions on behalf of individuals who are unable to act for themselves. The case involved child care proceedings, and the parties asked the Court to consider whether the appointment of the Official Solicitor was proportionate to the legitimate aim pursued or whether it impaired the very essence of R.P.'s right of access to a court.

Relying on Article 6.1 (right of access to court), the applicants complained in particular about the appointment of the Official Solicitor to act for R.P. in the proceedings concerning her daughter, alleging in particular that the implications of that appointment – which R.P. had been unable to challenge – had not been fully explained to her. Further relying on Article 8 (right to respect for private and family life), R.P. also complained that she had not had the opportunity to challenge the decision to remove her daughter from her care.[134]

The Court held that there had been no violation of Article 6.1 and rejected the claim under Article 8.

The Court's judgment quotes from a statement made by the Official Solicitor to the Court of Appeal which set out his standard working practice.

> "If there is a conflict in the evidence relating to an adult party's capacity to conduct the proceedings then I will not accept appointment unless or until that conflict is resolved either by the experts arriving at a consensus, or by determination of the court. I will return to this issue below.
>
> (...)
>
> The solicitor, however, remains the primary point of contact for the protected party. My case worker relies on the solicitor to ensure the protected party is involved, so far as is possible, and is informed about the progression of the proceedings, and for communication of the protected party's ascertainable views, wishes and feelings with regard to the matters at issue. Whilst the solicitor may not take instructions from the protected party I regard the maintenance of personal contact between the solicitor and the protected party during the case as important, to ensure that proper information is provided and to afford the protected party the opportunity to express any concerns about issues raised, or information provided in the proceedings. I expect any concerns raised to be properly considered and communicated to my case worker. My case worker will consider the protected party's views and wishes on all relevant points but where those views and wishes run contrary to the legal advice received as to the management and progression of the case, it is unlikely that I will prefer the protected party's views over that advice, as it would not be in the protected party's interests that I do so.
>
> (...)
>
> I am not necessarily involved in the investigation of capacity unless specifically directed to investigate by the court (although my staff are available to offer guidance with regard to the relevant test, if so requested). The evidence as to lack of litigation capacity may therefore be in the form of a medical or psychological report or by way of a report in the form of my standard certificate. The evidence is generally from either a psychiatrist or (in the case of learning disability or acquired brain injury) from a

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133 [2012] ECHR 1796

134 European Court of Human Rights Press Release, *Judgments concerning Armenia, Belgium, Bulgaria, Georgia, Greece, Hungary, Italy, Poland, Russia, Turkey, and the United Kingdom* ECHR 372 (2012), 9 October 2012

> psychologist. In a small number of cases it will be from a general practitioner. In a minority of cases it may be from another clinical specialist such as a neurologist or geriatrician. In the alternative the court may have made a determination, on the existing evidence, that the person concerned is a 'protected party' within the meaning of the rules.
>
> If the evidence on capacity to conduct the proceedings is ambiguous, or conflicting, then the Divisional Manager will request further clarification from the person who has conducted the assessment, or refer back to the court for a determination of the capacity issue.[135]

The Official Solicitor then specifically addressed the point of a protected party asserting capacity to act:

> If during the course of the case the solicitor advises the case worker that the protected party may have recovered capacity, the standard instructions provide that the solicitor must obtain further evidence on this point.
>
> If there is evidence that the protected party has recovered capacity, then I will make an application to the court for my discharge. It is of course always open to the protected party at any time during my appointment to apply for my discharge, if of the view that the evidence as to capacity is open to challenge. Similarly if a person comes forward as willing to act in substitution for myself, then an application may be made to substitute for me as litigation friend. My discharge or substitution as litigation friend is for the court to decide.
>
> If my case worker is informed that the protected party asserts his or her own capacity to conduct the proceedings and disputes the existing evidence, then the protected party would be invited to agree to undergo further assessment - for example, through referral to his or her general practitioner or other NHS referral. If the protected party refuses to undergo further assessment or seek further evidence, I have, of course, no power to compel this.[136]

R.P. submitted (among other things) that Article 6.1 of the European Convention on Human Rights had been violated because the decision on whether or nor she had litigation capacity was not fully tested by a court and she did not have a full opportunity to challenge that decision.

The Court considered whether the appointment of the Official Solicitor could be challenged and found that it could:

> The Court considers that in order to safeguard R.P.'s rights under Article 6 § 1 of the Convention, it was imperative that a means existed whereby it was possible for her to challenge the Official Solicitor's appointment or the continuing need for his services. In this regard, the Court observes that the letter and leaflet which the Official Solicitor sent to R.P. informed her that if she was unhappy with the way her case was being conducted, she could speak to either S.C. [her solicitor] or to the Official Solicitor, or she could contact a Complaint's Officer. Moreover, in his statement to the Court of Appeal the Official Solicitor indicated that R.P. could have applied to the court at any time to have him discharged. Alternatively, he indicated that if it had come to his attention that R.P. was asserting capacity, then he would have invited her to undergo further assessment. While the Court observes that these procedures fall short of a formal right of appeal, in view of the finding that R.P. lacked litigation capacity, it

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135 [2012] ECHR 1796, at para 28
136 *Ibid*

> considers that they would have afforded her an appropriate and effective means by which to challenge the appointment or the continued need for the appointment of the Official Solicitor.[137]

An article on this case on the *UK Human Rights Blog* attracted a comment from a commentator under the identity of "The Small Places" which discussed whether a person could challenge a finding of lack of capacity, and the problems involved in doing so:

> My feeling is that the ECtHR gave a very superficial analysis of the situation. Prior to RP bringing the case in the Court of Appeal, it wasn't even clear that a person who had been found to lack capacity to litigate had standing to (see paragraph 36 where Sir Nicholas Wall 'says no more about it' as neither the OS nor the LA raised a challenge on these grounds). I suppose the ECtHR ruling has at least made clear that people in RP's position must have standing to apply to the court to displace their litigation friend. But there are several problems here. How is a person who may have borderline capacity, who is unlikely in the extreme to be familiar with CPR 21 or Court of Protection Rule 147, supposed to do so without being able to instruct a solicitor? ... Secondly, if they do wish to challenge the appointment of a litigation friend in court – is there public funding for them to do so? How are they supposed to secure and fund any expert reports they might need?

The commentator questioned the use of the Official Solicitor's complaints procedure:

> The ECtHR placed great store by the OS's complaints mechanism. There is very little evidence that the complaints mechanism has ever been used in this way. Certainly none of the OS's annual reports for the last four years suggests that he has withdrawn from a case on the basis of a complaint. The ECtHR also said that RP should have raised her challenge to his appointment earlier. There is very little discussion as to precisely what RP was told about the OS's appointment at the outset. The role of a litigation friend seems baffling to most people outside the legal world. To be told that somebody has been appointed who will act in your best interests is very different to being told that somebody has been appointed who might argue a case which conflicts entirely with what you want. Surely that latter point is what must be pressed home to a person in order for them to fully understand the significance of being found to lack litigation capacity. Yet neither the CoA nor the ECtHR report that this is what RP was told.
>
> (...)
>
> There is a wider question about whether it is even appropriate for a person's 'objective' – as opposed to 'subjective' – best interests to be represented in court. There are cases where there is a danger that a person might run up excessive costs or settle for trifling amounts without the intervention of litigation friends – they often have a very valuable role in such cases. Likewise in cases where a person's wishes and preferences cannot be discerned. But in cases like this, or cases in the Court of Protection, where the courts are already bound to give effect to the best interests of the child or the person themselves, what is the danger in pressing as hard as possible for what the person actually wants? To do otherwise distorts the case that is presented before the court so that a person's rights to self-determination are never fully

[137] *Ibid* para 70

> adversarially tested. What is tested instead, is other people's views of what they should want.[138]

The Bill

Clause 11 of the Bill would enable any person "who has been deemed to lack capacity to bring or conduct any proceedings" at any time to appeal against that decision, or "make an application to assert capacity presently, and shall have standing to conduct the proceedings in that matter themselves and without their litigation friend".

Clause 12 would provide that "any person who, in the assessment of their capacity to make a decision, proposes to make a decision that is within the ambit of possible reasonable choices shall be deemed to have capacity for the purposes of that decision notwithstanding that they would otherwise be found incapacitous, unless it would on balance of probabilities cause them serious harm, whether immediately or in the future".

4 Part 3 Cost of living and measures to achieve lower fuel bills

Part 3 of the Bill seeks largely to set targets to expedite and maximise take-up of existing energy efficiency and fuel poverty measures by households.

4.1 Strategy

Clause 13 of the Bill would require the Secretary of State to put in place a strategy to ensure "increases in the installation of domestic energy efficiency measures and micro generation technologies" as referred to in the *Climate Change and Sustainable Energy Act 2006*, but with the addition of passive flue gas technology.

Code for Sustainable Homes

The clause would require the proposed strategy to include "steps for all new homes to comply with level 6 of the Code for Sustainable Homes by 2016".

The Code for Sustainable Homes has 6 levels. The lowest level is higher than the current building regulations. It is a voluntary standard although the previous Government required all new homes to include certification in the now defunct Home Information Packs.

There is a commitment in the Carbon Plan that there will be "regulatory requirements for zero carbon homes to apply from 2016". This follows on from a similar commitment made in Building a Greener Future published in 2007. The Government approach to this has been to review the voluntary Code for Sustainable Homes to make it increasingly stringent with a view that the highest level, Level 6, equates to what will be required to meet the zero carbon standard in 2016. The Government's intention is that these standards will be incorporated into building regulations from that date as a minimum requirement for all new homes.

This was set out in the latest review of the code in 2010, which also set out what the definition of a zero carbon home would be:

> It would require a 70 per cent reduction in carbon emissions against 2006 standards through a combination of energy efficiency, on-site low and zero carbon energy supply and/or connections to low carbon heat networks ('carbon compliance'). The remaining emissions, including a calculated amount to cover the use of appliances, would be

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[138] Rosalind English, "Autonomy and the role of the Official Solicitor – whose interests are really being represented?" *UK Human Rights Blog,* 10 October 2012, comment posted by The Small Places (@TheSmallPlaces) on 11 October 2012, accessed on 23 October 2012

> addressed through a system of 'allowable solutions' (including achieving further reductions on-site and a range of off-site measures).
>
> This builds on previous announcements that the route to zero carbon would involve a series of regulatory steps of improvements against 2006 requirements of 25 per cent in 2010, 44 per cent in 2013 and finally to zero carbon in 2016.[139]

Household Heating Systems

Clause 13 would also require the use of building regulations to be tightened to require significant improvements in replacement boiler efficiency by 2020, as long as the Secretary of State is satisfied that the market exists and there is sufficient expertise available to install and maintain any technologies. The Bill specifically refers to passive flue gas technology.

Passive flue gas heat recovery devices or PFGHRDs recover additional heat from a boiler's flue gases and use it specifically to heat the hot water supply. They are recommended by the Energy Saving Trust but there has been limited up-take of the technology. This was highlighted in the debate for the *Energy Bill* last year, where an amendment was tabled to require the Secretary of State to consider whether it was feasible to make them mandatory. At the time the Minister, Greg Barker, recognised the potential of the technology but did not support the clause.[140]

Microgeneration: Access to support

Clause 13 (2)(c) says that the strategy must ensure that microgeneration measures have access to Green Deal finance and to Feed-in Tariffs or the Renewable Heat Incentive (RHI) funding as the case may be.

The Government published a Microgeneration Strategy in June 2011. The Strategy referred to two core principles. The first on financial support:

> For small-scale electricity, the financial incentive is provided by the Feed-in Tariff, and for heat by the Renewable Heat Incentive which currently covers commercial and multiple heat installations. The Renewable Heat Incentive will cover domestic heat from 2012. Ahead of its expansion to the domestic sector, the Government is also providing £15 million of support through Renewable Heat Premium Payments.

The second principle focused on non-financial barriers to uptake:

> Government, the industry and consumers need to continue to work together to identify these barriers and find ways of addressing them. The onus is on the industry itself to make the most of the opportunities presented by the financial incentives. This will require improvements in quality, performance alongside the drive for cost reductions. The Government's role is to streamline regulation while ensuring that consumers continue to be robustly protected.

The strategy also set out several actions to address the non-financial barriers to uptake, to be implemented by the industry itself with support from Government.

Feed-in Tariffs and Renewable Heat Incentive

Both schemes are intended to incentivise the uptake of microgeneration technologies by households. They both pay ongoing returns to householders who also benefit from cheaper energy. However neither scheme offers capital support for the upfront costs of installing the technologies. This should be addressed by the implementation of the Green Deal - see

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[139] DCLG, Sustainable New Homes – The Road to Zero Carbon, December , December 2009
[140] PBC Deb 21 June 2011 cc444-5

below – as it is intended to offer upfront capital for the installation of energy efficiency measures and microgeneration technologies without cost to householders. The cost will be recovered through savings in energy bills.

Full details of both schemes can be found in the library notes on Feed-in Tariffs and the Renewables Heat Incentive

Green Deal

The Green Deal was provided for by the *Energy Act 2011*, and is the Government's "flagship piece of legislation, which will deliver energy efficiency to homes and buildings across the land".[141] It starts to come into effect from October 2012, although the full package including financing will not be available until January 2013.

Following a consultation, the Government published the implementing statutory instruments in Summer 2012. The Green Deal (Energy Efficiency Improvements) Order 2012 SI 2012/2106 sets out which microgeneration measures are eligible for the Green Deal. The Green Deal (Qualifying Energy Improvements) Order 2012 SI 2012/2105 sets out a longer list of 'qualifying energy improvements' under the Act. These also include microgeneration measures.

The Green Deal legislation therefore already allows for microgeneration measures to receive Green Deal finance, but the current Bill requires a Strategy to achieve significant increases in installation, and ensure access to Green Deal finance.

To consider whether this is needed, the Library's standard note on the Green Deal provides more background, but briefly, the concept of a 'pay as you save' scheme to improve energy efficiency was not controversial and was included in all the major parties' manifestos in the last General Election. Payments will attach to a property, not a person.

The devil has been in the detail however, notably the interest rate to be charged for Green Deal finance, and the mandatory energy company obligation schemes supporting it to address hard to treat and lower income homes. Since take up of existing energy efficiency schemes has been limited, it is hard to see why people will be attracted by the prospect of a finance arrangement. The Green Deal's 'golden rule' says that savings on energy bills should pay for the finance instalments, but it has been confirmed that this is 'on average', so there is no guarantee that this will happen in every case or home.

The final impact assessment (IA) for the Green Deal says that for the domestic sector, the central interest rate has been assumed at 7.5% (up from 7% in the consultation stage IA) and the sensitivity analysis uses a low rate of 6.5% and a high of 9.5%. It says that even so, Green Deal finance could "significantly reduce the opportunity cost of capital for investments in energy efficiency, particularly for low income households for whom access to credit may otherwise be difficult or at least expensive (such as the high interest rates charged on credit cards)". However, it is debatable which households will be attracted to the Green Deal and if they will include those who have access only to expensive sources of finance.

The cost of financing may be a major factor affecting Green Deal take-up, which any Strategy might need to address. It may be also difficult to place obligations on householders. The adverse media reaction to the so-called 'conservatory tax'[142] consulted upon under the building regulations earlier during 2012 suggests that prescriptive measures are unlikely to be popular.

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[141] HC Deb 19 May 2011 c491

[142] See Library standard note on the "Conservatory tax" 17 April 2012

4.2 Fuel poverty

Clause 15 requires the Secretary of State to produce a "costed road map to end fuel poverty", within 12 months of the passing of the Act, but not in households who have declined to have insulation measures installed.

There has just been a major review of the definition of fuel poverty, producing a suggested broad new definition (see below), on which the Government has undertaken to consult. There are also existing fuel poverty targets, but one has been missed already.

"Fuel poverty" is currently defined through the *Warm Homes and Energy Conservation Act 2000,* WHECA, originally a Private Member's Bill. The 2001 UK Fuel Poverty Strategy was produced as a result of the Act, and set targets of eliminating fuel poverty in vulnerable households by 2010 (which has been missed) and of 2016 for eliminating fuel poverty. It adopted a 10% income definition currently in use;

> "..a fuel poor household is one that cannot afford to keep adequately warm at reasonable cost. The most widely accepted definition of a fuel poor household is one which needs to spend more than 10% of its income on all fuel use and to heat its home to an adequate standard of warmth. This is generally defined as 21°C in the living room and 18°C in the other occupied rooms"

The definition is not altogether satisfactory, because three main factors determine whether a household is in fuel poverty: fuel prices, household income and dwelling condition. Households can therefore move in and out of fuel poverty. If energy price rises dominate, energy efficiency improvements, incomes, and indeed Government initiatives to end fuel poverty, cannot keep up. As the Labour Government said in its October 2009 response to the EFRA committee on Energy Efficiency and Fuel Poverty, "under the fuel poverty definition, income needs to increase substantially more in absolute terms than the energy price rises to remove a household from fuel poverty".[143]

Following an announcement in the October 2010 spending review[144], Professor John Hills of the LSE conducted an independent review of fuel poverty for England and Wales, for DECC. Hills' interim report[145] addressed the problem of measuring fuel poverty, and his final report *Getting the measure of fuel poverty: Final report of the fuel poverty review*[146] was published in March 2012.

The interim report discussed the strengths and weaknesses of the current indicator. Its main strength is considered to be its focus on modelled needs, rather than actual spending. It also encompasses the three issues of fuel prices, energy efficiency and household income. Yet its use of the fixed 10% threshold makes it very sensitive to the threshold chosen. It was based on being twice actual median spending in 1988, but is not adjustable to contemporary behaviour. Fuel price effects mask improvements in energy efficiency and tackling poverty and 'At times of low prices it can make some policies appear mis-directed'. In contrast to the focus of the 2000 Act, some households with high (above average) incomes can be counted as fuel poor. It uses income before deducting housing costs.

Most of the current indicator's drawbacks relate to the way it is based on a ratio of spending need to income, compared to a fixed threshold. This is why fuel prices dominate the trends and why it is so sensitive to assumptions made. The review concluded that the most

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143 DECC October 2009 *Government Response to the Efra Select Committee Inquiry: Energy efficiency and fuel poverty* Cm 7719

144 HM Treasury Spending Review 2010 press notices October 2010

145 Fuel Poverty: The problem and its measurement October 2011

146 John Hills, CASE Report 72, March 2012

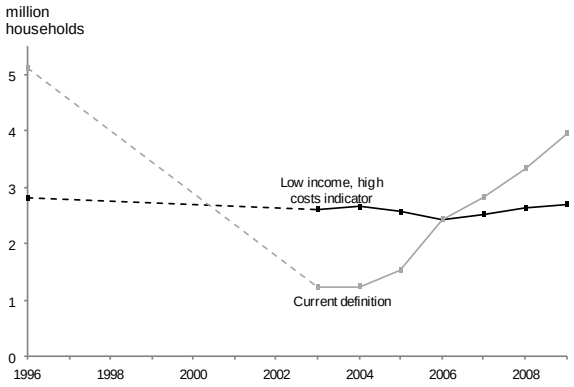
attractive of a range of possibilities considered is the idea of looking directly at the number of people who have both low incomes and live in energy inefficient homes. However, this needs to be combined with some other measure of those households' need to spend. In other words, it favours a measure of low income and high required fuel costs.

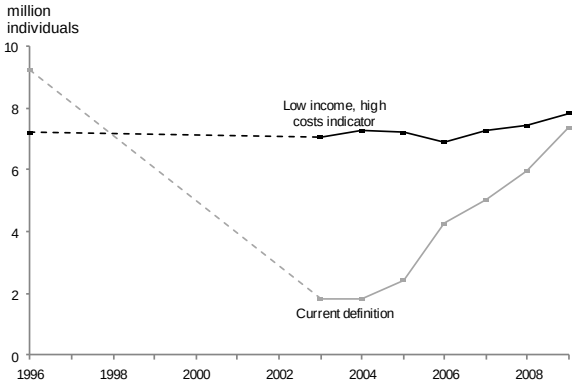
Hills concluded that the official measure of fuel poverty has "significant flaws" and has given rise to a "misleading impression both of trends and of the effectiveness of policies to tackle it". Its definition can encompass households that "clearly are not poor". Hills has proposed an alternative measure using the WHECA focus on individuals in households "living on a lower income in a home that cannot be kept warm at reasonable cost."

Hills seeks to count not only households but individuals living in "fuel poor" households according to income and reasonable cost thresholds, where a fuel poor household:

- (a) has required fuel costs above the median level; and
- (b) were they to spend that amount, would be left with a residual income below the official poverty line.

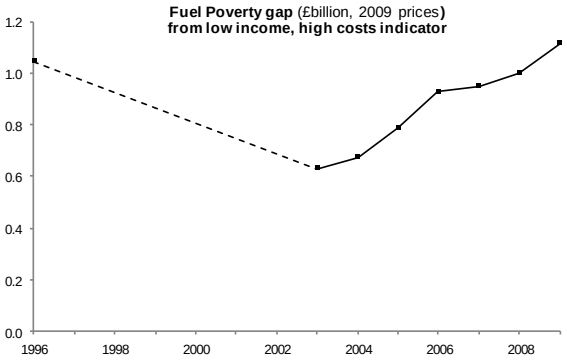
This leads to what Hills describes as a measure focused on low incomes and high costs (LIHC) and on the depth of the problems faced, or the 'fuel poverty gap'. These indicators are meant to help focus attention on those households in most severe fuel poverty and the policies which would best alleviate this. The two charts below compare the number of households and individuals defined as fuel poor under the Hills definition and the current one.[147] The proposed indicator is clearly much more stable over time. This is because it is affected to a lesser extent by changes in fuel prices and more closely linked to the underlying level of poverty.





[147] The data in all these charts is from the *Hills Fuel Poverty Review*, John Hills, CASE Report 72, March 2012

The chart opposite is the Hills estimate of the scale of the aggregate fuel poverty gap. For an individual fuel poor household this is defined as the difference between their fuel costs and the median (for their broad type of household). The aggregate is the sum of this value for all fuel poor households. This indicator take greater account of changes in fuel prices. It can also be cut by measures which reduce the *severity* of fuel poverty in households, but do not completely remove them from fuel poverty.



In response to Hills' suggestion of a LIHC indicator, the Government undertook to adopt a revised approach to measuring fuel poverty by the end of 2012, following a consultation in summer 2012.[148]

The Government's consultation on fuel poverty[149] was launched on 18 September 2012 and closes on 30 November 2012. The consultation document considers the implications of changing the definition for the fuel poverty target.

A LIHC definition of fuel poverty would by definition not be open to eradication, because under that definition, half of all households would always be defined as having higher than average (median) costs, and "it is difficult to imagine that none of these households would be low income". A headcount indicator of fuel poverty is for such reasons, and because the measure remains a relative one, likely to remain relatively stable over time. The Government consultation suggests then that a target concerned with elimination by a certain date (as we have now) would be less appropriate.

The Government suggests instead a measure showing the increases or decreases in the fuel poverty gap, specifically, the ratio of required energy costs of fuel poor households to what their costs would need to be for them not to be fuel poor:[150]

> The objective with this type of indicator would be to reduce it as much as possible. Because this indicator is a ratio it is not sensitive to energy price changes in the same way as simply looking at the fuel poverty gap (whether total or individual).

The consultation document favours a staged approach, with a series of milestones showing progress over time, which might work in a similar way to carbon budgets, with "a short term target being set every five years and with a requirement to set out in a strategy how the target will be met".

The current Bill differs by seeking to ensure that the Government produces this road map within 12 months.

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148 HC Deb 15 March 2012 c37WS
149 DECC, 18 September 2012 *Fuel poverty: changing the framework for measurement*
150 *Ibid*, para 109