



Children and Families Bill

Bill No 131 of 2012-13

RESEARCH PAPER 13/11 14 February 2013

This paper has been written for the House of Commons Second Reading debate on the *Children and Families Bill* [Bill 131] on 25 February 2013. The Bill seeks to reform legislation relating to adoption and children in care; aspects of the family justice system; children and young people with special educational needs; the Office of the Children's Commissioner for England; statutory rights to leave and pay for parents and adopters; time off work for ante-natal care; and the right to request flexible working.

Robert Long
Christine Gillie
Catherine Fairbairn
Douglas Pyper

Recent Research Papers

13/01	Welfare Benefits Up-rating Bill [Bill 116 of 2012-13]	04.01.13
13/02	HGV Road User Levy Bill: Committee Stage Report	07.01.13
13/03	Economic Indicators, January 2013	08.01.13
13/04	Crime and Courts Bill [Bill 115 of 2012-13]	09.01.13
13/05	Groceries Code Adjudicator Bill [HL]: Committee Stage Report	10.01.13
13/06	Unemployment by Constituency, January 2013	23.01.13
13/07	European Union (Approvals) Bill [Bill 121 of 2012-13]	30.01.13
13/08	Marriage (Same Sex Couples) Bill [Bill 126 of 2012-13]	01.02.13
13/09	Economic Indicators, February 2013	05.02.13
13/10	The Local Government Finance Settlement 2013/14 and 2014/15	08.02.13

Research Paper 13/11

Contributing Authors: Robert Long, adoption, family justice system, child care, and Office of the Children's Commissioner, Social Policy Section
Christine Gillie, special educational needs, and education of looked-after children, Social Policy Section
Catherine Fairbairn, family justice system, Home Affairs Section and Social Policy Section
Douglas Pyper, parental leave and flexible working, Business and Transport Section

This information is provided to Members of Parliament in support of their parliamentary duties and is not intended to address the specific circumstances of any particular individual. It should not be relied upon as being up to date; the law or policies may have changed since it was last updated; and it should not be relied upon as legal or professional advice or as a substitute for it. A suitably qualified professional should be consulted if specific advice or information is required.

This information is provided subject to our [general terms and conditions](#) which are available online or may be provided on request in hard copy. Authors are available to discuss the content of this briefing with Members and their staff, but not with the general public.

We welcome comments on our papers; these should be e-mailed to papers@parliament.uk.

Contents

	Summary	1
1	Introduction	4
	1.1 Announcement of the Children and Families Bill	4
	1.2 Pre-legislative scrutiny	6
2	Adoption	7
	2.1 Existing adoption law and guidance	7
	2.2 Proposals for Reform	10
	2.3 Child Contact: Children in Care and Adopted Children	13
	2.4 Promotion of educational achievement of children looked after by local authorities	15
	2.5 Draft Clauses	17
	2.6 Lords Committee Select Committee on Adoption Legislation report	18
	2.7 Government response to pre-legislative scrutiny	19
	2.8 The Bill	19
	2.9 Some initial reaction to the Bill	20
3	Family Justice	22
	3.1 Family Justice Review and Government Response	22
	3.2 Draft clauses	23
	3.3 Pre-legislative scrutiny: Justice Committee inquiry	23
	3.4 Family Mediation	24
	3.5 Expert Evidence in Family Courts	28
	3.6 Time limits in proceedings for care or supervision orders	33
	3.7 Care plans	37
	3.8 Child Arrangements Orders	39
	3.9 Welfare of the child: Parental Involvement ('Shared Parenting')	43
	3.10 Repeal of restrictions on divorce and dissolution etc where there are children	47
	3.11 Repeal of un-commenced provisions of Part 2 of the <i>Family Law Act 1996</i>	48
	3.12 The Bill	49
	3.13 Some initial reaction to the Bill	50
4	Special Educational Needs	52
	4.1 Introduction	52
	4.2 Outline of the current special educational needs system in England	53
	4.3 The case for change and the SEN green paper's proposals	55
	The Government's response to the green paper consultation and next steps	57

	Pathfinders	57
4.4	The draft legislation	58
4.5	The Education Committee’s pre-legislative scrutiny report	58
4.6	The Government’s response to the Education Committee’s report	64
	Changes to the draft legislation	65
	Other major areas where the Government has sought to give assurances	66
	Health services	67
	Disabled children who do not have special educational needs	68
	Education, Health and Care Plans for 19 to 25 year olds	69
4.7	The Bill	70
	Overview of the main provisions of the Bill	70
4.8	Some initial reaction to the Bill	76
4.9	Background on funding issues	83
5	Childcare	86
5.1	Local Authority duties: Sufficiency of childcare	86
5.2	Extended services for schools	86
5.3	Government proposals on Childcare	87
	Childminder Agencies	88
	Early re-inspection of childcare providers	89
5.4	The Bill	89
5.5	Some initial reaction to the Bill	89
6	Office of the Children’s Commissioner for England	90
6.1	Children’s Commissioners in devolved authorities	90
6.2	A Children’s Commissioner for England	91
6.3	United Nations Convention on the Rights of the Child (UNCRC)	91
6.4	Dunford Review of the Office of the Children’s Commissioner for England	92
6.5	Draft Legislation	96
6.6	Pre-Legislative Scrutiny: Joint Committee on Human Rights report	97
6.7	Government response to the JCHR report	99
6.8	The Bill	101
6.9	Some initial reaction to the Bill	102
7	Shared Parental Leave	102
7.1	Introduction	102

7.2	The development of parental rights	103
7.3	Current statutory provisions for leave and pay related to pregnancy and childcare	104
	Maternity leave and pay	104
	Ante-natal leave and pay	105
	Paternity leave and pay	106
	Parental leave	107
	Adoption leave and pay	107
7.4	The Government's proposals for reform	108
7.5	The Bill's provisions about leave, pay and ante-natal appointments	112
	Statutory rights to leave and pay	112
	Time off work: ante-natal care etc	113
7.6	Comment	113
8	Flexible working	115
8.1	Introduction	115
8.2	The development of the right to request flexible working	115
8.3	Current statutory provisions for flexible working	116
8.4	The Government's proposals for reform	118
8.5	The Bill's provisions about flexible working	120
8.6	Comment	120

Summary

This Research Paper has been written for the House of Commons Second Reading debate of the *Children and Families Bill* [Bill 131] on 25 February 2013. The Bill had its First Reading on 4 February 2013. The *Children and Families Bill* was published on 5 February 2013. [Explanatory notes](#) were published alongside it.

The Bill makes provision to reform legislation relating to:

- adoption and children in care;
- family justice;
- children and young people with special educational needs;
- the Office of the Children’s Commissioner for England;
- statutory rights to leave and pay for parents and adopters;
- time off work for ante-natal care; and
- the right to request flexible working.

Part 1 of the Bill would require local authorities to consider a ‘fostering for adoption’ placement when placing a child for adoption, and remove explicit duties to consider a child’s religious persuasion, racial origin and cultural and linguistic background when placing them for adoption. It would provide the Secretary of State with a power to direct local authorities to outsource their adoption functions.

The Bill would place new duties on local authorities to offer personal budgets and provide prospective adopters with information on their entitlements to support, and allow prospective adopters to search and inspect prescribed information about children who are being considered for adoption.

The Bill would allow local authorities to refuse contact between a child in care and the child’s birth family if it would safeguard the child’s welfare, and allow a court to make an order to permit or prohibit contact between a child who has been adopted or is being placed for adoption and their birth family.

The Bill would also require every local authority in England to appoint at least one officer employed by the authority to promote the educational achievement of looked after children.

Part 2 of the Bill would introduce a duty for courts to take into account that after separation both parents should continue to be involved in a child’s life, provided that is consistent with the child’s welfare; introduce a new child arrangements order to replace existing residence and contact orders; introduce a 26-week time limit for care and supervision proceedings and focus timetabling decisions for care proceedings on the child’s welfare, and focus court consideration of a child’s care plan on the permanent aspects of the plan.

Part 3 of the Bill makes new provision for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. The provisions extend to England and Wales, but most of the provisions will operate mainly or exclusively in England.

The proposed changes have been heralded as the biggest reforms to SEN provision in 30 years. In England, the current dual system of SEN statements for children and Learning Difficulty Assessments for 16 to 25 year olds would be replaced by a new single system of birth-to-25 assessments and Education, Health and Care Plans. This would give extended rights to young people in further education and training comparable with current statutory protections associated with SEN statements. There would be new requirements for local authorities and health services to plan and commission education, health and social care services jointly, and for co-operation between local authorities and a wide range of partners, including schools and colleges. Local authorities would be required to publish a 'local offer' of the support available for children and young people with SEN, and to involve children, their parents and young people in reviewing and developing the local offer.

The current right of parents of children with SEN statements to express a preference for a school would be extended to young people, and the range of institutions for which a preference could be expressed would be widened to include academies, further education and sixth form colleges, and independent special schools and independent special colleges approved for this purpose by the Secretary of State. Parents of children and young people who have an Education, Health and Care Plan would be offered a personal budget to enable them to have greater control over the support they need.

The current right of appeal to the First-tier Tribunal would be extended to young people with SEN up to the age of 25. If a parent or young person wishes to appeal to the First-tier Tribunal against decisions made by the local authority in relation to assessments and Education, Health and Care Plans there would be a requirement for them to consider mediation first; however, whether to enter into mediation would be voluntary. The Secretary of State would be empowered to establish pilot schemes to enable children to make appeals in their own right to the First-tier Tribunal.

Provision is made for the detailed requirements of particular provisions to be set out in regulations and a statutory code of practice would provide guidance on the new framework for SEN.

The Bill follows consultation on the proposals, and pre-legislative scrutiny of draft provisions carried out by the Education Committee.

The Education Committee welcomed the overall direction of the Government's proposals; however, it pointed out that the draft legislation lacked details, without which, it said, a thorough evaluation of its likely success was impossible. It noted that the Government intended to provide this detail in regulations and a revised SEN code of practice. The Committee said that it was essential that these documents addressed the concerns raised in the detailed written submissions submitted to the Committee. It also said that it was important that the lessons from the pathfinders inform the legislation, as it goes through Parliament, and the regulations and the code of practice. The Committee made various recommendations in relation to the particular provisions in the draft legislation.

In response, the Government has extended the period for the pathfinders, made significant changes to the draft legislation, and given various assurances, including the assurance that it will provide as much detail as possible on the proposed regulations and the revised code of practice during the Committee Stage of the Bill. The Government's detailed response to the Education Committee's report is contained in command paper, [Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny](#).

Although the changes to the draft legislation have been welcomed, commentators wish to see more details and want the provisions to be strengthened particularly in relation to enforcing the delivery of health and social care provision, and want minimum national

standards to underpin the local offer. There remains concern that disabled children and young people without SEN, but who need health and care support, would not come within the scope of the provisions.

Part 4 of the Bill would enable the creation of new childminder agencies, allow Ofsted to charge for early re-inspection at the request of a childcare provider, remove the existing duty on local authorities to assess the sufficiency of childcare provision in their area, and remove the duties on schools in England to consult local authorities, parents and staff, and to have regard to advice and guidance given by the local authority or the Secretary of State, before offering facilities or services (such as school-based childcare) to the community.

Part 5 of the Bill would create a strengthened Office of the Children's Commissioner for England, with a statutory remit to 'promote and protect children's rights'. The Bill would require the Commissioner to have regard to the United Nations Convention on the Rights of the Child and sets out revised powers for the Children's Commissioner, including carrying out investigations and assessing the impact of policy on children's rights. The Bill would combine the existing functions of the Children's Rights Director in Ofsted within the Office of the Children's Commissioner.

The Bill would impose a new requirement on the Commissioner to appoint an advisory board; require the Commissioner to consult on and publish a business plan, and require the Commissioner to produce an annual report on its activities and impact, to be laid before both Houses of Parliament rather than the Secretary of State as is currently the case.

Part 6 of the Bill would enable reforms to the statutory rights to leave and pay related to pregnancy and childcare. It would enable the introduction of a system of shared parental leave and pay by conferring powers on the Secretary of State to make regulations to underpin the new system. The precise details of the new system will not be known until such regulations are published.

Part 7 of the Bill would create a new right for an employee to take paid time off work to accompany a pregnant woman to an ante-natal appointment made on the advice of a designated healthcare professional. This new right would be available to husbands, civil partners, the biological parent of the expected child and intended parents in a surrogacy situation.

Part 8 of the Bill concerns the right to request flexible working. The provisions in this Part would extend the right to all employees. The right to request flexible working entitles qualifying employees to apply to their employers for a change to their terms and conditions of employment relating to their hours, times or location of work. Employers in receipt of an application currently follow a statutory procedure when handling it. Part 8 would abolish this procedure and replace it with a requirement that employers give "reasonable" consideration to requests.

1 Introduction

1.1 Announcement of the Children and Families Bill

The *Children and Families Bill* was announced in the [Queen's Speech](#) in May 2012.¹ The Department of Education press release published alongside the speech provided an overview of the Bill's intentions:

The Government will overhaul the special educational needs (SEN) system and reduce delays in the family justice and adoption systems, under new legislation announced in today's Queen's Speech.

The planned Children and Families Bill would deliver better support for families – legislating to break down barriers, bureaucracy and delays which stop vulnerable children getting the provision and help they need.

The Bill would introduce a single, simpler assessment process for children with SEN or disabilities, backed up by new Education, Health and Care Plans - part of the biggest reforms to SEN provision in 30 years.

It would speed up care proceedings in family courts so children do not face long and unnecessary hold ups in finding permanent, loving and stable homes – with the introduction of a new six-month time limit on cases and other reforms. Children currently wait an average of 55 weeks for court decisions.

It would include legislation to stop damaging delays by social workers in matching parents to ethnic minority children - black children already take 50 per cent longer to be adopted than white children or those of other ethnicities.

It would strengthen the law so children have a relationship with both parents if families break up – if that is in their best interest. Ministers will consult shortly on the legal options about how this would work.

And it would strengthen the powers of the Children's Commissioner – to champion children's rights and hold government to account for legislation and policy.

The Bill is expected to be introduced early in 2013.

The main elements of the forthcoming Bill include:

Special Education Needs

The key measures are:

- replacing SEN statements and Learning Difficulty Assessments (for 16- to 25-year-olds) with a single, simpler 0-25 assessment process and Education, Health and Care Plan from 2014
- providing statutory protections comparable to those currently associated with a statement of SEN to up to 25 in further education – instead of it being cut off at 16
- requiring local authorities to publish a local offer showing the support available to disabled children and young people and those with SEN, and their families
- giving parents or young people with Education, Health and Care Plans the right to a personal budget for their support

¹ Cabinet Office, [The Queen's Speech briefing notes](#), 9 May 2012, pp23-26

- introducing mediation for disputes and trialling giving children the right to appeal if they are unhappy with their support.

The legislation would draw on evidence from 20 local pathfinders set up in September 2011. The interim evaluation reports are due in summer and late autumn 2012, with a final report in 2013.

Ministers have committed to making all the necessary legal changes to put in place reforms proposed in the *Support and Aspiration Green Paper*.

The Green Paper was published for consultation in March 2011 – and next week, ministers will set out their detailed response and reform timetable.

Adoption

The key measure is:

- stopping local authorities delaying an adoption to find the perfect match if there are suitable adopters available. The ethnicity of a child and prospective adopters will come second, in most cases, to the speed of placing a child in a permanent home.

The proposal was set out in the Adoption Action Plan published in March 2012 – part of wider reforms to speed up and overhaul the system for prospective adoptive parents and children.

Family Law

The key measures are:

- creating a time limit of six months by which care cases must be completed
- making it explicit that case management decisions should be made only after impacts on the child, their needs and timetable have been considered
- focussing the court on those issues which are essential to deciding whether to make a care order
- getting rid of unnecessary processes in family proceedings by removing the requirement for interim care and supervision orders to be renewed every month by the judge and instead allowing the judge to set the length and renewal requirements of interim orders for a period which he or she considers appropriate, up to the expected time limit
- requiring courts to have regard to the impact of delay on the child when commissioning expert evidence and whether the court can obtain information from parties already involved
- requiring parents in dispute to consider mediation as a means of settling that dispute rather than litigation by making attendance at a Mediation Information and Assessment Meeting a statutory prerequisite to starting court proceedings
- freeing up judicial time by allowing legal advisers to process uncontested divorce applications.

It follows the Government's response in February 2012 to the final report of the independent Family Justice Review published in November 2011.

Shared Parenting

Ministers intend to strengthen the law to ensure children have a relationship with both their parents after family separation, where that is safe and in the child's best interests.

The Government believes that this will encourage more separated parents to resolve their disputes out of court and agree care arrangements that fully involve both parents.

The Government will consult shortly on how the legislation can be framed to ensure that a meaningful relationship is not about an equal division of time but the quality of time that a child spends with each parent.

This was announced as part of the Government's response to the independent Family Justice Review in February 2012. The review published its final report in November 2011.

Office of the Children's Commissioner

The key measures are:

- strengthening the Commissioner's remit – with new overall function to “promote and protect children's rights” as set out in the United Nations Convention of the Rights of the Child
- widening the Commissioner's remit to include the functions of the Children's Rights Director in Ofsted
- granting new powers to carry out assessments of the impact of new policies and legislation on children's rights and underline existing duties on government and public services to publish formal responses to Commissioner's reports
- giving more independence from ministers and report directly to Parliament – with Parliament playing a stronger role in scrutinising the Commissioner's performance
- granting future Commissioners a single six-year term of office.

It follows Dr John Dunford's independent review of the Office for Children's Commissioner which reported in December 2010.²

1.2 Pre-legislative scrutiny

Overview

In advance of the publication of the *Children and Families Bill* in January 2013, draft clauses on Special Educational Needs, Adoption, Family Justice and reform of the Office of the Children's Commissioner were published and subjected to pre-legislative scrutiny by various Parliamentary Committees. This paper refers throughout to particular recommendations and concerns raised in the respective committee reports. This section gives a brief overview of the pre-legislative scrutiny carried out for those particularly interested in a given area.

- [Draft clauses](#) were published to revise **Adoption** legislation.³ Pre-legislative scrutiny was carried out by the House of Lords Select Committee on Adoption Legislation.⁴

² Department for Education, [Children and Families Bill to give families support when they need it most](#), 9 May 2012

³ [Draft legislation on Adoption: Early Permanence Through 'Fostering for Adoption' and Matching for Adoption](#), November 2012, Cm 8473

⁴ Select Committee on Adoption Legislation, [Adoption: Pre-legislative scrutiny](#), 19 December 2012, HL 94

- [Draft clauses](#) were published on **Family Justice** reform.⁵ Pre-legislative [scrutiny](#) was carried out by the House of Commons Justice Committee.⁶ The Committee also conducted pre-legislative scrutiny of the draft shared parenting [clause](#) that was subsequently published by the Government in November 2012.⁷
- [Draft clauses](#) were published to reform provision for children and young people with **Special Educational Needs**.⁸ The House of Commons Education Committee conducted pre-legislative scrutiny on the clauses.⁹
- [Draft clauses](#) were published to reform the **Office of the Children’s Commissioner for England** in July 2012.¹⁰ Pre-legislative [scrutiny](#) of these clauses was undertaken by the Joint Committee on Human Rights.¹¹

Several clauses included in the final *Children and Families Bill* relating to adoption, as well as the Bill’s measures relating to childcare and the sections on employment law, were not subjected to pre-legislative scrutiny.

Publication of the Bill and Government Response to Pre-Legislative Scrutiny

The *Children and Families Bill* was published on 5 February 2013. [Explanatory notes](#) were published alongside it.

Alongside the Bill, the Government published [Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny](#). This document included, in its annexes, the Government’s responses to the four pre-legislative scrutiny reports.¹²

2 Adoption

2.1 Existing adoption law and guidance

The *Adoption and Children Act 2002* provides the legislative framework for adoptions in England and Wales. The Act is supplemented by regulations made under the Act and statutory and other guidance.

When making a decision in relation to the adoption of a child, the 2002 Act requires that the paramount consideration for courts and adoption agencies¹³ must be the child’s welfare throughout his life.¹⁴ They must also have regard to the adoption ‘welfare checklist’, which requires consideration of:

- a) the child’s ascertainable wishes and feelings regarding the decision (considered in the light of his age and understanding);

⁵ [Draft legislation on Family Justice](#), September 2012, Cm 8437

⁶ Justice Committee, [Pre-legislative scrutiny of the Children and Families Bill](#), 14 December 2012, HC 739

⁷ Department for Education, [Provisions about family justice](#), November 2012

⁸ [Draft legislation on Reform of provision for children and young people with Special Educational Needs](#), September 2012, Cm 8438

⁹ Education Committee, [Pre-legislative scrutiny: Special Educational Needs](#), 19 December 2012, HC 631-I

¹⁰ Department for Education, [Reform of the Office of the Children’s Commissioner](#), 11 July 2012

¹¹ Joint Committee on Human Rights, [Reform of the Office of the Children’s Commissioner](#), 7 December 2012, HL 83/ HC 811

¹² HM Government, [Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny](#), February 2013, Cm 8540. Annex A responded to the pre-legislative scrutiny on adoption, Annex B on family justice, Annex C on special educational needs, and Annex D on reform of the Office of the Children’s Commissioner for England.

¹³ Including local authorities placing children for adoption

¹⁴ *Adoption and Children Act 2002*, s1

- 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 characteristics of his which the court or agency considers relevant;
- e) any harm 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 doing so,
 - ii. the ability and willingness of any of the child's relatives, or any such person, to provide a secure environment in which a 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.¹⁵

The issue of race

When placing a child for adoption, the *Adoption and Children Act 2002* requires an adoption agency to give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.¹⁶ Accordingly, although factors such as race and cultural background have to be considered, they should not be used to prevent a child being placed with adopters of a different background, if that adoption is in the child's best interests. The paramount consideration must be the child's welfare.

Under the earlier law set out in the *Adoption Act 1976*, a parent of child could object to an adoption if the proposed adopters were not of the same racial, cultural and religious background as the child.¹⁷ Following the change in the law, there were reports that adoption agencies were placing undue weight on the race of the child. In 2010, seven year after the enactment of the 2002 Act, Martin Narey, the then chairman of children's charity, Barnado's, warned that adoption agencies were interpreting the legislation too literally and this was resulting in black and Asian children waiting on average three times longer than white children for adoptive families.¹⁸

The issue of mixed race adoption has been raised a number of times in the Chamber. The Rt Hon. Michael Howard MP, during the Second Reading debate on the *Children and Young Persons Bill* in 2008, said:

Michael Howard: According to the law, the paramount consideration in cases of adoption is the welfare of the child. That is exactly as it should be. It is true that the Adoption and Children Act 2002 requires an adoption agency to give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background. It also requires an adoption agency to give due consideration to the wishes of the natural parent. But I repeat, according to the law the paramount consideration must be the

¹⁵ Ibid., s1(4)

¹⁶ Section 1(5)

¹⁷ Local Authority Circular [LAC\(98\)20](#)

¹⁸ Quoted in "[Race issues are delaying the adoption process, charity warns,](#)" *The Independent*, 21 January 2010

welfare of the child. So, although factors such as race and cultural background have to be considered, they should not be able to prevent a child from being placed with adopters of a different background if that is in the child's best interests. Yet clearly, far too often, that is what happens.

Does the reason for that perhaps lie with the statutory guidance issued by the Government under the 2002 Act? That guidance emphasises the requirements to consider the child's religious and cultural upbringing, as well as any wishes and feelings that the child's parents or guardian may have about those matters. Is it perhaps the case that adoption agencies and social services departments are placing too much emphasis on that part of the guidance and not enough on the paramount consideration of the welfare of the child?¹⁹

In response the then Minister for Children stated:

Kevin Brennan: All I can say is that local authorities, under the law and under the guidance, must find a placement that meets the needs of the child. A child should not be denied the opportunity of a loving family only on the basis of the ethnic background of prospective adopters. The Government's policy is quite clear: it was set out originally in 1998 in the local authority circular, "Achieving the Right Balance". It has not changed—the matter was debated under the 2002 Act—and local authorities should comply with that. I cannot emphasise that too strongly.²⁰

In November 2010, the then Children's Minister, Tim Loughton, in a speech to mark National Adoption Week, called on local authorities and voluntary adoption agencies "not to deny children a loving home with adoptive parents solely on the grounds that they do not share the same racial or cultural background."²¹ He also stated that the Government intended to re-issue and update statutory adoption guidance to include advice on matching for black and minority ethnic (BME) community and mixed ethnicity children.²²

Statutory guidance

[Revised statutory guidance](#) for local authorities and adoption agencies²³ was published by the Government in February 2011. In the ministerial foreword to the revised guidance, the then Children's Minister, Tim Loughton, stated that he had also set up a ministerial advisory group on adoption to provide expert advice on proposals to improve and share best practice. Former chief executive of Barnado's Martin Narey was subsequently appointed [ministerial adviser on adoption](#).

The aim of the guidance was to clarify, rather than change, the law for adoption agencies on issues such as matching the ethnicity of the child with that of adopters. The guidance made it clear that matching the ethnicity of the parties should not prevent an adoption if the placement is in the best interests of the child. It provides:

Ethnicity and culture of children and prospective adopters

6. The structure of white, black and minority ethnic groups is often complex and their heritage diverse, where the race, religion, language and culture of each community has varying degrees of importance in the daily lives of individuals. It is important that social workers avoid 'labelling' a child and ignoring some elements in their background, or

¹⁹ HC Deb 16 June 2008, cc754-5

²⁰ HC Deb 16 June 2008, cc 776-7

²¹ Department for Education, [Ethnicity shouldn't be a barrier to adoption](#), 2 November 2010

²² Ibid.

²³ Department for Education, *Adoption and Children Act 2002, Statutory Guidance*, 2011 (as amended)

placing the child's ethnicity above all else when looking for an adoptive family for the child.

7. A prospective adopter can be matched with a child with whom they do not share the same ethnicity, provided they can meet the child's other identified needs. The core issue is what qualities, experiences and attributes the prospective adopter can draw on and their level of understanding of the discrimination and racism the child may be confronted with when growing up. This applies equally whether a child is placed with a black or minority ethnic family, a white family, or a family which includes members of different ethnic origins.

8. All families should help children placed with them to understand and appreciate their background and culture. Where the child and prospective adopter do not share the same background, the prospective adopter will need flexible and creative support to be given by their agency. This should be in the form of education and training, not just simplistic advice, provided in a vacuum, on learning their children's cultural traditions or about the food/cooking from their birth heritage. The support plan should consider how the child's understanding of their background and origin might be enhanced. This can include providing opportunities for children to meet others from similar backgrounds, and to practise their religion – both in a formal place of worship and in the home. Maintaining continuity of the heritage of their birth family is important to most children; it is a means of retaining knowledge of their identity and feeling that although they have left their birth family they have not abandoned important cultural, religious or linguistic values of their community. This will be of particular significance as they reach adulthood.²⁴

2.2 Proposals for Reform

The Adoption Action Plan: tackling delay

The revised statutory guidance was followed in March 2012 by the Government's [Adoption Action Plan](#) which set out proposals to improve the adoption process and reduce delays.²⁵ The Plan set out that the Government would:

- legislate to reduce the number of adoptions delayed in order to achieve a perfect or near ethnic match between adoptive parents and the adoptive child;
- require swifter use of the national Adoption Register in order to find the right adopters for a child wherever they might live;
- encourage all local authorities to seek to place children with their potential adopters in anticipation of the court's placement order;
- radically speed up the adopter assessment process so that two months are spent in training and information gathering – a pre-qualification phase – followed by four months of full assessment;
- introduce a “fast-track” process for those who have adopted before or who are foster carers wanting to adopt a child in their care; and
- develop the concept of a “national Gateway to adoption” as a consistent source of advice and information for those thinking about adoption.²⁶

²⁴ Ibid., p85

²⁵ Department for Education, [An Action Plan for Adoption: Tackling Delay](#), March 2012

²⁶ Ibid., p3-4

The issue of delays in care proceedings more generally is one that the Government examined as part of a wider [Family Justice Review](#).²⁷ Legislative measures relating to family justice are included in the *Children and Families Bill*. Information on the changes may be found in section 3 of this paper. The [Action Plan](#) highlighted the issue of ethnic matching as highlighted as one of the causes of delays in placing children for adoption.²⁸

A subsequent Ofsted report, *Right on Time*, published in April 2012, challenged the contribution of ‘ethnic matching’ to adoption delays. It found that the most significant cause of adoption delays was not the matching and placement process by adoption agencies and councils but the court process.²⁹

The report noted:

The most common reason for delay in the cases tracked for this report was the length of time taken for care proceedings to be concluded before an adoption plan could be confirmed. There were several reasons for court delay, including most significantly:

- repeat assessments of birth parents
- additional assessments of relatives, often commenced late in proceedings
- additional expert assessments, sometimes by independent social workers
- a general lack of social worker confidence and assertiveness within the court arena, which sometimes led to a lack of challenge to changes in plans and additional assessments
- insufficient capacity of local courts to meet demand, resulting in timetabling difficulties.³⁰

Regarding adoption placement and delays caused by ethnic matching, the report stated:

- Although several cases were subject to delay due to difficulties in identifying suitable adopters, most children were placed within 12 months of an agency decision that they should be adopted.
- Processes for matching children with adoptive placements were generally robust. There was little evidence of delay caused by an unrealistic search for a ‘perfect’ ethnic match.³¹

Further Proposals on Prospective Adopters: December 2012 announcement

On 24 December 2012, the Government announced further measures intended to speed up and otherwise improve the adoption process. The measures focused on improving the experience of prospective adopters and giving them a more active role in the adoption process. The Government announced it was:

- looking at ways to give adopters a more active role in the adoption process, with the chance to make a connection with a child in advance and play a greater role in finding the right match, by encouraging Adoption Activity Days and looking at options for opening up the Adoption Register to approved prospective adopters;

²⁷ [Family Justice Review: final report](#), November 2011, p16

²⁸ *Ibid.*, p21-22

²⁹ Ofsted, *Right on time: exploring delays in adoption*, April 2012

³⁰ *Ibid.*, p6

³¹ *Ibid.*, p7

- bringing adoption pay and leave in line with that of biological parents when it comes to maternity and paternity leave;
- giving adoptive parents the right to take time off work to meet the children they are set to adopt before they move in with family;
- trialling the idea of personal budgets, where adoptive parents can have more choice and control over the type and provider of adoption support, that would otherwise be allocated by councils;
- extending free early education for two year-olds to adopted children from 2014 and giving them priority school access from 2013;
- launching a new helpline in the New Year, with the phone lines manned by adopters; and
- launching a National Gateway for Adoption, a new 'one-stop-shop' online service, for the first stages of the adoption process, making it easier for those thinking about adoption to find out more.³²

Further Action on Adoption: January 2013 announcement

On 24 January 2013, the Government published *Further Action on Adoption: Finding More Loving Homes*, a follow-on document to the *Adoption Action Plan*. The document was published alongside the announcement of £150million in extra funding to tackle the backlog of children waiting to be adopted, and £1 million for voluntary adoption agencies (VAAs) to recruit more adopters. The Government criticised local authority adoption agencies for failing to recruit adopters and stated that if improvements were not made, new powers would be used to require local authorities to outsource their services:

Today's announcement is the last chance for local authorities to demonstrate that they can take convincing action to put a plan in place for the long term and recruit the adopters children need now nationally. If this fails to happen we will use the new power that we will legislate for at the earliest opportunity, to require local authorities to outsource their adoption recruitment and approval services.³³

The *Further Action* document provided the Government's reasoning behind making this reform, and discussed some possible consequences:

46. The step change in the numbers of adopters recruited and the quality of service that they receive is being held back by one particular feature of the present system. We need to remove the in-built link between adopter recruitment and assessment and individual local authority areas. It is this that dictates the small scale at which adopter recruitment and assessment is done, fragments and dilutes the efforts to find enough permanent homes for all children, and holds back effective voluntary adoption agencies.

47. We believe that this is an essential step towards having enough of the right adopters for the children who so badly need them and we are, if necessary, willing to use the law to make sure that this problem is addressed. We therefore propose to take a power that would enable us to require some or all local authorities to outsource adopter recruitment and assessment. If we had to use this power, local authorities would continue to be responsible for identifying children in their areas in need of adoption, obtaining placement orders where needed, swiftly finding appropriate

³² Department for Education, *New drive to help children find adoptive families*, 24 December 2012

³³ Department for Education, *Attracting more adopters – last chance for local authorities*, 24 January 2013

adoptive parents and supporting adoptive families, but would have to pay other agencies to recruit and assess adopters, rather than doing so themselves. In this eventuality local authorities would either cease to have adopter recruitment teams or alternatively they would support them to spin out, perhaps creating a single not-for-profit independent organisation from a number of former local authority teams. Many of these 'new' voluntary adoption agencies might be owned by their employees and motivated by a social mission to find happy stable homes for children who need them. They would compete with existing voluntary adoption agencies and any wholly new entrants to the market to provide adopters to local authorities.³⁴

Further Action also included a commitment from the Government, developing proposals raised in the 24 December 2012 announcement, "to legislate to develop a version of the Adoption Register which can be accessed and searched by would-be adopters."³⁵ Similarly building on the previous announcement, the document also confirmed the Government's intention to introduce pilots for personal budgets for adoption support, and that it would legislate for a national roll-out:

We will put more choice into the hands of adoptive parents by piloting personal budgets for adoption support in a number of local authority areas. Where local authorities have agreed to provide adoption support, personal budgets will enable parents to exercise more choice and control over the type of support provided, and the provider of that support. Not only will this give parents more of a say, but it could also help to stimulate the market as parents buy the most effective services. We intend to take powers in legislation to allow a full, national roll-out of personal budgets for adoption support in due course.³⁶

2.3 Child Contact: Children in Care and Adopted Children

Children in Care

In July 2012, the Government published a discussion paper on contact arrangements between birth parents and children in care or adopted children.³⁷ In its Foreword, the Government's advisor on adoption, Martin Narey, noted that children's contact with their birth parents was an issue that had consistently been raised with him as a concern, both in relation to adoption and care more generally. Currently, section 34 of the *Children Act 1989* provides that where a child is in local authority care, the authority must allow the child reasonable contact with their parents or guardians, or certain other specified persons.³⁸ The Act also provides that local authorities must endeavour to promote contact between a child in care and their family or other listed persons (for instance, someone who is not a parent of the child but has parental responsibility for them).³⁹

Mr Narey suggested that the existing presumption in favour of contact with birth parents should be reconsidered:

But let me be very clear. Most children who come into care enter for short periods and are soon reunited with their families. I am not remotely suggesting that contact should not take place in these circumstances. Even when children are in care for longer periods, and before it is clear that adoption is the right path for them, I expect contact

³⁴ Department for Education, *Further Action on Adoption: Finding More Loving Homes*, January 2013, p21

³⁵ *Ibid.*, p35

³⁶ *Ibid.*, p36

³⁷ Department for Education, *Contact Arrangements for Children: A Call for Views*, July 2012. A paper on the placement of sibling groups for adoption was also published at this time; in its [response](#), the Government opted not to introduce primary legislation in that area.

³⁸ *Children Act 1989*, s34(1)

³⁹ *Children Act 1989*, Schedule 2, Para 15(1)

with their natural parents and families to be the norm. But I do argue that such contact should be agreed only when it is in the best interests of the child. The current legislative presumption in favour of contact and which sometimes leads to contact being seen as inevitable, needs re-examination.⁴⁰

The discussion paper included the question of whether duties on local authorities to allow children in care reasonable contact with their birth parents and to promote contact for looked after children should be removed or replaced.⁴¹ In its response, the Government stated that responses to its call for views had “clearly favoured replacing the duties rather than removing them,”⁴² and said that the Government would:

...seek to dis-apply the current duty on local authorities to ‘endeavour to promote contact’ with the birth family and others where a local authority has been authorised to refuse contact, or is doing so on a temporary basis. We are also seeking to introduce a power to specify in regulations the matters that a local authority should consider when determining whether contact arrangements are consistent with safeguarding and promoting the child’s welfare. The intention is to specify that the local authority should have regard to the child’s care plan, consistent with the proposal made in the call for views document.⁴³

Children placed for adoption

The discussion paper also raised the issue of contact arrangements once a child is intended to be placed for adoption.⁴⁴ Once an adoption order is made, adoptive parents have full parental responsibility for their child and any further contact between the child and their birth parents is now a matter exclusively for the adoptive family; currently, birth families must seek permission to apply for a contact order. However, the paper stated, the issue can be complex, with some adoptive parents feeling an obligation to allow contact even when they believe it may not be in the best interests of the child, which could have adverse consequences for the child and their adoptive family.⁴⁵ Additionally, the post-adoption granting of a contact order for the birth family often depends on previously existing arrangements, and is unlikely to be granted if no existing arrangement is in place.⁴⁶

The discussion paper raised the possibility of enabling courts to make an order for ‘no contact’ between a child and their birth family once an application for an adoption order has been made, and also of creating a ‘permission filter’ to make it more difficult for birth parents to apply for contact orders:

49. One option may be to provide that the court can on application for an adoption order make an order for no contact. This would give adoptive parents recourse where informal contact arrangements were causing difficulties, but this would only take effect once an adoption order has been made. Post-adoption contact should be exceptional but in a minority of cases it may be appropriate, for example in the case of an older child. What should govern such contact arrangements is what is in the best interests of the child.

⁴⁰ Department for Education, [Contact Arrangements for Children: A Call for Views](#), July 2012, p2. The call for views raised several issues relating to contact arrangements that are not discussed in this paper because the Government decided not to proceed with them, or decided not to do so through primary legislation.

⁴¹ Ibid., p17

⁴² Department for Education, [Call for Views: adoption contact arrangements and sibling placements: Summary of feedback and Government response](#), February 2013, p18.

⁴³ Ibid., p18-19

⁴⁴ Department for Education, [Contact Arrangements for Children: A Call for Views](#), July 2012, p18

⁴⁵ Ibid., p14

⁴⁶ Ibid., p14

50. In addition to introducing a “no contact” order, we could amend legislation to create a new more demanding ‘permission filter’. This would raise the bar for any birth parent to make an application for a contact order. Criteria for granting permission already exists therefore we could explore how this might be strengthened.⁴⁷

The Government’s estimate of responses to the paper⁴⁸ noted slightly more support than opposition to its proposal that, on application for an adoption order, the court can make an order for ‘no contact’ between the child and its birth family. Such an order would only take effect once an adoption order had been made. The response then noted the Government’s intention to “take this proposal forward by amending current legislation to deal specifically with contact at the point of, and after, the adoption order.”⁴⁹

Similarly, the response stated that the discussion paper’s proposal to raise the bar for any birth parent who wished to make an application for a contact order with an adopted child had received slightly more support than opposition. The response stated that it would take a proposal forward as part of the *Children and Families Bill*, to provide that when considering contact arrangements at, and after, the adoption order stage, a ‘permission filter’ would apply for anyone who made an application for contact, other than the child or the adoptive parents.⁵⁰

2.4 Promotion of educational achievement of children looked after by local authorities

The DFE publication, [Outcomes of children looked after by local authorities in England, as at 31 March 2012](#), showed that in 2011/12 only 14.6% of children who had been looked after for at least a year achieved five A* to C GCSEs including English and maths, compared to 58.1% for non-looked after children.

Section 22(3A) of the *Children Act 1989*, as amended, places a duty on local authorities in England to promote the educational achievement of children looked after by them. [Statutory Guidance on the Duty of Local Authorities to Promote the Educational Achievement of Looked-after Children](#) describes the actions that local authorities are expected to take to comply with that duty. Many local authorities choose to appoint a senior officer who monitors and leads the educational progress of looked after children. Such staff are often referred to as Virtual School Headteachers (VSHs), and are often supported by virtual school teams. The approach is to work with looked after children as if they were in a single school, liaising with the schools they attend, monitoring their performance and supporting them. Examples of the VSH’s role are set out in paragraph 34 of the statutory guidance (referred to above).

There is already a statutory requirement for all maintained schools to have a designated teacher for looked after children.⁵¹

In September 2012, the All Party Parliamentary Group (APPG) for Looked After Children and Care Leavers, then chaired by Edward Timpson, published its final report, [Education matters in care](#), on its cross-party inquiry into the educational attainment of looked after children. Amongst other things, the report recommended putting the role of a VSH on a statutory footing.

⁴⁷ Ibid., p16

⁴⁸ Department for Education, [Call for Views: adoption contact arrangements and sibling placements: Summary of feedback and Government response](#), February 2013

⁴⁹ Ibid., p20

⁵⁰ Ibid.

⁵¹ *Children and Young Persons Act 2008*, section 20

The role of Virtual School Heads ('VSHs') should be extended and strengthened by making the position statutory. This will allow the VSH to have real weight within local authorities, hold schools to account and ensure the continuity and quality of learning and support beyond 16. Virtual School Heads should retain responsibility for care leavers from the age of 0–25.⁵²

The report noted that VSHs had been officially piloted in 11 local authorities with a remit to act as the local authority coordinator and champion to bring about improvements in the education of looked after children. The report cited an evaluation by Bristol University in 2009 and other evidence that showed the positive effect VSHs had on improving the educational outcomes of looked after children. It also gave some examples of best practice in organising provision.

Ofsted published a thematic inspection, *The impact of virtual schools on the educational progress of looked after children*, in October 2012, which was based on the evidence of nine virtual schools. This found that the scope and structure of the nine virtual schools varied considerably, depending on local circumstances.

19. All local authorities had established a model of support that meant that one individual had the lead responsibility to drive improvement in looked after children's educational attainment. These individuals will be referred to as virtual school headteachers within this report, although not all were known by that job title. Their roles, responsibilities and position within the local authority structure varied considerably.

20. Seven of the virtual school services were located within the local authority's education services, connected to services such as school inclusion or school improvement. The remaining two were based within multi-agency services for looked after children or within quality and performance units. Generally, those virtual schools teams that were based within education services were perceived by key partners – most crucially, schools – to have greater credibility and 'clout'. There were some advantages and disadvantages to all such arrangements, but whatever structure was in place, the quality of the relationships forged by the virtual school and its partners was the strongest indicator of good outcomes.

21. The role of the virtual headteacher was similarly varied across the nine authorities. All had an education background and all virtual school teams reported directly to the virtual headteacher, but not all of these were full time and there were differing levels of seniority. Several virtual headteachers held senior management posts within the local authority's education service with only part-time responsibilities formally assigned to the virtual school. In one local authority, this was as little as one day a week. Day-to-day operational leadership of the virtual school team here was suitably delegated. In these circumstances, the virtual headteacher's role was largely strategic and formed part of the post-holder's wider responsibilities for vulnerable children. Other virtual headteachers, sometimes of less seniority, tended to be more involved in operational responsibilities and acknowledged that there were sometimes difficulties in devoting enough time to more strategic, longer-term issues.

Ofsted recommended that the Government consider whether there should be a statutory requirement on local authorities to establish and maintain suitably robust virtual school arrangements.

⁵² All Party Parliamentary Group (APPG) for Looked After Children and Care Leavers, *Education matters in care*, 4 September 2012, p7

On 12 December 2012, Edward Timpson, who by this time had become Parliamentary Under Secretary of State for Children and Families, wrote to all Directors of Children’s Services (DCS) to announce the Government’s intention to put the post of VSH onto a statutory footing, and to encourage local authorities to follow the best practice identified in the Ofsted and the APPG reports.⁵³

Clause 9 of the Bill would amend section 22 of the *Children Act 1989* to insert a new subsection (3B) to require every local authority in England to appoint at least one officer employed by the authority to promote the educational achievement of looked after children.

The [Explanatory Notes](#) state that statutory guidance to local authorities about how they discharge their duty to promote the education of their looked after children will be revised to take account of the new provision. The guidance will explain the relationship between the functions of the appointed officer carrying out the role of VSH and the DCS. The [Explanatory Notes](#) state that the DCS would be responsible for promoting the educational achievement of their looked after children, and the VSH would be responsible for how this was achieved.

Commenting on the clause, the LGA said that it would work with the Government to ensure that councils retain flexibility to fulfil this role in a way that best meets local needs and that any additional burdens are funded.⁵⁴

2.5 Draft Clauses

On 8 November 2012, the Government [published](#) draft clauses on ‘fostering for adoption’ and to remove express duties on adoption agencies to give due consideration to religious persuasion, racial origin and cultural and linguistic background.⁵⁵ Both of these possible reforms had been raised in the *Adoption Action Plan*.

The [draft provisions and explanatory notes](#) set out the Government’s intentions:

- The ‘Fostering for Adoption’ clause imposes a new duty on a local authority looking after a child, where it has decided that the child should be placed for adoption, and has matched the child with an approved prospective adopter who is also a local authority foster parent. In these circumstances the local authority will be under a duty to give preference to a placement with those foster parents, where this is considered to be the most appropriate placement.⁵⁶
- The clause on ethnic matching removes the duty in section 1(5) of the *Adoption and Children Act 2002* to give due consideration to a child’s religious persuasion, racial origin and cultural and linguistic background when placing him or her for adoption, from local authorities and registered adoption societies in England. A more general duty to consider a range of matters in reaching a placement decision remains, including the child’s needs, wishes and feelings, and his or her background and other relevant characteristics.⁵⁷

⁵³ [DFE Letter from Edward Timpson, Parliamentary Under Secretary of State for Children and Families, to all directors of children’s services and lead members, 12 December 2012](#)

⁵⁴ [LGA, On the day briefing: Children and Families Bill, 5 February 2013](#) (free registration to access)

⁵⁵ Department for Education, [Government publishes draft legislation on ethnicity and “Fostering for Adoption”](#), 8 November 2012

⁵⁶ [Draft legislation on adoption: Early permanence through ‘Fostering for Adoption’ and Matching for Adoption](#), Cm 8473, para 4

⁵⁷ *Ibid.*, para 7

2.6 Lords Committee Select Committee on Adoption Legislation report

Fostering for Adoption

Pre-legislative scrutiny on the draft adoption clauses was carried out by the [House of Lords Select Committee on Adoption Legislation](#).⁵⁸ The Committee published its pre-legislative scrutiny [report](#) on the draft adoption clauses on 19 December 2012.⁵⁹

The report's summary provides an overview of the Committee's views. On 'fostering for adoption', the Committee believed the Government should widen the scope of its proposals:

The first clause deals with 'fostering for adoption'. We support the Government's intention to place children with prospective permanent carers as soon as possible. We also support the aim to minimise disruption by reducing the number of placements children experience whilst in care. We believe, however, that the Government's proposal is too limited, and does not place a sufficient obligation on local authorities to consider and promote fostering for adoption. We make recommendations to widen the duty, to require all local authorities actively to consider a foster for adoption placement for all children for whom adoption is the plan. We also recommend that decisions regarding a child's permanency plan should be made as soon as possible after the child's entry into the care system. To this end we propose changes to the Statutory Guidance on Adoption.⁶⁰

Matching for Adoption: Ethnicity

Regarding ethnicity when matching for adoption, the Committee expressed concerns about whether the draft clause achieved the correct balance between placing a child for adoption without undue delay, and respecting the components of a child's identity. The Committee recommended that legislation be amended to explicitly include consideration of religious persuasion, racial origin and cultural and linguistic background in placing a child for adoption, as part of the 'welfare checklist':⁶¹

The second draft clause is intended to repeal the requirement to give due consideration to ethnicity when matching for adoption in England. We share the Government's belief that children should not experience undue delay whilst a search for a perfect or near perfect ethnic match takes place. We do not, however, believe that considerations of race, religion, culture and language should be neglected altogether, as they are all components of a child's identity. We are concerned as to how the removal in England of section 1(5) of the Adoption and Children Act 2002 will be interpreted by those working in the field, and that it may be seen as a signal that race and ethnicity should be given no weight in the matching process. A better balance needs to be achieved. We therefore propose that the welfare checklist, at section 1(4) of the Act, should be amended to include considerations of ethnicity. This will ensure that issues of race, religion, culture and language are considered alongside the other elements of a child's welfare.⁶²

⁵⁸ The Committee normally deals only with post-legislative scrutiny, but had its remit extended to consider the draft clauses.

⁵⁹ House of Lords Select Committee on Adoption Legislation, *Adoption: Pre-legislative scrutiny*, First Report of Session 2012-13, HL 94

⁶⁰ *Ibid.*, p4

⁶¹ The checklist is detailed in section 2.1 of this paper

⁶² *Ibid.*

2.7 Government response to pre-legislative scrutiny

Fostering for Adoption

The Government response to the Lords Select Committee report noted agreement with “the spirit of the Committee’s recommendation” that the proposed duty on fostering for adoption should be widened, and proposed an earlier “trigger point” for this duty to be considered, namely the point at which the local authority is considering adoption as an option for the child, a point which in some cases could occur prior to a child’s birth.⁶³ The Government intended that such a duty would “place a wider obligation on local authorities to consider early permanence placements.”⁶⁴ The Government also stated that, as a consequence of this earlier starting point, it would amend the draft clause so local authorities should ‘consider’ rather than ‘give preference’ to a Fostering for Adoption placement.⁶⁵

Matching for Adoption: Ethnicity

The Government decided not to amend its draft clause on matching for adoption, stating its belief that the Committee’s proposed amendment would retain “the excessive emphasis that the present legislation is perceived to create for those aspects of a child’s background and characteristics that relate to their ethnicity.”⁶⁶ The response noted that adoption agencies would still have the child’s welfare as their paramount consideration in making an adoption placement, and be required to have regard to the ‘welfare checklist’ when placing a child, which includes the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant.⁶⁷

2.8 The Bill

The Bill includes final versions of the clauses subjected to pre-legislative scrutiny by the Lords Select Committee on Adoption Legislation, and other clauses relating to support for adoption which were included in the Government’s *Adoption Action Plan* and announcements of further adoption reform in December 2012 and January 2013. It also includes provisions relating to contact between children in care and their families, and adopted children and their families, announced in the July 2012 discussion paper on that topic.

- **Clause 1** would impose a duty on local authorities to, when considering placing a child for adoption, consider placing the child in a ‘fostering for adoption’ placement;
- **Clause 2** would remove the requirement on adoption agencies to give due consideration to a child’s religious persuasion, racial origin and cultural and linguistic background when making an adoption placement. This applies to local authorities in, and registered adoption agencies whose principal office is in, England. A requirement remains in place for agencies to consider the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant when making a placement;
- **Clause 3** would introduce a power for the Secretary of State to direct local authorities to make arrangements for their functions relating to adoption to be carried out by another local authority or by one or more voluntary adoption agencies;

⁶³ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540, p26

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid., p27

⁶⁷ Ibid.

- **Clauses 4 and 5** would place new duties on local authorities to consider requests for personal budgets and to give prospective adopters information about their entitlements to support;
- **Clause 6** would allow for prescribed information about children who are being considered for adoption by an English local authority to be placed on the Adoption and Children Act Register where the authority is considering adoption as an option for them, and for prospective adopters to be able to search and inspect the register to identify a child for whom they might be appropriate adopters;
- **Clause 7** would allow local authorities to refuse contact between a child in its care and the child's parents, guardians, or other specified persons with whom it would normally permit contact, if that contact would not safeguard and promote the child's welfare;
- **Clause 8** would allow a court to make an order to permit or prohibit contact between a birth family, or other relevant persons, and a child who is being placed or has been placed for adoption. The child, the person who has applied for the adoption order or the child's adoptive parents may apply for an order without the permission of the court, but any other person may only apply for an order with the permission of the court.
- **Clause 9** of the Bill would amend section 22 of the *Children Act 1989* to insert a new subsection (3B) to require every local authority in England to appoint at least one officer employed by the authority to promote the educational achievement of looked after children.

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

2.9 Some initial reaction to the Bill

Labour Party

Lisa Nandy, the Shadow Minister for Children and Young People, expressed concerns about the Bill's provisions for parental contact with children after separation, and questioned the Bill's lack of help for foster carers, but supported plans to speed up the adoption process:

This Bill dilutes a long standing principle in law that the interests of the child must come first in cases of parental separation. When this change to 'shared parenting' was made in Australia, it led to a chaotic backlog in the courts.

The legislation also does nothing to help foster carers, who are being hit hard by the Government's bedroom tax. Ministers need a plan to address the shortage of families becoming foster parents.

While we welcome plans to speed up the adoption process, Ministers need to show they have a plan for all children - not just those who are adopted.⁶⁸

Martin Narey

On 5 February 2013, the ministerial advisor on adoption Martin Narey published an [article](#) in support of the Bill's provisions on ethnicity:

It is frequently – sometimes mischievously – suggested that in changing the law on ethnicity and adoption, the government is suggesting that ethnicity doesn't matter. That

⁶⁸ Labour Party, *Children and Families Bill will do little to help hard working families - Hodgson and Nandy*, 5 February 2013

is simply not true. What the government is doing – and partly as a result of my urging – is ensuring that ethnicity and cultural considerations do not unnecessarily veto an otherwise satisfactory adoption.⁶⁹

Local Government Association

The Local Government Association (LGA) published a [response](#) to the Bill, focusing on aspects that had not been subjected to pre-legislative scrutiny. It raised concerns with the power the Bill introduces for the Secretary of State to direct local authorities' adoption responsibilities to be carried out by another local authority or by one or more voluntary adoption agencies:

[...] the power for the Secretary of State to remove local authorities from the recruitment of adopters is unnecessary disproportionate and risky.

The Government has recognised that many adoption services provide an excellent service and are very effective at recruiting sufficient adopters to meet local need. The problems lie in the incentives in the system which deters councils from recruiting more adopters than they need in their local area. The LGA is already working with SOLACE and ADCS on sector-led plans to overcome these systemic barriers and improve adopter recruitment. In addition, Voluntary Adoption Agencies (VAAs) only provide around 20 per cent of adopter recruitment currently. To seek to increase the capacity of these and new providers to cover most of the (increasing) need rapidly would run risks which need to be very carefully handled given the vulnerability of children waiting for adoption.

Addressing the problems in the current system so that it works effectively is a less risky and quicker option to achieving improvement than creating an entirely new one.⁷⁰

The LGA stated that the proposed clause on fostering for adoption should lead to greater uptake of the option, and that the process should increase stability for children.⁷¹

The LGA was sceptical about whether legislative change was required to address delay caused by concerns relating to ethnicity in matching children for adoption, but noted that both the Government and Lords Committee draft clauses kept the best interests of the child at their heart:

The LGA does not believe the Government has presented robust evidence that delay caused by the search for a “perfect ethnic match” is a widespread problem for which legislative change is required. The House of Lords Committee found that overall, the evidence it received did not suggest that this is such a significant problem that legislative change is necessary.

[...]

We do believe that ethnicity should be one issue balanced amongst all considerations, not an overriding factor. Both the Government's and the House of Lords Committee's draft clauses would support this approach as the best interests of the child will remain at the heart of decisions about adoption.⁷²

⁶⁹ “Race matters – but it must not be a bar to adoption,” *Guardian*, 5 February 2013

⁷⁰ Local Government Association, *On the day briefing: Children and Families Bill*, 5 February 2013, p3-4 [Free registration to access]

⁷¹ *Ibid.*, p4

⁷² *Ibid.*

The LGA said it was “not unsupportive” of personal budgets for adoption, but felt their enactment in legislation was premature as pilots have not yet started.⁷³ It also raised concerns about the impact of prospective adopters being able to access the Adoption Register, stating this “has the potential to be counter-productive if people become disappointed and disillusioned with the system, due to very high numbers of adopters wanting to adopt one particular child.”⁷⁴

3 Family Justice

3.1 Family Justice Review and Government Response

In March 2010 the Labour Government appointed a board, led by David Norgrove, to carry out a review of the family justice system. The Coalition Government subsequently supported the review, led by David Norgrove, then Chair of the Pensions Regulator. The Family Justice Review began work in March 2010. It was jointly sponsored by the Ministry of Justice, the Department for Education, and the Welsh Government.

The Review Board published an [interim report](#) in March 2011⁷⁵ and its [final report](#) in November 2011.⁷⁶ The Government published its [response](#) in February 2012.⁷⁷

The key [recommendations](#) of the Review Board were:

- A new six month time limit in care cases so delays are significantly reduced
- Enabling people to make their own arrangements for their children when they separate, through, for example, the use of mediation, and only use courts when necessary
- Overhauling the family justice system so that agencies and professionals work together with greater coherence to improve the experience for children and families.⁷⁸

The Government responded positively to the report, and said it intended to legislate at the earliest opportunity to improve the family justice system.⁷⁹ Legislative measures were subsequently announced in the Queen’s Speech in May 2012 as part of the Children and Families Bill. In addition, in line with a recommendation of the Family Justice Review, the Crime and Courts Bill [HL] would (among other things) establish a single family court for England and Wales, with a single point of entry.

The Crime and Courts Bill [HL] was introduced into the Lords on 11 May 2012 as HL Bill 4 of 2012-13, and is still before Parliament. On 2 November 2011, Mr Justice Ryder was appointed by the President of the Family Division, with the agreement of the Lord Chief Justice, to prepare a judicial response to the Family Justice Review and to make judicial proposals for the modernisation of family justice. Mr Justice Ryder’s report, *Judicial proposals for the modernisation of family justice*, was published on 30 July 2012 and contained a series of proposals to improve the workings of family courts, which he said were “judicial solutions to the problems which are identified in the Family Justice Review”.⁸⁰ His

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ [Family Justice Review: Interim report](#), March 2011

⁷⁶ [Family Justice Review: final report](#), November 2011

⁷⁷ Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012

⁷⁸ Ministry of Justice, [Family justice review: final report](#), 3 November 2011 [accessed 9 February 2013]

⁷⁹ Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012, p4

⁸⁰ Judiciary of England and Wales, [Judicial proposals for the modernisation of family justice](#), July 2012, p1

recommendations were endorsed by the Lord Chief Justice. When the report was published the Crime and Courts Bill [HL], including provision for a new single Family Court, was already before Parliament.

3.2 Draft clauses

The Government published [draft legislation on Family Justice reform](#) in September 2012. The foreword to the draft clauses set out the Government's intentions:

In February 2012 we published our response to David Norgrove's Family Justice Review. The review described a family justice system that was characterised by delay, expense, bureaucracy and lack of trust. Our response described how we would tackle those problems, which we know can be harmful to the children and families involved. The draft legislation set out in this document is the next step in bringing those proposals into effect and is supported by the Department for Education and the Ministry of Justice.

In public law cases, the legislative changes would reduce delay and duplication. A maximum time limit of 26 weeks would establish the timetable for completing care and supervision proceedings, unless an extension was required. The legislative reforms would make explicit that case management decisions should consider the impact on the welfare of the child and on the timetable for the case. They would also make clear that the court should focus only on the provisions of the care plan that set out the long term plan for the upbringing of the child.

The unnecessary requirement for interim care and supervision orders to be renewed after eight weeks, and then subsequently every four weeks, would be removed. Instead, the court would be allowed to set the length of interim orders for an appropriate period, up to the expected time limit. Courts would also be required to have regard to, amongst other things, the impact on the welfare of the child, and the timetable, duration and conduct of the proceedings, when deciding whether expert evidence is needed.

In private family law cases, the person proposing to make a court application would be required to attend a family mediation information and assessment meeting before going to court, unless an exemption applied. Contact and residence orders would be replaced with new child arrangement orders.⁸¹

3.3 Pre-legislative scrutiny: Justice Committee inquiry

On 12 September 2012 the House of Commons Justice select committee [announced](#) that it would be carrying out pre-legislative scrutiny into the draft family justice clauses.⁸² The Committee's announcement stated that it would inquire into issues including:

- mediation in family law cases;
- the proposed new child arrangements orders; the use of expert evidence in family law;
- time limits to proceedings for care or supervision orders;
- judges' role in considering care plans;
- safeguards for children in divorce cases; and

⁸¹ [Draft legislation on Family Justice](#), September 2012, Cm 8437, p5

⁸² Justice Committee, [Pre-legislative scrutiny of the Children and Families Bill](#), 12 September 2012

- shared parenting.

The shared parenting clauses were not published when the committee's announcement was made, but the committee said it would consider the issue as it expected draft clauses to be published during the course of its inquiry, which they were on 1 November 2012.

Report

The Justice Committee published its [report](#) on 14 December 2012. The [press notice](#) that accompanied the publication provided an overview of the Committee's views:

The report welcomes the Government's commitment to reducing delay within the care process, and the work being undertaken by some local authorities and the Courts to achieve a shorter timetable in care cases to the benefit of children. However, the Committee is less positive about the private law clauses, welcoming the focus on providing information about and assessing separating couples for mediation, whilst maintaining a degree of scepticism about the need and effect of changes to contact and residence orders.

The Committee maintains significant concerns about the clause intended by the Government to encourage parental involvement, on the grounds that any new presumption or legislative statement might detract from the principle that the best interests of the child are paramount. If the Government proceeds with its intention to include the draft clause in the Children and Families Bill when it is introduced, the MPs recommend that the Government makes clear what effect it intends the draft clause to have on Court orders.⁸³

More detailed information on the changes included in the Bill is provided in the following sections.

3.4 Family Mediation

Current position, Family Justice Review and Government response

Mediation is a way of resolving disputes including those that arise before, during or after separation or divorce. It is a voluntary and confidential process enabling parties to explain their concerns and needs to each other in the presence of a qualified family mediator.⁸⁴

Under a protocol introduced in 2011, before making an application for a court order in relevant family proceedings, all potential applicants are expected, unless exempted, to have considered alternative means of resolving their disputes.⁸⁵ The current position was set out by the House of Commons Justice Committee in their 2011 report, [Operation of the Family Courts](#):

CURRENT SYSTEM

113. In 1997 it was made compulsory for people applying for legal aid for private family law cases to consider mediation. However, parties who funded their legal proceedings privately had no obligation to consider mediation. Evidence suggested

⁸³ Justice Committee, [Justice Committee publishes report on pre-legislative scrutiny of Children and Families Bill](#), 14 December 2012

⁸⁴ [Family Justice Review: Interim report](#), March 2011, p146

⁸⁵ Family Procedure Rules, Practice Direction 3a – [Pre-Application Protocol for Mediation Information and Assessment](#)

that many were not aware of the option (discussed further below). This situation recently changed with the introduction of a new Practice Direction.

PRACTICE DIRECTION

114. On 6 April 2011 Practice Direction 3a—Pre-Action Protocol for Mediation came into effect. The Practice Direction requires that any couple "considering applying" for an order in the family courts must attend a "Mediation Information and Assessment Meeting" (MIAM) about "family mediation and other forms of alternative dispute resolution". If the parties are willing to attend together the meeting may be conducted jointly, but where necessary, separate meetings may be held. The meeting is designed to cover all aspects of the divorce or separation, not just arrangements for the child. The court will ask whether a litigant has attended a meeting and "can require that they do so before considering any application". The Practice Direction does not define a mediator, but gives information of where family mediators may be found. The Legal Services Commission (LSC) sets minimum standards for publicly-funded mediators, however, at present anyone can set themselves up as a privately-funded mediator with no qualifications or training.

115. The Practice Direction sets out the circumstances in which people do not have to consider mediation. These include cases where the parties already have an agreement and are only seeking a consent order, where the order is urgent due to a physical threat to the child or where an allegation of domestic violence has been made and this has resulted in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months. ...

116. Parties are only required to attend a meeting about mediation. Once they have been to the meeting, even if the mediator believes they are excellent candidates for mediation, they are free to go straight back to the court. Mediators can set their own fee for the MIAM, the LSC rate being £130 for a couple.⁸⁶

Although it is compulsory for people applying for legal aid for private family law cases to consider mediation, at present others cannot be compelled to attend a MIAM and it has been reported that there appears to be a wide variation in how courts in different regions interpret the rules.⁸⁷ In a speech to Resolution,⁸⁸ Sir Nicholas Wall, who was then President of the Family Division, commented on the operation of the scheme:

"May I... apologise for the fact that MIAMs are not working as they should in certain parts of the country. The position is that the government insisted on the "pre-action protocol" with every would-be litigant going to a MIAM as a pre-condition of instituting proceedings. At the same time the government refused to make attendance at a MIAM compulsory, on the ground that compulsory mediation was a contradiction in terms. The result, in some places, has been that the pre-action protocol is not being followed".⁸⁹

The Family Justice Review recommended that all applicants should be required to attend a MIAM prior to making a court application:

We cannot compel respondents to attend, but they should be encouraged to do so. Judges will retain the power to order attendance at a MIAM and the expectation is that

⁸⁶ House of Commons Justice Committee, *Operation of the Family Courts*, 14 July 2011, HC 518-I 2010-12, pp36-7

⁸⁷ Resolution News Release, *First anniversary of Mediation Assessment Meetings marked, as survey reveals they are not working as they should*, 4 April 2012 [accessed 12 February 2013]

⁸⁸ Formerly known as the Solicitors Family Law Association

⁸⁹ *Ibid*

this power should be exercised as much as possible where respondents have not considered mediation. Judges could be powerful advocates to encourage an expectation that other means of reaching agreement will be tried before an application to court.⁹⁰

The Review also recommended that the regime should allow for emergency applications to court and exemptions as in the Pre-Application Protocol.

Draft clause

Clause 1 of the draft legislation published by the Government would make it a requirement for a person, unless exempted, to attend a MIAM before making a “relevant family application” (defined as an application of a description specified in the *Family Procedure Rules* which is made to the court in, or to initiate, family proceedings). The provision would extend the existing requirement for recipients of legal aid to privately funded persons. The detail of how the requirement would work in practice, including exemptions, would be set out in the *Family Procedure Rules*. The types of proceedings to be specified might include, for example, proceedings relating to arrangements for a child or to a financial remedy following separation or divorce.⁹¹

The draft legislation also specified that the *Family Procedure Rules* might make provision for the court, or an officer of the court, to refuse to deal with any application if the requirement to attend a MIAM should have, but had not, been complied with.

The Explanatory Notes published with the draft legislation stated that the requirement to attend a MIAM “should mean that a prospective applicant receives and is able to consider information about family mediation as a means of resolving the dispute as an alternative to seeking a court order”.⁹² They also set out the Government’s intention that the new rules would comply with human rights requirements.⁹³

Pre-legislative scrutiny: Justice Committee report

The Justice Committee observed that much of the detail of the operation of MIAMs would be set out in the *Family Procedure Rules*, and said that the Government’s submission that the new rules would largely mirror the detail of the current Practice Direction was helpful. The Committee agreed with the Government that, because of the level of procedural detail needed, it was appropriate that the detailed operation of the draft clause should be set out in the *Family Procedure Rules* rather than in primary legislation.⁹⁴

The Committee concluded that well-trained family mediators should be able to identify cases of domestic abuse that should be exempt from MIAMs or mediation, but said that the responsibility for filtering out domestic abuse cases from the MIAM process should not solely rest on mediators.⁹⁵

The Committee recommended that:

⁹⁰ *Family Justice Review: final report*, November 2011, p155

⁹¹ *Draft legislation on Family Justice Explanatory Notes*, p34

⁹² *Ibid* p37

⁹³ *Ibid*

⁹⁴ House of Commons Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, 14 December 2012, HC 739 2012-13, paragraph 93

⁹⁵ *Ibid* paragraph 100

- the Government should consider with recognised mediation organisations how the child's voice could be heard within the MIAM to produce guidance applicable to all mediators undertaking MIAMs;⁹⁶
- privately-funded mediators should have to meet the current requirements for mediators undertaking legal aid work set by the Legal Services Commission: "This must be a priority and should be included in the draft clause";⁹⁷
- a judge, rather than a court officer, should have to decide about the merits of whether a party had complied with the MIAM process or not (the Committee considered that the draft clause did not make this clear);⁹⁸
- the Government should consider the inclusion of a time-limited exemption to prevent parties from having to pay for repeat MIAMs before applying to the Court.⁹⁹

The Committee also recognised the difficulty in requiring compulsory attendance at a MIAM by the respondent, but asked the Ministry of Justice to work with the Family Judiciary to develop a consistent practice across the Courts in adjourning cases for MIAM attendance:

We recognise that each case will be different, and that in many cases, delay for compulsory respondent MIAM attendance will not be suitable, but we consider that there should, in practice, be an equal and universal requirement for MIAM attendance for applicants and respondents. We do not recommend inclusion of the requirement in the draft clause, because we conclude that as a matter of Court practice and procedure, it is more appropriately included within the Family Procedure Rules.¹⁰⁰

Government response

In its response to the Justice Committee's report, the Government (among other things):

- recognised the importance of safeguarding children and vulnerable adults in a pre-proceedings context, and had asked the Pre-Proceedings Working Group of the Family Justice Council to look at the issue;¹⁰¹
- considered that the appropriate stage for the voice of the individual child to be heard was during the process of mediation itself, rather than in the MIAM;¹⁰²
- reiterated that it did not regulate privately funded mediation services, but pointed to the Government's response to a similar recommendation made by the Family Justice Review in which it committed to work with the Family Mediation Council and Legal Services Commission to make sure that accreditation standards were harmonised and that mediators were able to access Continuing Professional Development;¹⁰³
- understood concerns about the role of the court officer, but (although the wording of the clause in the Bill had changed) still intended that the court officer should determine

⁹⁶ *Ibid* paragraph 101

⁹⁷ *Ibid* paragraph 103

⁹⁸ *Ibid* paragraph 107

⁹⁹ *Ibid* paragraph 119

¹⁰⁰ *Ibid* paragraph 112

¹⁰¹ HM Government, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Annex B, Annex 1, paragraph 38

¹⁰² *Ibid* paragraph 39

¹⁰³ *Ibid* paragraphs 41-2

whether a prospective applicant had complied with the procedural requirement to attend a MIAM or was exempt from the requirement to do so, evidenced through completion of the necessary court form. The Government did not consider that the clause should seek to define matters of court procedure and intended to ask the Family Procedure Rule Committee to make detailed provision for the procedural requirements in court rules.¹⁰⁴ It was intended that the court officer would check to see if a standard form had been completed and signed appropriately and would not be assessing the merits. The officer would be able to refer concerns to a member of the judiciary for guidance.¹⁰⁵ The Government set out what was now proposed:

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

We propose to invite the Family Procedure Rule Committee to exercise this power so that the proposed functions in relation to the MIAM requirement can be undertaken by court officers, or the court.¹⁰⁶

3.5 Expert Evidence in Family Courts

Current position, Family Justice Review and Government response

Section 1 of the *Children Act 1989* provides that, 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. Expert social care and other reports are often required by the court when making welfare decisions about a particular child.

Issues associated with the use of expert witnesses in the family courts, including cost and delay, have been under consideration for some time. Concerns have also been raised about Legal Services Commission funding (legal aid).

Family Justice Review Final Report

The Family Justice Review Final Report acknowledged that expert evidence is often necessary to a fair and complete court process, but stated that the growth in the use of experts "is now a major contributor to unacceptable delay".¹⁰⁷ It made a number of recommendations intended to reduce the reliance on expert witnesses and improve their supply and quality.¹⁰⁸

The Final Report considered that judges must direct the process of agreeing and instructing expert witnesses as a fundamental part of their responsibility for case management. This responsibility "should not in effect be delegated to the representatives of the parties, as is often the case currently".¹⁰⁹ It continued that more judicial control should be exercised over letters of instruction "that are often too long and insufficiently focused on the determinative issues". In the order giving permission for the commissioning of the expert witness the judge

¹⁰⁴ HM Government, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, paragraph 34

¹⁰⁵ HM Government, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Annex B Annex 1, paragraphs 43-5

¹⁰⁶ *Ibid* paragraphs 46-7

¹⁰⁷ *Family Justice Review Final Report*, November 2011, p17

¹⁰⁸ *Ibid* pp32-3

¹⁰⁹ *Ibid*, p18

should set out the questions on which the expert should focus. This would normally be done following discussions with parties.¹¹⁰

The Review also considered the remuneration of expert witnesses,¹¹¹ and said that the supply and management of expert witnesses was a serious problem which needed urgent action.¹¹²

Government response

In its response to the Family Justice Review, the Government confirmed that it would act to reduce “the excessive use of expert reports” and strengthen the quality and timeliness of those which were commissioned. Legislation would be introduced:

41. Care proceedings raise some of the most difficult matters to be brought before the courts. Experts play an important role in supporting the court to reach the right decision on whether the child should be taken into care. But the commissioning of multiple expert reports, which can duplicate or substitute for the detailed evidence already offered by the local authority, is now the norm. A recent review of case files found experts feature in nearly 90% of care cases, and where experts are commissioned there are, on average, nearly four expert reports in each case. There are doubts over the value added by many of the reports while the additional delays and costs which result can be extensive.

42. We will legislate to make clear that in family proceedings the courts should only give permission for expert evidence to be commissioned where it is necessary to resolve the case and the information is not already available through other sources. We will also require the courts, in giving permission to commission expert evidence, to specifically consider the impacts the delay will bring. Local authorities will need to play their part by providing high quality, comprehensive initial assessments.

43. We also agree with the Review that there should be some minimum standards set to ensure that witnesses commissioned are experts in their fields and that they produce high-quality evidence which helps the court to reach its decision. We will look to develop these standards through the Family Justice Board.¹¹³

The Government said that legislation would consolidate and build upon requirements contained in the *Family Procedure Rules* and existing guidance. In the meantime the Government would ask the Family Procedure Rules Committee to review the current rules and supporting guidance, to identify whether further amendments were also necessary in these areas to support the Review’s recommendations.¹¹⁴

Judicial Proposals for the Modernisation of Family Justice

Mr Justice Ryder’s report, *Judicial proposals for the modernisation of family justice*, included proposals for experts to be scrutinised carefully. Experts were “misused and over used”:

41. The use of experts by the court deserves particular attention because of the time that it takes to undertake an expert assessment or analysis. The court must be adept to scrutinise whether the evidence that is necessary is already before the court and if it is, why further expert assessment or analysis is necessary on the same issues. To do

¹¹⁰ *Ibid*

¹¹¹ *Ibid*, p19

¹¹² *Ibid*, p122

¹¹³ Department for Education and Ministry of Justice, *The Government Response to the Family Justice Review*, February 2012, pp13-14 (footnote omitted)

¹¹⁴ *Ibid*, p60

otherwise where no complaint about the methodology or factual basis of existing evidence is identifiable, suggests that the court is being asked to provide a multi-layered alternative to judicial decision-making which is inappropriate. That is not to say that experts are unnecessary but rather that they are misused and over used. There is a place for independent social work and forensic witnesses to advise on discrete issues which are outside the skill and expertise of the court or to provide an overview of different professional elements in the more complex cases, but regard must be had to why those who are already witnesses before the court have not provided the evidence that is necessary and who should pay for it when it is missing. In every case, the judge should be able to say: is your expert necessary i.e. to what issue does the evidence go, is it relevant to the ultimate decision, is it proportionate, is the expertise out with the skill and expertise of the court and those already involved as witnesses by reference to the published and accepted research upon which they can rely and of which the court has knowledge.¹¹⁵

Mr Justice Ryder said that, in order to help achieve quality case management decisions in public law cases, there would be rule and practice direction changes relating to the use of experts and a timetable track which would presume that non-exceptional cases could be completed in 26 weeks. A Family Court Guide, would signpost good practice and the content of the rules and practice directions of the court, including how and when to use experts. If an expert was required, any necessary expert evidence would be likely to be provided by a single or single joint expert so that an issues resolution hearing could be listed at about 20 weeks to identify the issues which remained and the final hearing would be listed shortly afterwards.¹¹⁶

In private law cases (disputes between parents), Mr Justice Ryder identified the most pressing issue requiring a solution as “a mechanism to obtain expert analysis for the court where neither party can afford to pay for an expert and there is no public funding”.¹¹⁷

Justice Committee report and Government response

In July 2011, the House of Commons Justice Committee published its report, *Operation of the Family Courts*.¹¹⁸ One of the areas which the Justice Committee considered was the extent to which expert witnesses contributed to delays. The Committee said that the evidence it had received was unclear as to whether the main cause of delays was a shortage of experts, or unnecessary reports, or lack of case management by the judiciary.¹¹⁹

The Committee was convinced that there were unnecessary expert reports in some family cases,¹²⁰ and called for the judiciary to take more responsibility for the instruction of experts.¹²¹

The Government published its response to the Justice Committee report in October 2011.¹²² Although the Government recognised the need for more consistency in the use of expert witnesses, at that stage the Government was still waiting for the final report of the Family Justice Review and said that it would respond in due course.

¹¹⁵ Judiciary of England and Wales, *Judicial proposals for the modernisation of family justice*, July 2012, pp8-9

¹¹⁶ *Ibid*, pp10-11

¹¹⁷ *Ibid*, p12

¹¹⁸ House of Commons Justice Committee, *Operation of the Family Courts*, 14 July 2011, HC 518

¹¹⁹ *Ibid*, paragraph 246

¹²⁰ *Ibid*, paragraph 258

¹²¹ *Ibid*, paragraphs 269-70

¹²² *Government Response to Justice Committee's Sixth Report of Session 2010–12: Operation of the Family Courts*, Cm 8189, October 2011

Family Procedure Rules 2010

Provisions relating to the use of experts in family proceedings are included in the *Family Procedure Rules 2010* (as amended).¹²³ A new Part 25 was inserted into the 2010 Rules by the *Family Procedure (Amendment) (No.5) Rules 2012* which came into force on 31 January 2013.¹²⁴ The new Part 25 is largely a consolidation of new and old rules relating to the control of expert evidence.¹²⁵ The Ministry of Justice set out the changes to the previous Part 25 as including:

- a change to the test for permission to put expert evidence before the court from 'reasonably required' to 'necessary'. In proceedings relating to children, the new test also applies to permission to instruct an expert and for a child to be examined or assessed for the purpose of the provision of expert evidence;
- the inclusion of specific factors to which the court is to have particular regard in reaching a decision whether to give permission relating to expert evidence, including the impact on the timetable and conduct of the proceeding and the cost. Additional factors are specified in proceedings relating to children. These include what other expert evidence is available (including any obtained before the start of proceedings) and whether the evidence could be obtained from another source such as one of the parties;
- in proceedings relating to children, an application for permission to instruct an expert should state the questions which the expert is required to answer and the court will give directions approving the questions that are to be put to the expert.

In addition, controlling the use of expert evidence has been added to what is included in active case management for the purposes of rule 1.4 of the Family Procedure Rules and the order of matters included in active case management has been altered placing setting timetables and controlling the progress of the case first.

The Ministry of Justice stated that these changes followed on from recommendations of the Family Justice Review, and that the Government's proposed family justice legislation, which would include provisions on expert evidence, would eventually supersede parts of the amended *Family Procedure Rules*.¹²⁶

The President of the Family Division, Sir James Munby, said:

There is no question of families being denied the chance to call evidence they need to support their case or being denied a fair hearing. But the new test gives judges more control over expert evidence in family proceedings. The rule change gives family judges the means to make robust case management decisions to make sure the expert evidence is focused and relevant.

This change underlines the key role of the court in determining what expert evidence it requires to help it reach the decisions in a case.

¹²³ Ministry of Justice website [accessed 12 February 2013]

¹²⁴ SI 2012/3061

¹²⁵ [Bill 131-EN](#) paragraph 114

¹²⁶ Ministry of Justice, *Amendments to Family Procedure Rules Part 25 and Revised Practice Directions on Experts*, 13 December 2012 [accessed from the [Academy of Experts website](#) on 12 February 2013]

This change is a vital component of the active judicial case management that will be needed to prepare the ground for the new Single Family Court, due to come into being in April 2014.¹²⁷

Draft clause

Clause 3 of the draft legislation would deal with control of expert evidence and of assessments in children proceedings.¹²⁸ The Explanatory Notes published with the draft legislation stated that the clause would ensure that expert evidence in family proceedings concerning children was permitted “only when necessary to resolve the case justly, taking account of factors including the impact on the welfare of the child, and whether the information could be obtained from one of the parties already involved in the proceedings”.¹²⁹

Clause 3 would make provision about when expert evidence might be sought or put before the court in children proceedings. In summary:

- anyone wishing to instruct an expert to provide evidence for use in children proceedings must first seek the permission of the court to do so; expert evidence obtained without the court’s permission would be inadmissible unless the court ruled otherwise
- the court would have to give permission for a child to be examined or assessed by an expert for the purpose of preparing expert evidence for the court; expert evidence obtained in contravention of this provision would be inadmissible unless the court ruled otherwise
- the court’s permission would be necessary for any expert evidence, whether in the form of a written report or oral evidence, to be put before the court
- the court would give permission for any of the above only if satisfied that the expert evidence was necessary to assist the court in resolving the proceedings justly; in reaching that decision, the court would have to consider the factors specified in subsection (7).

The Explanatory Notes published with the draft legislation stated that the factors had the effect, among other things, that the court would need to consider “how the child might be affected if it is likely that the instruction of an expert would lengthen the timetable for the proceedings”.¹³⁰

Certain types of evidence would be excluded from the ambit of expert evidence so they would not be subject to the restrictions set out in the clause.

Matters relating to experts in children proceedings could still be determined by the *Family Procedure Rules*.

Clause 3 would also amend section 38 of the *Children Act 1989*, which enables the court to give such directions as it considers appropriate relating to the medical or psychiatric examination or other assessment of the child when making an interim care order or an interim supervision order, to align section 38 with the new test for permission for expert evidence in children proceedings.

¹²⁷ “New Part 25 of FPR introduced to speed up family proceedings”, *Family Law Week*, 31 January 2013 [accessed 12 February 2013]

¹²⁸ HM Government, *Draft legislation on Family Justice*, September 2012

¹²⁹ *Ibid* p35

¹³⁰ *Ibid* p41

Pre-legislative scrutiny: Justice Committee report

The Justice Committee made a number of recommendations in relation to the provisions about expert witnesses (among other things) and concluded that the draft clause on experts was a proportionate response, but that its effective operation in practice would be dependent on certain improvements. The Committee also made recommendations for some small revisions to draft clause 3.¹³¹

Government response

The Justice Committee had queried why the wording of the permission test for experts (“necessary to assist the court to resolve the proceedings justly”) differed from the test for the 26 week limit extensions (“necessary to enable the court [...]).¹³²

The Government explained why it considered that the wording of the draft legislation should be retained:

We believe that the provisions on expert evidence rightly require the court to consider whether the evidence is necessary to “assist” the court to resolve the proceedings justly. However, we consider that in the context of the time limits clause, an extension should be granted only when necessary to secure that justice is done; the extension will make the difference between justice and injustice. On that basis, our view is that “enable” conveys the required sense better than “assist”.¹³³

The Government disagreed with the Committee’s suggestion that two of the sub-clauses repeated one another and rejected their recommendation that one of them should be deleted. It said that one of the sub-clauses related to obtaining expert evidence and the other to adducing (presenting) that evidence.¹³⁴

The Government’s response also addressed concerns raised by the Justice Committee about aspects of LSC funding.¹³⁵

3.6 Time limits in proceedings for care or supervision orders**Current position, Family Justice Review and Government response***Care proceedings*

The Family Justice Review identified delays in public law proceedings, through which the state can intervene in family life to protect children, as a significant concern. Drawing on statistics from January to June 2011, the Review’s report noted:

The protection system is under great and increasing pressure:

- case volumes have increased in recent years and appear to still be increasing. The number of children involved in public law applications was 3% higher in the last 12 months than the preceding 12 months;
- care and supervision cases are taking ever longer - cases take an average of 61 weeks in care centres and 48 weeks in Family Proceedings Courts, a figure that has increased in the six months since our interim report;

¹³¹ House of Commons Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, 14 December 2012, HC 739 2012-13, paragraphs 63-73

¹³² This provision is considered in section 3.6 of this paper below

¹³³ HM Government, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Annex B, Annex 1, paragraph 21

¹³⁴ *Ibid* paragraph 24

¹³⁵ *Ibid* paragraphs 27-31

- there are around 20,000 children currently waiting for a decision in public law, compared to some 11,000 at the end of 2008.¹³⁶

The report noted that “it seems that delay is endemic, and builds up at every stage.”¹³⁷ It also acknowledged that concern about delay is not new, and that “many attempts have been made to reduce case length but case duration continues to rise. In particular the introduction of system wide targets had not been successful.”¹³⁸

In its interim report, the Review launched a consultation on a statutory time limit obliging the court to conclude proceedings within six months.¹³⁹ In its final report, it noted wide support for this limit, with some opposition suggesting a time limit provided the wrong focus, and did not address the systemic problems that cause delay.¹⁴⁰ However, the Review concluded that a time limit would be of use:

3.68. We agree that a time limit would not of itself guarantee success in tackling delay. A programme of wide ranging and fundamental reform is needed, whether or not there is a time limit. But we believe that a time limit could give a strong focus to the work. Her Honour Judge Newton (quoted in paragraph 3.9) argued in effect that acceptance of delay is now institutional. A time limit could deliver a jolt to the system, breaking current expectations, and creating a new set to which all would need to work.

3.69. For these reasons we propose there should be a statutory time limit of six months for care cases.¹⁴¹

In its response to the Family Justice Review, the Government stated that “adding an expected time limit into legislation would send a clear and unambiguous signal to all parts of the system that extensive delays are unacceptable,” and that it would legislate to introduce a six-month time limit at the earliest opportunity.¹⁴²

Interim Care and Supervision Orders

The Family Justice Review also made proposals relating to interim care or supervision orders. A supervision order under the *Children Act 1989* places a child under the supervision of a designated local authority and places a local authority officer under a duty to advise, assist and befriend the supervised child. Interim supervision orders may also be made.¹⁴³ An interim care order places a child in the care of the local authority on an interim basis until the court can make a final decision.¹⁴⁴

The Family Justice Review recommended that the existing requirement to renew interim care and supervision orders after eight weeks and then every four weeks¹⁴⁵ should be amended to give judges discretion to grant interim orders for the time they see fit, subject to a maximum of six months and not beyond the time limit for the case. The Review recommended that the

¹³⁶ *Family Justice Review: final report*, November 2011, p91

¹³⁷ Ibid.

¹³⁸ Ibid., p106

¹³⁹ *Family Justice Review: Interim report*, March 2011, p34

¹⁴⁰ *Family Justice Review: final report*, November 2011, p106

¹⁴¹ Ibid., p107

¹⁴² Department for Education and Ministry of Justice, *The Government Response to the Family Justice Review*, February 2012, p55

¹⁴³ *Children Act 1989*, s35

¹⁴⁴ Ibid., s38

¹⁴⁵ Ibid., s38(4)

court's power to renew should be tied to their power to extend proceedings beyond the time limit.¹⁴⁶

The Government accepted this recommendation (referring specifically to interim care orders), stating that it would:

remove an unnecessary restriction on judges' ability to set ICOs for a time period appropriate to the case and the needs of the child; it would also remove unnecessary additional hearings and administrative and court processes.¹⁴⁷

Draft clauses

The Government's draft clauses on family justice included provision for a statutory 26-week time limit for care cases. The Explanatory Notes provided alongside the clauses set out the Government's reasons for introducing the change:

The Family Justice Review identified that delay in care and supervision order proceedings was a significant problem. It concluded that delay was endemic in the system, and built up at every stage with cases taking an average of 56 weeks to complete. Delay can harm a child's chances of finding a permanent home, can damage a child's development, may put a child at risk of harm, and can cause distress and anxiety to the child. The provision imposing a time limit in care and supervision proceedings has been introduced to reduce unnecessary delay in such proceedings and to ensure that cases are progressed swiftly and are more actively managed with children's welfare and timescales taking priority.¹⁴⁸

The draft clauses required that particular regard be given by the court, when drawing up the timetable for a case, to the impact of the timetable on the welfare of the child.¹⁴⁹

The draft clauses also included provision to remove the eight week time limit on the duration of initial interim care orders and interim supervision orders and the four week time limit on subsequent orders, and allowing the court to make interim orders for the length of time it sees fit, up to the date when the relevant care or supervision order proceedings finish.¹⁵⁰

Pre-legislative scrutiny: Justice Committee report

The Justice Committee's [report](#) included some more up-to-date information on the current time-frame of care cases:

25. By September 2012, the average duration of care cases had reduced, and by our second evidence session, Cafcass was able to provide us with an update that in the second quarter of 2012 the average duration was 46 to 47 weeks, although we note its further evidence that these figures conceal a spread from "30 weeks in the quickest courts to 64 in other parts of the country".¹⁵¹

Addressing the issue of a potential time limit, the Committee stated its belief that, at local authority level, it considered that a 26 week time limit was beneficial and feasible in the

¹⁴⁶ [Family Justice Review: final report](#), November 2011, p16

¹⁴⁷ Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012, p57

¹⁴⁸ [Draft legislation on family justice](#), September 2012, Cm 8437, para 46

¹⁴⁹ *Ibid.*, para 48

¹⁵⁰ [Draft legislation on family justice](#), September 2012, Cm 8437, para 9

¹⁵¹ Justice Committee, [Pre-legislative scrutiny of the Children and Families Bill](#), Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 25

majority of cases.¹⁵² However, it raised concerns about cases that were likely to take longer than 26 weeks:

44. We recommend that the draft clause is amended to increase flexibility and allow judges to identify cases that are likely to take longer than 26 weeks at case management hearings throughout the proceedings, and to take such cases out of the 26 week timetable and/or to allow directions to be given beyond 26 weeks, rather than requiring constant re-listing and fruitless, taxpayer-funded, extension hearings. We consider that allowing limited flexibility for the disposal of applications for care or supervision orders, but greater flexibility in making interim care and supervision orders (as discussed below at paragraph 56) has the potential to create a disjointed judicial case management process.¹⁵³

The Committee recommended that flexibility surrounding time limits be included in secondary legislation, with a power to set a time limit provided in primary legislation:

We recommend that the Government redrafts clause 4 to follow the Norgrove Report recommendation that “The power to set a time limit should be introduced in primary legislation. Secondary legislation and guidance should specify the actual time limit and provide the operational detail.” Given the importance of the timetable and the need for parties to be aware of and contribute to any decision to vary the limit, we further welcome the confirmation from the Government that the affirmative resolution procedure would apply to the secondary legislation varying the time limit.¹⁵⁴

The Committee concluded that the draft clauses removing restrictions on the duration of interim care orders and interim supervision orders was “a useful legislative change, which allows flexibility for judges in effectively and proportionately managing cases.”¹⁵⁵

Government response

In its response to the Justice Committee’s report, the Government stated its disagreement with the Committee’s recommendation that the time limit should be included in secondary legislation:

Perhaps the most significant issue on which we do not agree with the Committee is the recommendation to set out the 26 week time limit in secondary legislation (regulations), rather than on the face of the Bill. We remain of the view that the provision should be in primary legislation. This will provide the family justice system with a clear and unambiguous statement about the need to tackle delay in care cases. Additionally, it enables a full, transparent debate on the time limit to take place in Parliament.¹⁵⁶

The response also provided the Government’s view on when the time limit might be extended:

Under the new legislation, the starting point for the court should always be that the proceedings should be completed without unnecessary delay and in any event within 26 weeks. However, the court will have the discretion to extend the case beyond the 26 week time limit if it is considered necessary to resolve the proceedings justly. When drawing up or revising the timetable, the court will be required to have particular regard

¹⁵² Ibid., para 35

¹⁵³ Ibid., para 44

¹⁵⁴ Ibid., para 51

¹⁵⁵ Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 61

¹⁵⁶ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540, p30

to the impact that the timetable or any revision would have on the welfare of the child. We intend to invite the Family Procedure Rule Committee to set out in court rules the specific factors to which the court should have regard when considering whether to grant an extension.

Orders to extend time will not usually require an additional hearing, as the extension should be dealt with during the normal stages of the case identified in the Public Law Outline.¹⁵⁷

The response welcomed the Committee's support for the removal of restrictions on the duration of interim care orders and interim supervision orders.¹⁵⁸

3.7 Care plans

Current position, Family Justice Review and Government response

Under section 31(3A) of the *Children Act 1989*, no care order may be made with respect of a child without court consideration of a local authority-prepared 'care plan' for that child.¹⁵⁹ The Family Justice Review considered the question of how far a court needs to scrutinise the local authority care plan to be satisfied that a care order is in the child's best interests. The Review's report raised concerns about the extent of the court's remit in considering these plans, both in statute and in practice:

3.15. The Act requires the court to examine the care plan for the child before making an order but does not specify how complete the plan needs to be. The leading case requires that there be "*a care plan which is sufficiently firm and particularised for all concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future.*"¹⁶⁰

The Family Justice Review concluded that courts had progressively extended their interest in the proposed care plan, and that court scrutiny of the plan often went beyond what was required or desirable:

[Court scrutiny of the care plan] can try to determine how the child should be parented and not just by whom. The motivation is honourable but the result is to cause delay for that child and others, and to waste time and money, particularly bearing in mind that a court can only consider a child's needs at one point in time. The needs and circumstances are highly likely to change, potentially negating the value of the detailed scrutiny. To take responsibility away from the local authority contributes to a lack of confidence and decisiveness on their part, undermining their parental authority.¹⁶¹

The Review recommended that courts consider only the "core or essential" aspects of a care plan:

When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are:

- planned return of the child to their family;

¹⁵⁷ Ibid., p36

¹⁵⁸ Ibid., p38

¹⁵⁹ S31A of the *Children Act 1989* provides the legislative basis for the preparation of care plans by local authorities.

¹⁶⁰ Re S (Minors) (Care order: implementation of care plan); Re W (Care orders: adequacy of care plan) [2002] 1 FLR 836 *per Lord Nicholls*; *Family Justice Review: final report*, p95

¹⁶¹ *Family Justice Review: final report*, p95

- a plan to place (or explore placing) a child with family or friends;
- alternative care arrangements; and
- contact with birth family to the extent of deciding whether that should be regular, limited or none.¹⁶²

The Government accepted this recommendation, and said in its response to the Review that it would legislate to focus court considerations on the core elements of a care plan:

The Government agrees that it is important that the courts continue to consider the core elements of children's care plans before making care orders. Where an issue of detail is critical to deciding who should care for the child, the courts should also continue to be able fully to consider and debate this.

However, the detail of care plans often changes over time in response to children's changing needs and, in the majority of cases, it makes sense for the detail to be left to the local authority which has the ongoing responsibility for the plan. The Government accepts this recommendation and will bring forward legislation to make this distinction between the role of the courts and local authorities in children's care plans clear.¹⁶³

Draft clause

The Government's draft clauses on family justice amended section 31 of the *Children Act 1989* to focus the court's considerations on the 'permanence provisions' within a child's care plan:

[...] to focus the court's consideration, when making its decision as to whether to make a care or supervision order, on the provisions of the care plan that set out the long-term plan for the upbringing of the child. Specifically, the court is to consider whether the local authority care plan is for the child to live with a parent or any member of or friend of the child's family, or whether the child is to be adopted or placed in other long term care. These are referred to as the "permanence provisions" of the section 31A plan. The court is not required to consider the remainder of the section 31A plan. New subsection (3C) provides that the Secretary of State may by regulations amend what is meant by the "permanence provisions".¹⁶⁴

The draft clauses also included provision to ensure that regulations about permanence provisions would be subject to the affirmative procedure.¹⁶⁵

Pre-legislative scrutiny: Justice Committee report

The Justice Committee's report noted that evidence presented to them by Ministers and others led them to believe that, "in practice judges will retain a discretion to look beyond the permanence provisions, where they think it is appropriate to do so."¹⁶⁶ The Committee suggested that this flexibility might mean the draft clause did not have its intended effect in re-focusing judicial scrutiny.¹⁶⁷

¹⁶² Ibid., p101

¹⁶³ Department for Education and Ministry of Justice, *The Government Response to the Family Justice Review*, February 2012, p52

¹⁶⁴ *Draft legislation on family justice*, September 2012, Cm 8437, para 60

¹⁶⁵ Ibid., para 61

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

The Committee's report also noted that the clause as drafted did not refer to the planned return of the child to their birth family, and recommended that it should be amended to do so.¹⁶⁸

Government response

The Government's response stated that the clause on care plans' overall intention was "to keep the court focussed on the essential issue of the local authority's long term permanence plan for the child", while retaining flexibility for the court to consider other parts of the care plan where it is in the child's best interests to do so.¹⁶⁹ It noted that, "in the majority of cases, the detail of the care plan could, and should, be left to the local authority," and agreed to amend the draft clause on care plans to make this more explicit.¹⁷⁰

The Government's response accepted the Committee's concerns regarding contact arrangements with the child's birth family and stated that the clause would be amended to make clearer the link to the court's duty to consider the contact arrangements for the child.¹⁷¹

3.8 Child Arrangements Orders

Current Position

Section 8 of the *Children Act 1989* includes four types of order for use in a wide range of different situations involving children: residence orders, contact orders, prohibited steps orders, and specific Issues orders. The Bill introduces a new child arrangements order (CAO), to replace the existing residence and contact orders (prohibited steps and specific issues orders remain in place).

In summary, a residence order:

- settles the practical arrangements for the accommodation of the child;
- vests parental responsibility in the holder of the residence order and deems them to be the child's 'nearest relative' under the *Mental Health Act 1983*;
- may contain directions or conditions;
- allows the court to make an order for financial relief;
- carries automatic restrictions (without either the written consent of every person who has parental responsibility for the child or the leave of the court) concerning:
 - changing the child's name;
 - removing the child from the UK (although there is a general exception for periods of less than one month);
- discharges any pre-existing care order.¹⁷²

A contact order is defined in section 8 of the *Children Act 1989* as:

¹⁶⁸ Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 86

¹⁶⁹ Ibid.

¹⁷⁰ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, p42-43

¹⁷¹ Ibid.

¹⁷² Hershman and McFarlane, *Children Law and Practice*, para B276

[A]n order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.¹⁷³

More than one contact order may be made in respect of a child, and there does not need to be a residence order in force for a contact order to be made.¹⁷⁴

The Library standard note *Children: Residence and contact related matters for parents, grandparents and others after separation*, SN/SP/3100, provides more information on the current position for parents and others in arranging contact, and on the issues courts will consider in making orders. A further Library note, SN/SP/2827, sets out information on *Parental Responsibility* and how it may be acquired.

Family Justice Review proposals for Child Arrangements Orders and Government response

The *Family Justice Review* made recommendations relating to the development of a 'child arrangements order', which would set out the arrangements for the upbringing of the child when court determination of disputes related to the care of children is required. This would involve repealing the existing residence and contact orders provided for under the *Children Act 1989*:

We recommend government should develop a child arrangements order, which would set out arrangements for the upbringing of a child when court determination of disputes related to the care of children is required. The new order would move away from loaded terms such as residence and contact which have themselves become a source of contention between parents, to bring greater focus on practical issues of the day to day care of the child.¹⁷⁵

The Government accepted the recommendation to develop CAOs, subject to further work:

The Government sees value in changing the emphasis of court orders to focus on the practical arrangements for caring for the child, and remove the current emphasis on the labels 'contact' and 'residence'.

This is consistent with wider measures proposed by the Review to establish a clear focus throughout the process of dispute resolution on the needs of the child. The Government will bring forward legislation on this issue at the earliest opportunity.¹⁷⁶

The Review recommended that existing prohibited steps orders¹⁷⁷ and specific issue orders¹⁷⁸ should be retained for discrete issues where a CAO was not appropriate. The Government agreed:

The Government agrees that there is merit in retaining both specific issues orders, and prohibited steps orders, whilst recognising that the majority of disputes will be resolved through different channels.

¹⁷³ *Children Act 1989*, s8(1)

¹⁷⁴ Hershman and McFarlane, *Children Law and Practice*, paras B321–326

¹⁷⁵ *Family Justice Review: final report*, November 2011, p22

¹⁷⁶ Department for Education and Ministry of Justice, *The Government Response to the Family Justice Review*, February 2012, p69

¹⁷⁷ An order that "no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court." *Children Act 1989*, s8(1)

¹⁷⁸ An order "giving directions for the purpose of determining a specific question which has arisen, or may arise, in connection with any aspect of parental responsibility for a child." *Children Act 1989*, s8(1)

Both specific issues orders and prohibited steps orders will be used to resolve less common issues which are less likely to relate to the child's every day care. The retention of these orders will help ensure that both parenting agreements and consideration of a 'Children's Arrangements Order' remains focused on the child's day to day care arrangements.¹⁷⁹

The Review recommended that the new CAOs should be available to fathers without parental responsibility, as well as those who already hold parental responsibility, and to wider family members with the permission of the court. The Government accepted this recommendation:

The Government agrees that any new order relating to agreements for care of a child should be available to fathers with and without parental responsibility, as well as to wider family members, where the court has granted leave.

This is consistent with current arrangements for eligibility to apply for a contact or residence order under section 8 of the Children Act 1989.

This position is in line with wider measures to ensure that the child remains firmly at the centre of processes for resolving private family law disputes.¹⁸⁰

In considering the development of CAOs, the Review recommended that if a father, as a result of a CAO, would require parental responsibility in order to carry out the care set out in that order, the judge would also make a parental responsibility order. It further recommended that where a CAO requires another family member to have parental responsibility, that person should have parental responsibility for the duration of the order.¹⁸¹ Subject to further work, the Government agreed:

The Government agrees with the Review that where a father without parental responsibility (PR) is effectively exercising PR as a result of a court order, that should be recognised formally by the court through the award of PR. Existing law already means that the majority of parents acquire PR automatically; unmarried fathers who are given PR by the court in this way should not therefore have their PR limited to the duration of the order.

Where a wider family member would need PR to fulfil the order, the PR order should be limited to the duration of the order. If PR were to be awarded to wider family members on an ongoing basis, the child's care arrangements are likely to become unnecessarily complicated.

These proposals are consistent with wider efforts to maintain a clear focus on the child's needs as well as on the responsibilities of other individuals to meet those needs.¹⁸²

Draft clauses and Pre-legislative scrutiny: Justice Committee report

Clauses to introduce CAOs were included in the [draft legislation on Family Justice reform](#) published in September 2012.¹⁸³ The Justice Committee raised concerns about the likely effectiveness of the proposed CAOs:

¹⁷⁹ Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012, p69

¹⁸⁰ Ibid.

¹⁸¹ [Family Justice Review: final report](#), November 2011, p150

¹⁸² Department for Education and Ministry of Justice, [The Government Response to the Family Justice Review](#), February 2012, p70

¹⁸³ [Draft legislation on family justice](#), September 2012, Cm 8437

130. We think that it is unlikely that a change to the wording of orders from “residence” and “contact” to “child arrangements order” will remove the perception of winners and losers within the family courts, although a change of terms would not, in itself, be objectionable; the effect of this change must be considered in combination with the other private law reforms. Our main concerns relate to how, from the drafting of the clause and the mixing of the different elements of living and spending time with, the Court is to record what ultimately it needs to decide, namely, with whom a child is to live, and the time and type of communication they will have with the non-resident parent. The mixing of the different elements of the order makes the clause much more complex and confusing, particularly for litigants in person. We agree with the Association of Lawyers for Children and Family Law Bar Association that shared residence orders are a better way of removing perceptions of winners and losers than CAOs.¹⁸⁴

The Committee’s report also addressed concerns raised in evidence that the draft clauses on CAOs could cause confusion and delay in cross-jurisdictional cases:

138. It is likely that, with time, the terms of Child Arrangements Orders will become sufficiently established so as to prevent misunderstandings arising in cross-jurisdictional cases, but, in the medium-term there is the potential for problems because the looser language of the draft clause makes the meaning of the subsections more debatable. We therefore recommend that the individual elements of the CAO are separately set out within the draft clause, leaving one order, but with clearer contents; and secondly, that the clause sets out that the person with whom the child is to live has rights of custody for the purposes of the Hague Convention and other relevant international family law treaties.

139. We ask the Government to look again at the potential practical problems with interpretation of the draft clause in light of how the international law relating to children operates. We are not reassured by the Minister’s answer that, as long as the body of the Court order makes clear where the child will be living there should not be any implications. The issue is one of delay and confusion – the draft clause must avoid parents being required to appeal their cases in foreign courts because the custody rights granted by the CAO have been misunderstood in that country’s the lower Courts, as other parents have had to before them.¹⁸⁵

Government response

The Government’s response acknowledged the Committee’s concerns about the complexity of the clause related to the proposed CAOs, and on international recognition of CAOs. However, the Government stated its belief that the clause was drafted as simply as possible and did achieve its aims:

[...] we are of the view that the clause is drafted in as simple terms as possible, whilst still achieving the policy aim of reducing the perceived hierarchy of different types of order, and moving away from the concept of orders being made in favour of one parent over and above another.¹⁸⁶

On cross-jurisdictional matters, the response further stated:

International recognition depends on the content of an order not the name of the order. As now, it should be clear from the content of the child arrangements order whether

¹⁸⁴ Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 130

¹⁸⁵ *Ibid.*, para 138-139

¹⁸⁶ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, p48

the order regulates arrangements relating to the person with whom a child is to live. If, for example, the order regulates the child's living arrangements and consequences flow from the child living with a particular person, that person (or others seeking confirmation that the child lives with that person), should be able to rely on that child arrangements order as confirmation that the child should be living with that person, in the same way as is currently the case in relation to a residence order. Parental responsibility that results from the making of such an order will remain.¹⁸⁷

3.9 Welfare of the child: Parental Involvement ('Shared Parenting')

Child contact: current position

The Library standard note *Children: Residence and contact related matters for parents, grandparents and others after separation*, SN/SP/3100, provides information on the current position for parents and others in arranging contact, and on the issues courts will consider in making orders.

Family Justice Review and Government consultation

The [Family Justice Review](#) considered the issue of 'shared parenting', a presumption that both parents should be involved in the life of their child after separation.

The Review's final report recommended that no legislation be introduced "that creates or risks creating the perception that there is a parental right to substantially shared or equal time for both parents."¹⁸⁸ The Government did not accept this recommendation, stating its belief that "legislation may have a role to play in supporting shared parenting and [we] will consider legislative options for encouraging both parents to play as full a role as possible in their children's upbringing."¹⁸⁹

A Government consultation on shared parenting was [announced](#) in June 2012. The announcement set out the four different options relating to shared parenting being consulted on:

Four different approaches are being consulted for amending section 1 of the *Children Act 1989*:

Option 1: requires the court to work on the presumption that a child's welfare is likely to be furthered through safe involvement with both parents – unless the evidence shows this not to be safe or in the child's best interests.

This is the Government's preferred option.

Option 2: would require the courts to have regard to a principle that a child's welfare is likely to be furthered through involvement with both parents

Option 3: has the effect of a presumption by providing that the court's starting point in making decisions about children's care is that a child's welfare is likely to be furthered through involvement with both parents.

Option 4: inserts a new sub-section immediately after the welfare checklist, setting an additional factor which the court would need to consider.¹⁹⁰

¹⁸⁷ Ibid., p49

¹⁸⁸ [Family Justice Review: Final report](#), November 2011, p 21

¹⁸⁹ Department for Education, [The Government Response to the Family Justice Review: A system with children and families at its heart](#), February 2012, p66

¹⁹⁰ Department for Education, [Proposals to enable children to see both their parents are launched](#), 13 June 2012

Consultation response and draft clauses

Following this consultation, the Parliamentary Under-Secretary of State for children and families, Edward Timpson, wrote to the Chair of the Justice select committee on 1 November 2012 with a draft clause on shared parenting.¹⁹¹

The draft clause instructed courts “to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child’s welfare.”¹⁹² The accompanying explanatory note stated that:

The purpose of this amendment is to reinforce the importance of children having an ongoing relationship with both parents after family separation, where that is safe, and in the child’s best interests.¹⁹³

The consultation response noted that the Government’s favoured ‘Option 1’, as listed by the consultation, had been preferred by 52 per cent of respondents and that the Government would be legislating on this basis, with strong wording to address proposals around the safety of the child:

Analysis of the responses shows a clear preference among those who responded for legislative change to reinforce this expectation, and for option 1 (the ‘presumption’ approach) in particular. Over half of all respondents who responded to this consultation supported the Government’s view that this option is the most appropriate legislative approach. The Government has considered all of the points raised during this consultation and remains of the view that option 1 will best meet its objectives to ensure that children can benefit from the involvement of both parents in their lives following family separation; it will be seeking to amend the *Children Act 1989* to achieve this.

However, the Government acknowledges the need, highlighted by many respondents, to ensure that proper safeguards are in place to protect children and vulnerable parents. The *Children Act 1989* already makes clear that the welfare of the child must be the court’s paramount consideration in making decisions about the child’s upbringing; this will remain the case. But following consideration of consultation responses, the Government intends to amend its proposed approach to include stronger wording around safety, with the aim of addressing the concerns raised by respondents.¹⁹⁴

Pre-legislative scrutiny: Justice Committee report

The Commons Justice Committee’s pre-legislative scrutiny [report](#) expressed concerns about whether the shared parenting clause would achieve its aims:

...it appears to us that the draft clause has been included not to effect any change in Court orders but to tackle a perception of bias within the Courts that we have previously concluded has no basis in fact, and in the hope of influencing parents to

¹⁹¹ Department for Education, [letter to Sir Alan Beith, Chair of the Justice Select Committee](#), from Edward Timpson MP, 1 November 2012

¹⁹² Department for Education, [Provisions about family justice](#), November 2012

¹⁹³ Department for Education, [Explanatory note – Shared Parenting](#), November 2012, p1

¹⁹⁴ Department for Education, [Cooperative parenting following family separation: proposed legislation on the involvement of parents in a child’s life: Summary of consultation responses and the Government’s response](#), November 2012, p15

agree to make provision for shared parenting rather than risk entering the court process.¹⁹⁵

The Committee also considered whether the draft clause on shared parenting might have a negative impact on the ‘paramountcy principle’. Section 1(1) of the *Children Act 1989* states that ‘When a court determines any question with respect to the upbringing of a child ... the child’s welfare shall be the court’s paramount consideration.’ The Committee’s report stated:

169. Changes to the law on shared parenting must ensure that they do more good than harm. It is generally agreed that the involvement of both parents in a child’s life is normally beneficial and in the interests of the child, but as the incidence of abuse cases in the Courts and across population studies show, it is not beneficial in every case, and therefore we do not consider that it can be “presumed”. We therefore maintain significant concerns about the draft clause on shared parenting.

170. We consider that the types of cases that require a court order rather than resolving by consent, be that with or without the help of lawyers or mediators, are precisely the types of case where there are the highest levels of conflict. These include a range of scenarios from physical abuse, to an inability to co-operate to make joint decisions on important issues for the child. We are concerned that the draft clause will be applied across these sorts of cases, which would not necessarily be in the child’s best interests. We think that children benefit from the current ability of the courts to make individualised decisions as this allows a court to take all the circumstances into account and prioritise the welfare of the child; a good example of this is the case of *A v A*¹⁹⁶ referred to by Mrs Justice Pauffley in her evidence to us.¹⁹⁷ There is a danger that the introduction of a second presumption will take the attention of the Court, but equally importantly the attention of parents (who will often be litigants in person), away from determining what is in the child’s best interests and on to double rebuttal on the grounds of harm.¹⁹⁸

The Committee also addressed the issue of whether the draft clause was likely to be misunderstood as a right to particular amounts of time for parental contact. The Committee recommended that the Government made clear what effect the draft clauses were intended to have on court orders, and proposed a re-wording of the clause to include a definition of parental ‘involvement’, and also to re-title the clause to make reference to ‘parental involvement’ rather than ‘shared parenting’:

177. We agree that on its face the draft clause on shared parenting does not give or imply rights to equal time, but we think that many parents will misunderstand the clause as giving such rights because of the use of the word “involvement” without definition, and because of the use of a presumption.

[...]

179. If the Government proceeds with its intention to include the draft clause in the Children and Families Bill as introduced, we recommend the Government make clear, preferably before introduction of the Bill, what effect they intend the draft clause to have on Court orders. We also recommend that the draft clause is revised firstly to include a definition of “involvement” setting out that it does not give or imply a right to a

¹⁹⁵ Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 153

¹⁹⁶ *A v A (Shared Residence)* [2004] EWHC 142 (Fam); [2004] 1 FLR 1195

¹⁹⁷ Q 77

¹⁹⁸ Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, Fourth Report of Session 2012-13, 14 December 2012, HC 739, para 169-170

set amount of time, and secondly, and to avoid any possible confusion, the short title ['Shared Parenting'], although not a material part of an Act, is changed to "Parental involvement". If "involvement" is not defined, we expect that the Appeal Courts will be required to define it.¹⁹⁹

The report concluded on shared parenting:

189. We consider that any legislation on this subject, when interpreted objectively, should retain the paramountcy of the welfare of the child, and should prevent shared parenting orders being made where the child is at risk of harm, and/or where, whatever the level of parental involvement, that involvement would not further the welfare of the child. The problem, as we identify it, is how the clause will be subjectively interpreted by parents who appear before the Court, or who agree arrangements for residence and contact without a Court order, but on the basis of what they understand the law to say and mean. The distinction is one of technical drafting versus the practical effect on real families.²⁰⁰

Government response

The Government did not accept that the draft clause might require amendment to avoid a conflict between the welfare of the child and the principle that, unless the contrary is shown, both parents should be involved in a child's life:

The presumption as currently framed only applies to a parent who can be involved in a way that does not pose a risk of harm to the child; it is then rebutted if there is any evidence to suggest that the child's welfare would not in fact be furthered by the involvement of that parent. The two-stage nature of the presumption is clearly set out in the explanatory notes and is further explained in the process chart²⁰¹ and example scenarios included in the notes. This ensures that no court will be required to presume that the welfare of a child would be furthered by the involvement of a parent who cannot be involved without posing a risk of harm, and "harm" will be given the broad definition as contained within section 31(9) of the Children Act 1989.

Courts will continue to be subject to the overriding duty in section 1(1) [of the 1989 Act] that the child's welfare shall be their paramount consideration whenever determining any question with respect to the upbringing of a child.²⁰²

The Government also expressed its belief that the change would encourage a less adversarial approach to child contact cases, and would help change perceptions of child contact cases:

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

¹⁹⁹ Ibid., para 177-179

²⁰⁰ Ibid., para 189

²⁰¹ A process chart setting out the intended process by which the court will consider whether a parent's involvement in a child's life would be beneficial to the child's welfare can be found in [Children and Families Bill explanatory notes](#), p126 (between paras 658 and 659)

²⁰² [Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny](#), p49-50

The amendment would serve to reinforce by way of statute the expectation that both parents should be involved in a child's life, unless of course that is not safe or not consistent with the child's welfare. The Government recognises that courts already operate on this basis, but nevertheless there is a widespread perception among those who use the courts that this is not the case. The amendment will address this, and will provide greater clarity and transparency in relation to the court's decision-making process. In doing so, it will encourage the resolution of agreements outside court by making clear the basis on which courts' decisions are made and by ensuring that parents' expectations are realistic when deciding whether to bring a claim to court. The Government anticipates that over time, this change will contribute to a societal shift towards greater recognition of the value of both parents in a child's life, and to a reduction of the perception of bias within the court system.²⁰³

The Government rejected the Committee's recommendation that parental 'involvement' be defined in the Bill, but accepted the Committee's recommendation that the title of the provision should be changed:

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

The Government accepts the Committee's recommendation that the title of the provision should be changed. We agree that such a change would be helpful in terms of promoting a clearer understanding of the purpose of the amendment. Taking into account the recommendation of the Committee, the Government's preferred title is "Welfare of the Child: Parental Involvement" to reflect the title of section 1 of the Children Act 1989, which is amended by the clause.²⁰⁴

As a result, the 'shared parenting' measures are included in the *Children and Families Bill* under the heading of 'Welfare of the Child: Parental Involvement'.

3.10 Repeal of restrictions on divorce and dissolution etc where there are children

Current position, Family Justice Review and Government response

At present, section 41 of the *Matrimonial Causes Act 1973* and section 63 of the *Civil Partnership Act 2004* require the court to consider, in any proceedings for divorce (marriage) or dissolution (civil partnership), nullity or judicial separation, where there are children of the family, whether it should exercise any of its powers under the *Children Act 1989*.

Draft clause

Clause 7 of the draft legislation would repeal section 41 of the *Matrimonial Causes Act 1973* and section 63 of the *Civil Partnership Act 2004*. The Explanatory Notes published with the draft legislation stated that any dispute about the arrangements for a child resulting from divorce, dissolution etc. would in future be dealt with by way of free-standing application to the court under the *Children Act 1989*.²⁰⁵ The Explanatory Notes also stated that repealing these provisions would "help to facilitate the implementation of the Government's wider policy

²⁰³ Ibid.,

²⁰⁴ Ibid., p51

²⁰⁵ HM Government, *Draft legislation on Family Justice*, September 2012, p34

of expediting and simplifying the procedure for uncontested divorces” and set out further information about the intended simplified procedure. The aim of the proposal was to save judges’ time in looking at uncontested divorce cases, and arrangements for children would no longer be scrutinised as part of the divorce process:

As these arrangements are agreed in the vast majority of cases at the point of divorce it is appropriate for any subsequent substantive disputes which arise to be taken forward in separate proceedings.²⁰⁶

The Explanatory Notes went on to state that the Government intended “to use the powers to delegate functions of the Family Court, or of a judge of that court, ... to delegate the consideration of uncontested divorce and judicial separation and dissolution and separation proceedings to legal advisers of the family court, subject to a power to refer appropriate cases to a judge”.²⁰⁷

Pre-legislative scrutiny: Justice Committee report

The Justice Committee considered whether Clause 7 might remove an important safeguard for children, and concluded that, on the balance of the evidence it had received, it did not do so. The Committee considered that the changes were likely to be “merely administrative” but recommended that the Government should monitor the changes “to ensure that if the problems suggested by some of our witnesses arise, they are identified and appropriate safeguards are re-introduced either in statute or by changes in Court procedure.”²⁰⁸

Government response

The Government accepted the need to review the change and said that it would seek the views of the judiciary, Cafcass²⁰⁹ and other interested parties to identify if any problems materialised as a consequence of this change.²¹⁰

3.11 Repeal of un-commenced provisions of Part 2 of the *Family Law Act 1996*

Background

Part 2 of the *Family Law Act 1996*, most of which has never been brought into force, would have introduced “no fault divorces” and required the parties to a divorce to attend “information meetings” with a view to encouraging reconciliation where possible. The Government has stated that the provisions “were aimed at reducing the bitterness of divorce and the damaging impact on all involved in divorce”.²¹¹

A series of information meeting pilot schemes was launched in June 1997 following which Lord Irvine of Lairg, who was then Lord Chancellor, announced, in January 2001, that the Government would invite Parliament to repeal Part 2 once a suitable legislative opportunity occurred. He confirmed that this decision would not affect section 22, in Part 2, relating to the funding of marriage support services, which had been brought into force and would remain so.²¹²

Clause 8 of the Government’s draft legislation would repeal the provisions of Part 2 of the *Family Law Act 1996* which have not already been brought into force, and related provisions.

²⁰⁶ *Ibid* p45

²⁰⁷ *Ibid* pp45-6

²⁰⁸ House of Commons Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill*, 14 December 2012, HC 739 2012-13, paragraph 197

²⁰⁹ Children and Family Court Advisory and Support Service

²¹⁰ HM Government, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Annex B, Annex 1, paragraph 66

²¹¹ [Bill 131-EN](#) paragraph 140

²¹² [HL Deb 16 January 2001 cc126-7WA](#)

It would also turn certain modifications of statutory provisions which were intended to have effect until such time as Part 2 came into force, into permanent amendments to the modified provisions. The Government has stated that it remains committed to the principles behind the *Family Law Act 1996*, “of saving saveable marriages and, where marriages break down, bringing them to an end with the minimum distress to the parties and children affected, and encouraging people to use family mediation to resolve disputes”.²¹³ The Explanatory Notes published with the draft legislation state that “a range of non-statutory initiatives pre-court and at court have been introduced to promote and encourage consideration and use of mediation and these are aimed at all separating parents, whether or not the parents are married”.²¹⁴

In joint evidence to the Justice Committee, the Ministry of Justice and Department for Education stated that “in order to implement the proposed statutory MIAM legislation we need to repeal these divorce provisions as the mandatory MIAM requirement is similar to the information meeting”. The Committee concluded that draft clause 8 contained appropriate and necessary legislative changes.²¹⁵

A Library standard note, [Divorce: repeal of Family Law Act 1996 Part 2](#), provides further information.²¹⁶

3.12 The Bill

- **Clause 10** would impose a requirement for a person to attend a family mediation information and assessment meeting (MIAM) before making a relevant family application. With some amended wording, it is in similar terms to Clause 1 of the draft legislation. The *Family Procedure Rules* would set out how the requirement would work in practice. The Explanatory Notes state that the Government intends that in cases which are urgent (as to be defined) or where a MIAM cannot be arranged within a specified time, or where there is evidence of domestic violence, the requirement to attend would not apply.²¹⁷ The Government also intends to invite the Family Procedure Rule Committee “to make provision in the *Family Procedure Rules* so that, for example, the requirement to attend a MIAM will apply (unless an exemption applies) in relation to an application for a child arrangements order”.²¹⁸
- **Clause 11** would introduce a duty for courts to take into account that both parents, after separation, should continue to be involved in a child’s life, provided that is consistent with the child’s welfare;
- **Clause 12 and Schedule 2** would introduce a new child arrangements order to replace existing residence and contact orders and allows courts to direct parties to a case to undertake relevant activities when child arrangements orders are breached;
- **Clause 13** of the Bill would deal with when expert evidence may be sought or put before the court in children proceedings, and is in substantially the same form as in the draft legislation. The Explanatory Notes state that “in so far as children proceedings are

²¹³ [Draft legislation on Family Justice](#) Explanatory Notes, p46

²¹⁴ *Ibid*

²¹⁵ House of Commons Justice Committee, [Pre-legislative scrutiny of the Children and Families Bill](#), 14 December 2012, HC 739 2012-13, paragraph 191

²¹⁶ SN/HA/1409, last updated 12 February 2013

²¹⁷ [Bill 131-EN](#) paragraph 89

²¹⁸ *Ibid* paragraph 90

concerned, these measures will replace similar provisions which are contained in the new Part 25 of the *Family Procedure Rules 2010*.²¹⁹

- **Clause 14** would introduce a 26-week time limit for care and supervision proceedings, focuses timetabling decisions for care proceedings on the child's welfare, and removes the need to renew interim care orders and interim supervision orders as frequently, giving the courts flexibility to set interim orders in line with the timetable for the case;
- **Clause 15** would make it explicit in law that, when the court considers a care plan, it should focus on those issues that are essential to its decision about whether to make a care order;
- **Clause 16** is consequential on the previous two clauses, and provides that regulations about permanence provisions or time limits for the disposal of care or supervision proceedings would be to be subject to the affirmative procedure;
- **Clause 17** of the Bill would repeal section 41 of the *Matrimonial Causes Act 1973* and section 63 of the *Civil Partnership Act 2004* and related provisions as set out in the draft legislation. Arrangements for children would no longer be scrutinised as part of the divorce process but could instead be resolved through separate proceedings at any time.²²⁰
- **Clause 18** of the Bill is substantially similar to Clause 8 of the draft legislation. It would repeal the provisions of Part 2 of the *Family Law Act 1996* which have not already been brought into force, and related provisions.

These changes apply to both England and Wales. The contextual information provided with the Bill noted that while almost all of the provisions are non-devolved matters, in areas which related to devolved matters (local authority preparation of care plans and some consequential amendments arising from the "child arrangements order"), the Welsh Government had agreed in principle to the provisions.²²¹

3.13 Some initial reaction to the Bill

Local Government Association

The Local Government Association welcomed the Bill's provisions for limiting the use of expert evidence, and the 26-week time limit for care proceedings, which it believed would be "important in reducing delay for children."²²²

The Child Protection All Party Parliamentary Group

The Child Protection All-Party Parliamentary Group published a report on 12 February 2012, *Making Care Proceedings Better for Children*,²²³ which included recommendations on care plans, the six-month time limit and ensuring court decisions are made in the best interests of the child:

²¹⁹ [Bill 131-EN](#) paragraph 114

²²⁰ [Bill 131-EN](#) paragraph 138

²²¹ [Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny](#), Cm 8540, p13

²²² Local Government Association, [On the day briefing: Children and Families Bill](#), 5 February 2013, p5 [Free registration to access]

²²³ Child Protection All-Party Parliamentary Group, [Making Care Proceedings Better for Children](#), 12 February 2012

Scrutiny of care plans

Courts currently scrutinise care plans which is valued by many professionals. Given that the level of court scrutiny of care plans is being rolled back, we recommend that:

Recommendation 1: Courts should still play a role in scrutinising some aspects of care plans beyond the Government's proposals. We welcome the Government's amendment to the clause which will clarify the role of the court's to consider contact arrangement. There is a need to ensure the Bill is clear about the circumstances when this should take place. Issues such as sibling group placement, or contact and other family contact arrangements should be considered as these are important to the child's long-term development.

Recommendation 2: The Government must ensure sufficient training and support for social workers to enable them to produce good quality care plans and to operate effectively in court. Pre-proceeding work should take place with the courts and social workers to help reduce delay by improving the quality of care plans before cases reach the courts.

Recommendation 3: Government must fulfil their commitment in the Family Justice Review to expand on the existing programme of good practice development in relation to the role Independent Reviewing Officers (IROs) have in the scrutiny of care plans. Government should report back on further progress made. The Department for Education should consider how IROs could provide that scrutiny.

Six month time limit

The Government is proposing to introduce a time limit of six months by which care cases should be completed, apart from where cases are deemed to be 'exceptional'. While the Child Protection APPG wholly supports the need to reduce unnecessary delay, we are concerned about a potential lack of clarity with the term 'exceptional' and how this will work in practice. Some planned interventions which are shown to be effective take longer than six months and it is important that these are not ruled out by this legislation. We also heard that for some children decisions are best taken over a longer period than six months. We recommend that:

Recommendation 4: The Government's decision to remove the term 'exceptional' for cases that need to go beyond 26 weeks is welcome. We remain concerned, however, that it is not clear that decisions on timescales should always be taken in the best interests of the child. Some planned interventions take longer than 26 weeks and should not be curtailed by this legislation. We therefore recommend that the Government give further consideration to amending the Bill.

Recommendation 5: The Government must ensure that social workers receive training and support to produce high quality assessments and to give evidence in court as the recognised expert about the child and family. Expert witnesses should only be sought for specialised areas where there is insufficient evidence and to do so would help the court reach a decision in the best interests of the child.

Ensuring court decisions are in the best interests of the child

The Child Protection APPG is concerned about evidence it heard which suggests that family court proceedings are often led by judges who are not necessarily specialist in this area and that children do not always feel their views are heard by the courts. We recommend that:

Recommendation 6: The Government must fulfil their commitment in the Family Justice Review (via the family justice modernisation programme) to ensure judges who are specialists in family law are used in family courts on a permanent basis and that they are given the opportunity to develop a better understanding of current research regarding outcomes for children in various placement settings.

Recommendation 7: Judges should routinely ask children whether they would like to meet them in order to ascertain their wishes and find out more about them. Guardians should also prepare children adequately for appearances in care proceedings.²²⁴

4 Special Educational Needs

4.1 Introduction

The [Queen's Speech](#) on 9 May 2012 announced that the Government would propose measures to improve provision for disabled children and children with special educational needs (SEN). The Department for Education's [press notice](#) on the measures said that they would be contained in the planned *Children and Families Bill*, and that they were the biggest reforms to SEN provision in 30 years.²²⁵

The announcement followed a period of consultation on the green paper, [Support and aspiration: a new approach to special educational needs and disability](#), published in March 2011.²²⁶ The green paper's main proposals included a new approach to identifying SEN through a single early-years setting-based category and school-based category of SEN; replacing SEN statements and Learning Difficulty Assessments (for 16 to 25 year olds) with a new single assessment process and a combined Education, Health and Care Plan by 2014 for children and young people with SEN from birth to the age of 25; local authorities and other services to set out a local offer of all services available; the option of a personal budget by 2014 for all families with children with a statement of SEN or a new Education, Health and Care Plan; and, strengthening parental choice of school, for either a mainstream or special school.

On 15 May 2012, the DFE published its detailed [response](#) to the formal public consultation on the green paper and also set out the next steps to implement the measures set out in the green paper.²²⁷ It confirmed that the Government would include the measures in the *Children and Families Bill*, and would publish draft SEN provisions for consultation and pre-legislative scrutiny.

The draft provisions were published on 3 September 2012 in [Draft legislation on Reform of provision for children and young people with Special Educational Needs](#).²²⁸

The Education Select Committee carried out the pre-legislative scrutiny of the draft SEN provisions. Its [report](#) was published on 19 December 2012.²²⁹

²²⁴ Ibid., p6-7

²²⁵ [Children and Families Bill to give families support when they need it most](#), DFE Press Notice, 9 May 2012

²²⁶ [Support and aspiration: a new approach to special educational needs and disability](#), Cm 8027, March 2011

²²⁷ [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#), DFE, 2012

²²⁸ [Draft legislation on Reform of provision for children and young people with Special Educational Needs](#) (Cm 8438, September 2012)

²²⁹ [Pre-legislative Scrutiny: Special Educational Needs](#), House of Commons Education Committee, Sixth Report of Session 2012-13, HC Paper 631-I, Vol. 1: Report and formal minutes; HC Paper 631-II, Vol. II: oral and written evidence; and Vol. III: additional written evidence, which is available on the [Committee's website](#).

The Government published its response to the Education Committee's pre-legislative scrutiny report in Command paper, *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*.²³⁰

A pathfinder programme is currently testing the key elements of the proposals, and the Government has decided to extend the pathfinders to September 2014.

The following sections of this research paper provide a brief outline of the current SEN system, the case made for change, the main issues raised by the Education Committee in its report on the draft provisions, the Government's reaction, the SEN provisions as introduced in the *Children and Families Bill*, and some initial comment on them.

4.2 Outline of the current special educational needs system in England

The current statutory framework relating to provision for children with SEN is contained in Part 4 of the *Education Act 1996*, as amended, and associated regulations.

A child has special educational needs if s/he has a learning difficulty which needs special educational provision to be made.²³¹ A child has a learning difficulty for these purposes if s/he has significantly greater difficulty in learning than the majority of children of the same age, or has a disability which prevents or hinders him or her from making use of educational facilities of a kind generally provided for children of the same age in schools within the area of the LA. The legal responsibilities of local authorities (LAs) and schools towards children with SEN are contained in the *Education Act 1996*, as amended. Guidance on the duties of LAs and schools is set out in the statutory *Code of Practice on the Assessment and Identification of Special Educational Needs*.²³² The current Code of Practice is subject to consultation and must be laid before Parliament and approved by both Houses.²³³

The code of practice sets out a graduated approach to SEN that recognises a continuum of SEN which may require increasing action by the school. Currently, there are three levels of intervention for pupils with SEN.

School Action – where the teacher or the school Special Educational Needs Coordinator (SENCO) decides to provide something for the child additional to or different from the school's usual differentiated approach to help children learn. In January 2010, 11.4 per cent of the school population were identified at School Action level, approximately 916,000 pupils;

School Action Plus – where the school consults specialists and requests help from external services. In January 2010, 6.2 per cent of the school population were at School Action Plus level, approximately 496,000 pupils; and

Statement – where the child requires support beyond that which the school can provide and the local authority arranges appropriate provision. In January 2010, 2.7 per cent of the school population or 221,000 pupils had a statement of SEN.²³⁴

(More recent statistics are provided in the DFE's Statistical Release, *Children with special educational needs: an analysis - 2012*, dated 17 October 2012.)

²³⁰ Cm 8540, published 5 February 2013

²³¹ *Education Act 1996*, section 312

²³² DFES 2001: <http://www.teachernet.gov.uk/docbank/index.cfm?id=3724>

²³³ *Education Act 1996*, Section 314

²³⁴ *Support and aspiration: a new approach to special educational needs and disability*, Introduction, paragraph 25

For children aged under five, there is Early Years Action, similar to School Action, and Early Years Action Plus, similar to School Action Plus, as well as statements of SEN; however, most statements are made for school-aged children.

The governing bodies of maintained schools must use their best endeavours to secure appropriate SEN provision for any pupil with SEN, and must appoint a member of the school staff to be a Special Educational Needs Coordinator (SENCO).²³⁵

Each local authority is responsible for identifying the children in their area who have SEN of a kind that may call for SEN provision.²³⁶ Having identified a child with SEN, the local authority must notify the parent that they are considering whether to make a formal (statutory) assessment of the child's needs. After a statutory assessment the local authority will decide whether it is necessary to make a statement of SEN. A local authority, health authority, or primary care trust (PCT) whose help is requested by a local authority is to provide that help unless they consider it unnecessary, or the health authority or PCT consider it unreasonable because of prior claims on their resources, or unless the other local authority considers the request incompatible with their statutory duties or unduly prejudicial to the discharge of their functions.²³⁷ In practice there can sometimes be difficulties especially if a child's needs cut across education and health boundaries, as can be the case with speech and language therapy, for example.

A parent may request a local authority to arrange a statutory assessment of a child for whom the authority is responsible and for whom no statement has already been made. If the local authority decides not to comply with a request, the parent may appeal to the First-tier Tribunal (SEN and Disability).²³⁸

A statement of SEN describes the child's needs and the special provision needed.²³⁹ The *Code of Practice* sets out the detailed procedures relating to the assessment and statements of SEN.

A statement is in six parts.

Part 1: Personal details, including the child's name and the name and address of parents.

Part 2: Details of the child's SEN in terms of his or her learning difficulties.

Part 3: Details of the special educational provision that should be made, including the long-term objectives to be achieved, and any arrangements for setting short-term targets and monitoring progress towards those targets.

Part 4: The type and name of the school where the SEN will be met, or the arrangements for education, other than in school.

Part 5: Details of all relevant non-educational needs, as agreed between the health services, social services or other agencies and the local authority.

Part 6: How the non-educational provision required to meet the needs set out in Part 5 should be met, including the objectives of the provision and arrangements for monitoring progress in meeting these objectives.²⁴⁰

²³⁵ *Education Act 1996*, section 317; *Education and Inspections Act 2006*, section 173

²³⁶ *Education Act 1996*, section 321

²³⁷ *Education Act 1996*, section 322

²³⁸ *Education Act 1996*, section 329

²³⁹ *Education Act 1996*, section 324

Parts 2, 3 and 4 of the statement are legally binding on the local authority. However, parts 5 and 6 are not. This means that there is a right of appeal to the First-tier Tribunal (SEN and disability) about parts 2, 3 and 4.

Regulations made under the *Education Act 1996* impose time limits on some aspects of the statementing process.

The local authority must enable parents to express a preference for a school, and must name the preferred school unless it is unsuitable for the child's age, aptitude, ability or his/her SEN, or the placement would be incompatible with the efficient education of other children with whom the child would be educated or with the efficient use of resources.²⁴¹

There is a presumption in favour of a mainstream education for children with SEN. Statutory guidance on the placement of children in mainstream education was issued in *Inclusive Schooling*, published in 2001 by the then Department for Education and Skills.

The *Education Act 1996* makes provision for local authorities to review SEN statements. The *Children, Schools and Families Act 2010* introduced provision for an additional right of appeal for parents where, following a review of a statement of SEN, the local authority decides not to make any changes. Library [Research Paper 09/95](#) and Library [Standard Note SN/SP/3375](#) provided background on the previous Labour government's policies on SEN.

The [First-tier Tribunal \(Special Educational Needs and Disability\)](#) has issued a guide for parents on *How to Appeal against a SEN Decision*. This explains when parents can appeal to the Tribunal, and how to go about making an appeal.

Academies and SEN

Academies operate in accordance with their individual funding agreement. Those academies that have been established since the *Academies Act 2010* must comply with section 1(7) of the *Academies Act 2010*, which imposes obligations on them equivalent to those contained in Part 4 of the *Education Act 1996*. The requirements on academies established before the 2010 Act will depend upon the exact terms of their individual academy's funding agreement.

Post-16 provision

Currently, a statement of SEN will stop if a young person leaves school at 16; however, if the person remains at school, the local authority can maintain a statement until s/he reaches 19 or until the end of the school year when s/he finishes the course. If the young person leaves school for further education, his/her SEN is assessed under a different process, the Learning Difficulty Assessment (LDA). Section 139a of the *Learning and Skills Act 2000* places local authorities under a duty to arrange a LDA for students in their last year of compulsory education who have a statement of SEN and who they expect to continue in post-16 education. Local authorities also have the power to undertake LDAs for young people who do not have a statement but who appear to have learning difficulties and are receiving, or are likely to receive post 16 education. LDAs however do not have the statutory rights and protections associated with statements of SEN. Library [Standard Note SN/SP/6341](#) describes the arrangements for students with learning difficulties and disabilities in post-16 education in England.

4.3 The case for change and the SEN green paper's proposals

In recent years, there has been growing concern about the operation of the SEN system. In July 2006, the then Select Committee on Children, Schools and Families reported on special

²⁴⁰ [Guide to the Law for School Governors](#), May 2012

²⁴¹ *Education Act 1996*, Schedule 27

educational needs, and highlighted strong concerns about parents' confidence in the SEN system. Library [Standard Note SN/SP/3375](#) provided background on the Committee's report and the Labour government's response to it.

Part of the Labour government's response to the issues raised by the Select Committee was to ask Brian Lamb, the chair of the Special Educational Consortium, to carry out an inquiry into how parental confidence in the SEN assessment process might be improved. A series of reports was published.²⁴²

In addition, a number of reports looked at specific aspects of SEN provision²⁴³ and an Ofsted review of SEN, *Special educational needs and disability review – a statement is not enough*, which was commissioned by the Labour government, was published on 14 September 2010. Library [Standard Note SN/SP/5781](#) provided further background on the Ofsted review.

The green paper, *Support and aspiration: a new approach to special educational needs and disability*, published on 9 March 2011, contained wide-ranging proposals to change the present system. The Education Secretary announced the detailed proposals in a [Written Ministerial Statement](#) on the 9 March 2011.²⁴⁴

The current problems and how the Coalition Government's proposals would address these problems were summarised in the [DFE press notice on the green paper](#). In particular it stressed that the Government wanted to address the following issues.

parents having to battle to get the support their child needs

SEN statements not joining up education, health and care support

children falling between the gaps in services or having to undergo multiple assessments

multiple layers of paperwork and bureaucracy adding delays to getting support, therapy and vital equipment

a confusing and adversarial assessment process, with parents' confidence in the system undermined by the perceived conflict of interest where the local authority must provide SEN support as well as assess children's needs

Ofsted and others suggest that too many children are being over-identified as SEN, which prevents them from achieving their potential because teachers have lower expectations of them.

The Government proposed to:

include parents in the assessment process and introduce a legal right, by 2014, to give them control of funding for the support their child needs;

replace statements with a single assessment process and a combined education, health and care plan so that health and social services is included in the package of support, along with education;

ensure assessment and plans run from birth to 25 years old;

²⁴² These are currently available on the [National Archives](#) website.

²⁴³ See [Library Standard Note SN/SP/5781](#)

²⁴⁴ [HC Deb 9 March 2011 cc63-5WS](#)

replace the existing complicated School Action and School Action Plus system with a simpler new school-based category to help teachers focus on raising attainment;

overhaul teacher training and professional development to better help pupils with special educational needs and to raise their attainment;

inject greater independence from local authorities in assessments by looking at how voluntary groups might coordinate the package of support; and

give parents a greater choice of school and give parents and community groups the power to set up special free schools.

In relation to the last point, the green paper said that the Government would ‘remove the bias towards inclusion’ and improve the range and diversity of schools so as to:

give parents a real choice of school, either a mainstream or special school. We will remove the bias towards inclusion and propose to strengthen parental choice by improving the range and diversity of schools from which parents can choose, making sure they are aware of the options available to them and by changing statutory guidance for local authorities. Parents of children with statements of SEN will be able to express a preference for any state-funded school – including special schools, Academies and Free Schools – and have their preference met unless it would not meet the needs of the child, be incompatible with the efficient education of other children, or be an inefficient use of resources. We will also prevent the unnecessary closure of special schools by giving parents and community groups the power to take them over²⁴⁵

Consultation on the green paper ran from 9 March to 30 June 2011. Library Standard Note [SN/SP/5917](#) included a selection of the initial reaction made to the proposals.

The Government’s response to the green paper consultation and next steps

On 15 May 2012, the Government published its detailed response to the formal public consultation on the green paper: [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#).²⁴⁶ This confirmed that the *Children and Families Bill* would be introduced in this session of Parliament and that the Government would publish draft SEN provisions for consultation and pre-legislative scrutiny. Library Standard Note [SN/SP/6420](#) summarises comments made on some of the key aspects of the proposals.

In his [Written Ministerial Statement](#) on 15 May 2012, Michael Gove said that the draft Bill would be informed by early lessons from the SEN pathfinders. The Government’s intention, subject to Parliament’s approval, is to implement the reforms from 2014.

Pathfinders

Twenty pathfinders were announced.²⁴⁷ These cover 31 local authorities and their PCT and emerging Clinical Commissioning Group partners. A list of the pathfinders is available on the [DFE website](#). The Department announced the appointments of research analysts [SQW](#)²⁴⁸ to

²⁴⁵ [Support and aspiration: a new approach to special educational needs and disability](#), Executive summary, paragraph 7

²⁴⁶ [Support and aspiration: a new approach to special educational needs and disability - progress and next steps](#), DFE, 2012

²⁴⁷ HC Deb 17 October 2011 c609

²⁴⁸ SQW is a firm that provides “research, analysis and advice on sustainable economic and social development for public, private and not-for-profit organisations”: <http://www.sqw.co.uk/about>

evaluate the pathfinder programme and Mott MacDonald consultancy to provide support to the pathfinders.

The terms of reference for the SQW evaluation and the evaluation framework were set out in an [Evaluation Briefing Report](#) published by SQW in January 2012.

Two quarterly reports of the evaluation of the SEND pathfinder programme have been published by SQW - the first, [Evaluation of the SEND Pathfinder programme: Quarterly report - March 2012](#), and a second, [Evaluation of the SEND Pathfinder programme: Quarterly report - June 2012](#).

In October 2012, the DFE published an [Interim Evaluation Report, Research Report DFE – RR 248](#). Amongst other things, the report said that the current pace of progress was behind that expected and was unlikely to provide sufficient evidence to provide comprehensive responses to the evaluation objectives within the 18-month evaluation timescale.²⁴⁹ The pathfinders were due to end in March 2013.

In his evidence to the Education Select Committee on 6 November 2012, Edward Timpson, Under-Secretary of State at the Department for Education, said that the pathfinders would be extended for 18 months beyond March 2013, through to September 2014.²⁵⁰

4.4 The draft legislation

The draft provisions relating to SEN and explanatory notes were published on 3 September 2012 in [Draft legislation on Reform of provision for children and young people with Special Educational Needs](#).²⁵¹ The [Written Ministerial Statement](#) announcing publication of the draft provisions summarised the proposed changes. The draft legislation, which consisted of 51 clauses, provided a framework for the new system and for much of the detail to be contained in regulations. Library Standard Note [SN/SP/6420](#) summarised the draft provisions.

4.5 The Education Committee's pre-legislative scrutiny report

The Education Select Committee carried out the pre-legislative scrutiny of the draft SEN provisions. Its [report](#) was published on 19 December 2012.²⁵²

The following highlights some of the main issues raised in the Committee's report. Readers are referred to the complete report and evidence published for a full account.

Detail, timing and context of the proposed reforms

While the Committee welcomed the overall direction of the Government's proposals, it pointed out that the draft legislation lacked details, without which, it said, a thorough evaluation of its likely success was impossible. It noted that the Government intends to provide this detail in regulations and a revised SEN Code of Practice. The Committee said it was essential that these documents address the concerns raised in the detailed written submissions submitted to the Committee. It also said that it was important that the lessons from the Pathfinders inform the legislation as it goes through Parliament and the regulations and the Code of Practice thereafter. The Committee welcomed the Government's decision to extend the Pathfinder programme until September 2014; however, it expressed particular

²⁴⁹ [Evaluation of the SEND Pathfinder Programme, Interim Evaluation Report](#) (by Meera Craston, Graham Thom, Rhian Johnson & Laure Henderson – SQW), DFE Research Report - RR248, paragraph 22

²⁵⁰ [Oral evidence taken before the Education Committee, 6 November 2012](#), Q198, HC Paper 631-II, Ev30

²⁵¹ Cm 8438

²⁵² [Pre-legislative Scrutiny: Special Educational Needs, House of Commons Education Committee, Sixth Report of Session 2012-13](#), HC Paper 631-I, Vol. 1: Report and formal minutes; HC Paper 631-II, Vol. II: oral and written evidence; and Vol. III: additional written evidence, which is available on the [Committee's website](#).

concern about the Pathfinders perceived lack of engagement with post-16 education providers, and recommended that the extended programme address this shortcoming.

The Committee did not recommend any significant delay in introducing the Bill; however, it noted that most witnesses questioned the timing of the legislation alongside major reforms in education and health.²⁵³ The wider education reforms include the forthcoming changes in school funding and SEN funding, and the staged increase in the education/training participation age to 18 by 2015. There were also questions about how the proposed Education, Health and Care Plans would relate to proposed Department of Health changes to social care support for adults.

Co-operation between agencies

The Committee said that the Government were relying too heavily on the duty of joint-commissioning placed on local authorities, health and social care in order for the reforms to work.

The lack of statutory duties on health or social services to provide the support described in an Education, Health and Care Plan was seen by witnesses as a major failing of the draft provisions. The Committee quoted from the DFE's Evaluation of the SEND Pathfinder Interim Report of October 2012, which suggested that many stakeholders did not see the joint-commissioning duties as sufficient to protect the needs of individuals. Evidence to the Committee by one of the major pathfinders, SE7, welcomed the requirement for joint-commissioning and the integration of services but said that there should be a requirement on health and care services to provide the provision set out in the Education, Health and Care Plan.

In evidence to the Committee the Minister explained difficulties associated with this approach but said that the Government were looking at ways that could strengthen the close working and accountability between education, health and social care services. However, the Committee said that its evidence suggested that, in the absence of any statutory duty on Health, there would be a high risk of disengagement by the health sector, with potentially adverse consequences, including an incomplete local offer, disjointed assessment processes, and difficulty for parents in getting redress from all partners if there were concerns and confusion over accountability for the provision of services. The Committee asked the Minister whether the Government had considered putting on the face of the Bill a duty to co-operate as regards all of the different functions within the health service. The Minister said that he would look at this to see if it were 'do-able' and whether it would make any material difference.²⁵⁴

The Committee said that the active involvement of the NHS - in commissioning, delivery and redress - would be critical to the success of the legislation, and that the Government must ensure that the NHS is obliged to participate fully.²⁵⁵ Various recommendations were made by the Committee on this point, including that regulations should commit health services to adhere to timetables for assessments of SEN. The Committee also called on the Government to clarify in the legislation how responsibility for the provision of services which can be defined either as supporting health or SEN - such as speech and language therapy - would be decided.²⁵⁶

²⁵³ Ibid. paragraph 18 to 20

²⁵⁴ Ibid. paragraphs 27 to 33

²⁵⁵ Ibid paragraph 36

²⁵⁶ Ibid. paragraphs 61 to 72

Terminology

Sarah Teather, then Minister of State for Children and Families, suggested that it would be helpful if the Committee could gauge views on suitable alternatives to the term 'special educational needs' under the proposed system. The Committee recommended that, in the absence of any consensus or strong support for a change, the new legislation should continue to use the terminology "special educational needs".²⁵⁷

Post-16 provision

The Committee noted that there was widespread support for a statutory SEN framework for children and young people from birth to 25 years of age. Concern was expressed about the funding of the new framework particularly for post-16 provisions, especially as the legislation is being introduced at the same time as the DFE is carrying out a major overhaul in the way 16 to 18 education is being funded.²⁵⁸

As noted above, the Committee expressed concern that the SEN pathfinders had failed to involve colleges adequately in trials of the approaches set out in the draft clauses. It recommended that the extended pathfinder programme address this shortcoming in order to understand fully the financial and administrative effects the proposals would have on colleges and local authorities in securing provision for young people with SEN up to the age of 25. The Committee also said that the Government must ensure that the extension of the statutory framework from 16 to 25 is not allowed to extend provision for some at the expense of the quality and quantity of provision for all.²⁵⁹

The Committee was also concerned that 'a potentially confusing picture' was emerging over the responsibility and rights for 19 to 25 year olds with some stakeholders interpreting the new system as providing guaranteed education for all young people with SEN to age 25. The Committee thought that such a guarantee would be doubtful, and called on the Government to clarify the position so that all those involved know what they can expect from the new legislation, and who is accountable for providing it. The Committee sought assurances that the extension of approaches for 0 to 25 provision would also address the needs of young people pursuing higher education.²⁶⁰ The Committee also recommended that the legislation provide entitlement to Education, Health and Care Plans for those not in education, employment or training (NEETS) of compulsory participation age and to young people undertaking apprenticeships.²⁶¹

Integrated Education Health and Care Assessments

The Committee welcomed the principle of integrated Education Health and Care assessments, but said that it believed they would require much more rigorous testing and shaping through the pathfinders in order to advise regulation in this area. It said that the Government should focus on how to achieve good quality assessments, and said that regulations should stipulate how this should be achieved. It also recommended that all current protections afforded by a Statement of SEN be maintained in the new legislation.

Some witnesses highlighted the need for a co-ordinating agent in the multi-agency assessment process and wanted the legislation to provide for key workers. The Committee concluded that there should be a presumption that a key worker/lead professional would be appointed unless there were good reasons not to do so.²⁶²

²⁵⁷ Ibid. Paragraph 37

²⁵⁸ Ibid. paragraphs 39 to 43

²⁵⁹ Ibid. paragraph 43

²⁶⁰ Ibid. paragraph 50

²⁶¹ Ibid. paragraphs 94 to 98

²⁶² Ibid. Paragraph 60

As noted above, witnesses were concerned that the draft clauses did not seek to place duties on health services to compel integrated support in the same way as on local authorities. There were calls for the regulations to clarify the kinds of co-operation that may be requested including co-operation in the delivery of services not just co-operation in assessments for Education, Health and Care Plans. Many witnesses stressed the need for clear accountability for agencies.²⁶³

Some witnesses were concerned that eligibility for an Education, Health and Care Plan would only be through a child having SEN. The Committee said that there was a strong case to include disabled children, with or without SEN, in the scope of entitlement to integrated provision and Education, Health and Care Plans, and accordingly recommended this. It also said that the legislation should make clear that the entitlement covers children from birth upwards, including those too young to be in an educational setting but for whom an early assessment might highlight educational needs.

A large number of witnesses was concerned that the provisions would remove the parent's/school's right to ask a local authority for a child's SEN to be assessed and for that request to be responded to within a set time period. The Committee noted that the DFE had said that rather than restricting parents' rights, it intended this element of the legislation to be an expansion of rights across the board - it would not just be the parents, it could be a GP, a health visitor or others who have a vested interest in that individual child's welfare, who could make a request. Many witnesses were also concerned that there was no specific provision for the regulations to list timescales for responding to requests for an assessment and no timescales for conducting assessments. However, the Minister said in his evidence that this was something that he was still considering. The Committee recommended that the current protections be reiterated in the new legislation, and that timescales for responding to a request for an assessment, and for conducting an assessment be set out in regulations. An alignment of assessment timescales between local authorities and Health was essential, the Committee said, and that whatever the difficulties, they must be overcome.²⁶⁴

Concern was also expressed about the proposed description of an Education, Health and Care Plans as a Plan that 'sets out' rather than 'specifies' special educational provision. Some witnesses felt that this would lead to SEN being described vaguely so as to avoid the legal duty to secure a specific amount of provision/help. The Committee noted that the Minister had said the intention was that there should be no material difference between 'specify' and 'set out', and that the intention was to continue with the current position. He had confirmed that the Plans would have the same legal status as SEN statements. However, the Committee wanted it to be made absolutely clear on the face of the Bill that Education, Health and Care Plans carry the same legal status as Statements of SEN.²⁶⁵

The Committee also commented on when Education, Health and Care Plans should be stopped and started. Some witnesses were concerned about the provision for a Plan to cease where the educational outcomes set out in the Plan for the young person have been achieved. Many witnesses raised concerns about young people not in education, employment or training (NEETs), many of whom had SEN. The Committee said that the cut-off point for the Plan should be when educational outcomes are achieved but that there must be regulatory provisions to ensure that 18-25 year olds with SEN can quickly have their plan reinstated if they move back into education. It acknowledged the particular position of NEETs and apprentices, and recommended that the legislation provide entitlement to

²⁶³ Ibid. Paragraphs 62 to 64

²⁶⁴ Ibid. Paragraphs 81 to 84

²⁶⁵ Ibid. Paragraph 89

Education, Health and Care Plans to NEETs of compulsory participation age and to young people undertaking apprenticeships.²⁶⁶

The Committee also recommended that regulations should allow flexibility in the frequency and timing of Education, Health and Care Plan reviews.²⁶⁷

Mediation

The proposed compulsory mediation before appeal to the First-tier Tribunal met with strong opposition from witnesses. The Committee said that there was much support for the concept of early and meaningful discussion with parents, and recommended that mediation should not be compulsory but that consideration of mediation should be. The Committee noted that at present, in the family courts, the applicant and respondent in certain circumstances are expected to attend a family mediation information and assessment meeting (a "MIAM") to find out about and consider mediation, or other forms of non-court based dispute resolution. The Committee noted that the Government's draft clauses on family justice which will be included in the same bill as the SEN clauses propose that, in future, attendance at a MIAM should be compulsory for every person who wishes to apply for a court order in family proceedings of a certain type. This was, the Committee said, a useful model for the SEN dispute procedures.²⁶⁸

Transition from SEN statements to Education, Health and Care Plans

The Committee noted that parents were naturally anxious that the transition from SEN statements to Education, Health and Care Plans could be used to reduce the number of children with Plans. It would, the Committee said, make sense for the change to be made on a rolling basis as children transfer from primary to secondary education, for example, and also to prioritise those with significant health and care needs first. It believed that the pathfinders will be important in testing the best approach to the transition.²⁶⁹

Children with SEN but without an Education, Health and Care Plan

The proposed change to replace School Action and School Action Plus with a single category caused some concern among witnesses. Brian Lamb, who had chaired the inquiry into how parental confidence in the SEN assessment process might be improved, said that "the draft Bill is still unclear about how the Government expects schools to work with children who have SEN but no plan following the removal of school action and school action plus." He also drew attention to the "crucial" part that the new SEN Code of Practice will play in this respect.²⁷⁰

The Committee said that it was concerned about the lack of clarity as to how pupils currently receiving support under the School Action and School Action Plus categories would be supported under the new proposals. While it acknowledged that initiatives such as Achievement for All have much to contribute, nevertheless, it felt that the Government must make clear at this early stage what is expected of schools in delivering better outcomes for pupils with SEN who are not entitled to an Education, Health and Care Plan. The Committee recognised the importance of the Code of Practice in providing detail on this and on other matters, and recommended that the Code remain a statutory document, subject to consultation and parliamentary scrutiny (see below). The Committee also recommended that

²⁶⁶ Ibid. Paragraph 98

²⁶⁷ Ibid. Paragraph 101

²⁶⁸ Ibid. Paragraph 110

²⁶⁹ Ibid. Paragraphs 111 to 116

²⁷⁰ Ibid. Paragraphs 122 and 123

the role and status of SEN Co-ordinators (SENCOs) in schools be strengthened by requiring that they be teachers qualified for the role.²⁷¹

The status of the new SEN Code of Practice

Several submissions to the Committee wanted the new Code of Practice to be subject to parliamentary scrutiny. The Committee recommended that the Code of Practice remain a statutory document, subject to consultation and laid before Parliament under the negative resolution procedure. This, it said, would maintain the potential for meaningful scrutiny whilst minimising disruption and delay.

The DFE's written evidence to the Committee said that although it would be possible to require the Code to be approved by negative procedure, it felt that would be inappropriate as it would be necessary to go through the procedure every time a slight change was required to update aspects of the Code. It also observed that Parliament would have already approved the provisions of the legislation, and that the Secretary of State would also consult on the draft Code before he issued it.²⁷²

The local offer

The local offer, in which local authorities would set out the services available to children and young people with SEN or disabilities, attracted a good deal of comment from witnesses, the majority of whom wanted clarity about what it is going to be. In relation to schools, the green paper said that it would cover curriculum, teaching, assessment and pastoral support. There would be a duty on other relevant service providers to co-operate in drawing up the local offer.

A recurring theme in the evidence submitted to the Committee was how 'ordinary practice' on SEN in schools would be defined so that what should be 'ordinarily available' in schools in terms of support for pupils with low to moderate SEN would be clear. Some witnesses pointed out that the interpretation of SEN is dependent on context – for example, whether a pupil's needs are additional to those normally provided to all pupils would depend on the provision for all pupils, and that context becomes increasingly significant with greater school diversity.²⁷³ The Committee said that the local offer would therefore be of crucial importance in outlining what would be ordinarily available in schools and what would be provided as additional. Some witnesses not only wanted to see within the legislation a clearer role for schools in relation to the local offer but also to include a duty for schools to co-operate with each other on providing SEN provision.

The Committee welcomed the fact that academies including free schools would have the same duties and responsibilities as mainstream schools with regard to pupils with SEN, but it believed that these responsibilities needed to be spelled out more clearly in primary legislation. It remained concerned that there was a risk that some schools may not contribute to a local offer so as to discourage pupils with SEN and their parents from choosing their school since the school accountability system is based on exam results which means that there is no incentive for schools to admit pupils with SEN. The Committee said that it encouraged the Minister to take up the offer from Ofsted to work together with the Department to create an improved accountability framework for achievement of SEN pupils based on outcomes.

²⁷¹ Ibid. Paragraph 128 to 129

²⁷² *Pre-legislative Scrutiny: Special Educational Needs, House of Commons Education Committee, Sixth Report of Session 2012-13*, Vol. II. HC Paper 631-II. Further written evidence submitted by the Department for Education, Ev71, paragraph 40

²⁷³ Ibid. paragraph 135

The draft legislation made provision for regulations to cover the information to be included in a local authority's local offer. Brian Lamb wanted to see a legal duty to provide what is set out in a Local Offer, and some witnesses wanted to see national minimum standards of provision linked to such a duty. The Committee asked the Minister if there was an intention to include in regulations governing the local offer a requirement that it be evaluated against a national framework, he responded "that is not currently the intention, but that is something that I will, now you have raised it, give some more consideration to".²⁷⁴

The Committee said that the involvement of parents and young people in the development of local offers was critical, and recommended that the role of parents and young people be reinforced in primary legislation.²⁷⁵

Choice of school

There was widespread support for the extension of the list of schools for which parents can express a preference in an Education, Health and Care Plan to include academies and free schools. The Committee recommended that independent special schools and colleges should also be included on this list.²⁷⁶

Personal budgets and direct payments

The Committee observed that at present very little was known as to how direct payments would operate in practice, and that the Pathfinders were still at early stages of developing approaches to operating the scheme. It reported that the majority of witnesses had supported the principle of personal budgets; however, it noted that the National Union of Teachers (NUT) was opposed because of the risk that it might lead to a reduction in the range of services available. The NUT said that "teachers feel strongly" that parents should not be able to use direct payments and personal budgets in relation to education provision, and argued that decisions on the appropriate type of educational provision must stay with the school. The Committee noted that the regulations which set up the pilot scheme to trial direct payments give head teachers a veto over whether students or parents can use personal budgets in relation to their school. The NUT wanted to see this veto replicated in the draft clauses. The Association of School and College Leaders also commented that school leaders were very concerned about the implications for school budgets.

Several submissions to the Committee highlighted significant flaws in the current regulations allowing Pathfinders to make direct payments. The Committee recognised "the critical importance of learning from the Pathfinders when formulating regulations on personal budgets and direct payments" and said that it was essential that Ministers take these lessons fully into account.²⁷⁷

4.6 The Government's response to the Education Committee's report

Alongside the Bill, the Government published the command paper, *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*, which included the Government's detailed response to the Committee's report.²⁷⁸ The following highlights the key changes made to the draft legislation and how the Government intends to address some of the other main issues. However, this not intended to be a comprehensive account of the Government's views on all the Committee's recommendations, for that

²⁷⁴ Ibid paragraph 145

²⁷⁵ Ibid. paragraph 153

²⁷⁶ Ibid. p164

²⁷⁷ Ibid. paragraph 169

²⁷⁸ *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*, Cm 8540, published 5 February 2013, Annex C

readers are referred to the command paper, *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny* (particularly Annex C).

Changes to the draft legislation

The Government has made a number of changes to the draft legislation, in response to the Committee's recommendations and concerns raised during the scrutiny of the draft legislation. The main changes include the following.

A new clause (**clause 19**) sets out general principles that local authorities in England must have regard to in fulfilling their functions relating to children and young people with SEN in England. These principles seek to ensure that children, their parents and young people can participate as fully as possible in the local authority's decisions.

The Bill defines health or social care provision which is made wholly or mainly for the purposes of the education or training of the person as special educational provision. This definition, contained in **clause 21(5)** of the Bill, was not included in the draft legislation but has been the subject of case law where therapies (such as speech and language therapy) are required wholly or mainly for education or training purposes.

A requirement, currently in the *Education Act 1996*, for health bodies who identify pre-school age children who they feel have or probably have SEN to inform the local authority is carried over into **clause 24** of the Bill. This requirement was not in the draft legislation.

The provision in the draft legislation for local authorities to consult, when keeping education and care provision under review, has been amended to include in the list of those to be consulted children and young people with SEN, their parents, and youth offending teams (**clause 27** of the Bill).

The matters to be covered in a "local offer" under **clause 30** of the Bill have been extended to include provision to assist in preparing children and young people for adult life and independent living. Another change to the draft legislation is that local authorities would be required to publish comments received from or on behalf of children and young people with SEN on the local offer and the authority's response to those comments (**Clause 30(6)**).

The current explicit right for a parent to request a statutory assessment would be retained. Under **clause 36** of the Bill a child's parents, a young person or a person acting on behalf of a school or post-16 institution would have the right to request a statutory assessment.

The draft legislation made provision "setting out" rather than "specifying" provision in an Education, Health and Care Plan; however, the Government has acknowledged concern about this, and **clause 37** of the Bill makes provision for Plans to specify a child's or young person's SEN, outcomes sought, provision required, and any health care and social care provision.

The Secretary of State is empowered to approve independent specialist colleges and independent schools for SEN. Once an institution is approved, parents and young people could express a preference for it to be named in an Education, Health and Care Plan, and the institution would have a duty to admit the person. **Clause 41** makes provision relating to such approvals, and for the matters to be taken into account in deciding whether to give or withdraw approval.

An Education, Health and Care Plan would not cease if a young person drops out of education or is undertaking an apprenticeship. The draft legislation had specifically provided for Plans to no longer be necessary in those circumstances (draft clause 24(3)); however, that proposal has been omitted from **clause 45** of the Bill.

Mediation before an appeal to the First-tier Tribunal would not be compulsory (as proposed in the draft legislation). Under the Bill, parents and young people would be required to consider mediation but would not be compelled to enter mediation if they do not wish to do so. Under **clause 50**, subject to specific exceptions, an appeal to the First-tier Tribunal could only be made after mediation had been considered. Where a parent or young person decides to enter into mediation, they must take part in it before they can bring an appeal. However, where the parent or young person decides against entering mediation they would be able to go straight to an appeal.

The Code of Practice issued by the Secretary of State would be laid before Parliament under the negative resolution procedure (**clause 66**). The draft legislation had not made provision for the new code to be laid before Parliament. (The current code is subject to the affirmative procedure.)

Other major areas where the Government has sought to give assurances

The Government has said that it would

- continue to draw on the learning from the pathfinders in framing regulations and in developing statutory guidance;
- reinforce the expectation of effective involvement of the post-16 sector in the extended pathfinders;
- ensure that the views of the pathfinders are taken into account in developing the arrangements for making the transition from the current to the new system. The Bill makes provision for regulations for those arrangements and the Government plans to “share further details of our thinking with Parliament during the passage of the Bill”²⁷⁹;
- maintain the current requirement for SENCOs to be qualified teachers;
- set out the detailed requirement of the local offer in regulations and share further details with Parliament during the passage of the Bill. It is envisaged that the regulations would provide the common framework for local offers. The Bill makes provision for local authorities to publish both comments about their local offer and the authority’s response. How this should be done would be set out in regulations. Regulations would also make provision for complaints about the local offer for children and young people with SEN. Advice on the local offer would be included in the Code of Practice, which would stress the importance of involving children, young people and parents in monitoring the local offer. The code would also set out what should be expected from schools and colleges based provision for SEN;
- consider further how best to ensure that parents and young people have access to information, advice and support across education, health and social care; and,
- take fully into account lessons from the pathfinders when formulating the regulations on personal budgets and direct payments.

Edward Timpson, Parliamentary Under Secretary of State for Children and Families, acknowledged the difficulty in evaluating the likely success of the legislation until more detail

²⁷⁹ *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*, Annex C, paragraph 50

is provided but said that the Government would provide as much detail as possible during the Committee Stage.

67. I recognise it is challenging to evaluate the likely success of the legislation until more detail is provided in regulations and the revised Special Educational Needs Code of Practice. I intend to offer as much of that detail as possible during the committee stage of the Bill and the extended pathfinder programme will continue to play a central role in informing that process.²⁸⁰

Health services

The Education Committee made a number of recommendations about the role of the health services in the new system, and said that the Government must ensure that the NHS is obliged to participate fully.

In its response, the Government said that it shared the view that co-operation between local authorities and health agencies would be vital, and noted that the Department for Education and Department of Health were working on a package of measures to improve the commissioning and delivery services.

24. This includes measures to ensure provision of coordinated advice and information services by local authorities and clinical commissioning groups, and to require local authorities to consider what support parents might need through the assessment process, such as support to navigate through the assessment process. I have made provisions in the clauses of the Bill to support this.

25. Following further productive work with the Department of Health on non-Bill related policy issues, the Government will ask Healthwatch and the Care Quality Commission (CQC), given their role in championing the needs of patients, to explore how they could hold the NHS to account for how well it meets the needs of children and young people with SEN.

26. I am continuing to work with the Department of Health to develop further policy around the NHS Commissioning Board and will be able to say more about this in due course.

27. On the question of therapies, the provisions in the Bill will retain the position established in case law to date. It makes clear that health or social care provision which is required wholly or mainly for the purposes of education or training is to be treated as special educational provision.

28. I believe that the strengthened arrangements for planning and commissioning of services to support children and young people with special educational needs will reduce disputes about who pays for which services.²⁸¹

The Government's response to the Education Committee also noted other developments relating to the delivery of health services:

37. The Department of Health is recruiting and training an additional 4,200 health visitors by 2015 to deliver a full service and family offer, ranging from community and family support to additional services related to SEN or disability. Identifying whether a child is disabled or may have SEN is a core part of the training for health visitors. As

²⁸⁰ *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*, Annex C, paragraph 67

²⁸¹ *Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny*, Annex C, paragraph 24 to 28

capacity grows, every Sure Start Children's Centre should have access to a named health visitor, working with other health professionals and social workers where families have ongoing needs requiring multi-agency support. When parents have concerns about their child's development and learning, they will be offered additional support and, where appropriate, referred to another health professional such as a speech and language therapist or a paediatrician. This will be particularly important in identifying children's support needs.

38. We are working with the Department of Health to bring together the early years progress check at age two in the new Early Years Foundation Stage with the Healthy Child Programme health and development review at age two to two and a half to create a fully integrated early years and health review. We are looking at possible models for conducting an integrated review with health and early years experts and with a number of local areas as part of an external evaluation. As part of this work we will look at how an integrated review can contribute to the SEN single assessment process, drawing on the findings from the pathfinders.²⁸²

Disabled children who do not have special educational needs

The Education Committee recommended that disabled children and young people from birth to 25 without SEN should be included in the scope of the legislation, including the provisions relating to integrated provision and Education, Health and Care Plans.

In its response, the Government said that it had considered the arguments carefully but was not minded to include disabled children and young people with no special educational needs in the provisions. It said that most disabled children would come within the scope of the legislation and that those who do not have SEN are covered by the Equality Act and social care legislation.

30.I have considered the arguments for this very carefully. The definition of special educational needs in the legislation includes children and young people with a disability where this disability results in the child or young person needing special educational provision to be made. This includes children who have a disability which prevents or hinders them from making use of facilities of a kind generally provided for others of the same age in mainstream schools or mainstream post-16 institutions. The scope of the legislation is wide and will encompass most disabled children. It means that where children need additional or different provision to support their education they will be covered by the SEN statutory framework.

31.Whilst it is true that disabled children and young people who do not have special educational needs fall outside the SEN definition and would not be eligible for an assessment for a statutory Education, Health and Care Plan, they would have important protections in other legislation.

32.For example, all disabled children and young people up to age 17 are eligible for a child in need assessment under section 17 of the Children Act 1989; and if found to require an assessment, the local authority has a duty to support them in various ways, including in relation to their health and development. Where they meet the criteria, disabled young people aged 18 and over have their needs met by adult social care services and, under proposals in the draft Care and Support Bill, would have a statutory Care Plan.

33.Disabled children and young people are also supported by the Equality Act 2010, which gives schools, colleges and local authorities a range of duties. Schools are

²⁸² [Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny](#), Annex C, paragraph 37 and 38

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

34.The Bill will not prevent local authorities who wish to develop non statutory plans for disabled children without SEN from doing so. Some pathfinder authorities are taking this approach. But in view of the wider statutory provisions mentioned above I do not feel it would be appropriate to require all local authorities to do so.

35.For these reasons, I am not minded to include disabled children and young people with no special educational needs in the provisions.²⁸³

Education, Health and Care Plans for 19 to 25 year olds

The Education Committee highlighted a potentially confusing picture over the rights and responsibilities for 19 to 25 year olds.

In its response, the Government said that the provisions would not create a new guarantee, or expectation that young people with SEN should stay in education until they are 25. To do so, it said, would not be in the best interests of many young people, who will want to complete their education and progress into adult life and work. The Government has ruled out having eligibility criteria in relation to Plans for 19 to 25 year olds.

14.I have considered the Committee's recommendation of statutory eligibility criteria for when individual 19-25 year olds can receive Education, Health and Care Plans. But I have decided against pursuing this as circumstances vary greatly and I believe that the local authority and the individual young person must be free to agree together what is in the young person's best interests. Remaining in fully funded education or training must enable young people to progress, building on what they have learned before and helping them to make a successful transition to adult life.

15.Further detail on how these principles will work in practice for 19-25 year olds with SEN will be set out in regulations and the Special Educational Needs Code of Practice, drawing on the learning from our local pathfinders.

16.The Committee also asked for reassurance that our reforms will support young people pursuing higher education. Young people with learning difficulties and disabilities should have the same opportunity to apply to higher education as their peers. The new Education, Health and Care Plan will provide a much greater focus on outcomes, building on young people's own ambitions and aspirations. This can include progressing to higher education, as well as finding employment and living independently. The provision specified within the plan will support young people towards those outcomes, and help them to realise their full potential.

17.Whilst these provisions won't apply to young people undertaking higher education courses, there are other means of support available to them. Young people with a disability (including a long-term health condition, mental health condition or specific learning difficulty) who are successful in securing a place on a higher education course

²⁸³ [Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny](#) Annex C, paragraphs 30 to 35

can apply for a Disabled Students Allowance (DSA). DSAs are not means-tested, are awarded in addition to the standard package of support and do not have to be repaid. In the academic year 2010/11, 47,400 full time students were provided DSA support, amounting to £109.2m.²⁸⁴

4.7 The Bill

Part 3, **clauses 19 to 72**, of the Bill, as presented, make provision for identifying children and young people with special educational needs (SEN), assessing their needs and making provision for them. [Explanatory Notes](#)²⁸⁵ and a Delegated Powers Memorandum²⁸⁶ on the Bill have been published.

The provisions are a major reform of the present statutory framework and will replace, in relation to England, provisions in Part 4 of the *Education Act 1996* and associated schedules and regulations, and sections 139A to 139C of the *Learning and Skills Act 2000* in relation to children and young people in England.

Overview of the main provisions of the Bill

The following provides an overview of the main provisions; however, for a detailed account of the clauses see the [Explanatory Notes](#) published with the Bill. The provisions extend to England and Wales, but most of the provisions will operate mainly or exclusively in England.²⁸⁷ References to local authorities below relate to local authorities in England only.

General principles (clause 19)

Local authorities in exercising their functions under Part 3 of the Bill would be required to have regard to the views, wishes, and feelings of the child²⁸⁸ and their parents, or the young person, and to enable them to participate in as fully informed way as possible in decision-making, with a focus on achieving the best possible educational and other outcomes. **Clause 72** defines a young person as a person over compulsory school age but under 25.

Definitions and duties to identify children and young people with SEN (clauses 20 to 24)

A child or young person has special educational needs if he/she has a learning difficulty or disability which calls for special educational provision to be made. The definition of SEN and learning difficulty replicates the current definitions and applies them to children and young people from birth to 25. Special educational provision, healthcare provision and social care provision are defined (**clause 21**). Under clause 21(5) health or social care provision which is made wholly or mainly for the purposes of the education or training of a child or young person is to be treated as special educational provision. The definitions of various other terms including young person, mainstream school, post-16 institution, and training etc are given in clause 72.

Local authorities would be under a duty to identify all those children and young people in their area who have or may have SEN. **Clause 23** makes local authorities responsible for all the children and young people in their area who have been identified by the authority as having SEN, or who has been brought to the authority's attention by any person as someone who has or may have SEN. The local authority's responsibilities include their functions of

²⁸⁴ [Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny](#) Annex C, paragraphs 14 to 17

²⁸⁵ [Explanatory Notes Bill 13 - EN](#)

²⁸⁶ Delegated Powers Memorandum on the Children and Families Bill prepared by the Department for Education for the Delegated Powers and Regulatory Reform Committee, 5 February 2013

²⁸⁷ Clauses 49, 55 and 71 make amendments to legislation that applies to Wales.

²⁸⁸ A child means a person who is not over compulsory school age. See s579 of the *Education Act 1996*.

identifying and assessing a child or young person's education, health and care needs, drawing up an Education, Health and Care Plan, and preparing a local offer of services that are available for children and young people with SEN and their families.

Where a clinical commissioning group, NHS Trust or NHS Foundation Trust, in carrying out their functions in relation to a child under compulsory school age, are of the opinion that the child has or probably has SEN they must tell the child's parents and give them the chance to discuss this with an officer of the group or trust. They must then tell the appropriate local authority. If the group or trust think a particular voluntary organisation is likely to be able to give the parents advice or assistance in respect of their child's SEN they must tell the parents.

Local integration of education, health and care provision and joint commissioning (clauses 25 to 32)

Local authorities would be required to exercise their functions in a way that promotes integration between SEN provision, healthcare provision and social care provision in order to promote the well-being of children and young people.

Local authorities and local clinical commissioning groups would be required to make arrangements for joint-commissioning special educational provision, healthcare provision and social care provision for children and young people with SEN for whom the local authority is responsible. The form of these arrangements would be for local determination but must include matters specified in **clause 26**, including what information and advice would be provided about education, health and care provision, how it would be provided, and how complaints about education, health and care provision could be made and handled. In addition, the arrangements would also include procedures for resolving disputes between the partners.

Local authorities would be required to keep under review the special educational provision and social care provision made in their area for children and young people with SEN and the provision made outside their area for children and young people with SEN for whom they are responsible.

Local authorities and named local partners would be required to co-operate in the exercise of functions under Part 3 of the Bill. Where a local authority requests health service partners, other local authorities and youth offending teams to co-operate, the body must comply with the request unless it considers that doing so would be incompatible with its own duties, or otherwise would have an adverse effect on the exercise of its functions. If a body does not comply with a request it must give the authority written reasons for its decision. Regulations may impose time limits where a request to co-operate relates to a local authority's duties to secure Education, Health and Care assessments or the preparation of Education Health and Care Plans (**clause 31**).

Local authorities would be required to publish a 'local offer' of provision for children and young people with SEN (**clause 30**). They would be required to keep their local offers under review and revise them. The local offer would cover: special educational provision, healthcare and social care provision, other educational provision, training provision, arrangements for travel to schools or post-16 education or providers of relevant early provision, and provision to assist in preparing children and young people for adulthood and independent living. A duty would be placed on the local authority to publish from time to time comments it received about the local offer from, or on behalf of, children and young people with SEN, and parents of children with SEN, and the authority's responses to those comments. The detailed requirements of the local offer would be set out in regulations covering the information to be included in the local offer, how it is to be published, who is to be consulted in preparing it and how the authority would involve children and young people

with SEN and parents of children with SEN in preparing and reviewing it. The regulations may in particular require the local offer to include information about how to obtain an Education, Health and Care assessment, other sources of information, advice and support, and information about how to make a complaint about provision in the local offer.

Local authorities would be required to ensure there is advice and information available locally for parents and young people (**clause 32**). Currently, local authorities provide parent partnership services to parents of children with SEN under section 332A of the *Education Act 1996*. The Bill would replace and extend the scope of the provision to young people.

Inclusion in mainstream education (clauses 33 to 35)

The current presumption in favour of a mainstream education is retained, and extended to young people in post-16 education.

A local authority would be under a duty to ensure that an Education, Health and Care Plan provides for the child or young person to be educated in mainstream education (i.e. not in a special school or special college) unless that is against the wishes of the child's parent or the young person, or would damage the efficient education of others and there are no reasonable steps that could be taken to overcome this.

Education, health and care needs assessments and Education, Health and Care Plans (clauses 36 to 49)

A child's parent, a young person or a person acting on behalf of a school or post-16 institution would have the right to request an Education, Health and Care needs assessment. The local authority would be required to consider whether an assessment is necessary for a child or young person where such a request has been made or where the authority has become responsible for the child or young person in some other way, such as by someone else bringing the child or young person to the authority's attention. **Clause 36** sets out the local authority's duties when making their decision about whether to carry out an assessment. Regulations may make provision about assessments, including how they are to be conducted. If a local authority decides not to carry out an assessment, the child's parents or the young person may appeal against that decision to the First-tier Tribunal (**clause 50**).

Clause 37 sets out what a local authority must do if the assessment indicates that a child or young person requires an Education, Health and Care Plan for their special educational provision. The Plan would specify the child's or young person's special educational needs, the outcomes sought for him or her, the special educational provision required, and any health care and social care provision of a 'prescribed description' required by him or her (special educational provision, health care provision and social care provision are defined in clause 21).

When a local authority is deciding whether or not a young person aged 19 or over needs an Education, Health and Care Plan, it must take into account that person's age. The Explanatory Notes on the Bill state that while young people may have a Plan up to age 25, they will be ready to leave education or training and make the transition into adult life at differing ages, and that in many cases a Plan will end sooner than that.²⁸⁹

When preparing a draft Plan, the local authority would be required to consult with the child's parents or the young person. Parents or young people would have the opportunity to request that a particular school, further education college, or other institution be named in the Plan. **Clause 38(3)** lists the types of institutions that may be requested. **Clause 41** empowers the Secretary of State to approve independent schools that are specially organised to make

²⁸⁹ Explanatory Notes, Bill 131-EN, paragraph 202

special educational provision for children with special educational needs and special post-16 institutions.

The local authority would be required to consult any institution that it is considering naming in an Education, Health and Care Plan and, where that institution is maintained by another local authority, the other authority. The local authority would have to comply with the parent's or young person's request unless the child or young person's attendance at the school would not meet their special educational needs, or would be incompatible with the efficient education of others or the efficient use of resources (**Clause 39(4)**). If there is no request for a particular institution that comes within the types listed in **clause 38(3)**, the local authority would name the specific institution or type of institution that it considers appropriate, after consultation with the school or institution (**clause 40**). Under **clause 43**, the governing body, proprietor or principal or school or institution named in a Plan would have to admit the child or young person. The clause lists the schools (including academies) to which the duty to admit applies.

As paragraph 205 of the Explanatory Notes make clear, parents and young people may make representations for an independent school or post-16 independent specialist provider not included in the list contained in **clause 38(3)** but there would be no corresponding duty on the local authority to name such an institution in the Plan (as is the case under the current legislative framework) or for that institution to be under a duty to admit the child or young person.

The local authority that maintains an Education, Health and Care Plan would be required to secure the special educational provision specified in the Plan. The local authority would not need to do so if the child's parent or the young person made alternative, suitable arrangements (**clause 42**).

Provision is made for reviews of an individual's Plan and for re-assessments. Under **clause 45** a local authority may stop maintaining a Plan if they are no longer responsible for that child or young person (for example if the person has moved to another area) or if they consider that it is no longer necessary for the Plan to be maintained. It would no longer be necessary to maintain a Plan if the person ceased to require the special educational provision specified in the Plan. In determining this, the local authority would be required to have regard to whether the educational outcomes specified in the Plan had been achieved. This would enable a local authority to continue a Plan where a young person had dropped out of education but would like to return to education or training. **Clause 45** is significantly different from the draft provisions - not only would a Plan no longer automatically cease when a young person leaves education or training but a Plan would no longer automatically cease when a young person undertakes an apprenticeship. Local authorities could maintain a Plan for a young person until the end of the academic year in which they become 25. This would enable the person to complete the year with appropriate support.

Local authorities would be under a duty to review a Plan when a child or young person is released from custody. However, regulations would specify when this would not be necessary. The Delegated Powers Memorandum noted that many periods of custody are short and if a review had been undertaken shortly before the person was detained it may not be necessary to conduct another review on release.²⁹⁰

A new provision is inserted into the *Children Act 1989* to empower local authorities to provide services to support better transitions between children's and adult services for young people

²⁹⁰ Delegated Powers Memorandum on the Children and Families Bill prepared by the Department for Education for the Delegated Powers and Regulatory Reform Committee, 5 February 2013

with Plans. The Explanatory Notes on the Bill state that guidance on this would be contained in the Code of Practice.

Personal Budgets (clause 48)

The Local authority would be required to prepare a personal budget if asked to do so for a child or young person for whom it maintains an Education, Health and Care Plan or for whom it has decided to make a Plan. The details relating to personal budgets would be set out in regulations made under the negative resolution procedure. The Order establishing the original pilot scheme for SEN direct payments was made by the affirmative resolution procedure. However, the Government believes that, with the experience obtained by the pilot schemes, the negative procedure would now be suitable.²⁹¹

Appeals, mediation and dispute resolution (Clauses 50 to 55)

Clause 50 sets out matters that may be the subject of appeals to the First-tier Tribunal. It extends the current right of appeal to the First-tier Tribunal to young people aged up to 25 and, in the case of young people in school, transfers the right of appeal from the parent to the young person. It also gives the parents of children under 2 years of age a right of appeal to the Tribunal.

The draft provisions have been significantly changed so that mediation would not be compulsory. Subject to specific exceptions, a person would have to consider mediation before an appeal to the Tribunal. Mediation advisers would provide information about this. **Clause 51** sets out the duties of mediation advisers. The parent or young person would decide whether to enter into mediation. Where they decide to do so, they would have to take part in mediation before bringing an appeal. However, if they decide not to enter into mediation they would be able to go straight to appeal. Appeals that only concern the name of a school, college or institution or type of school, college or institution in an Education, Health and Care Plan or the fact that the Plan does not name any school, college or institution could be made without going to mediation. The *Explanatory Notes* point out that in such cases there would already have been discussion with the parent or young person.

Local authorities would be required to make dispute resolution arrangements (**clause 52**).

The Secretary of State would be empowered to establish pilot schemes in local areas to enable children in their own right to make appeals to the First-tier Tribunal (**clause 53**). **Clause 54** empowers the Secretary of State to make an order to enable children in all local authority areas in England to bring appeals and disability discrimination claims to the First-tier Tribunal. (Currently only parents have the right to appeal.) It is envisaged that these powers could be used if the pilots were successful. **Clause 55** amends the *Equality Act 2010* to enable young people in England over compulsory school age who are in school to bring disability discrimination claims in their own right to the First-tier Tribunal (**clause 55**).

Special educational provision, educational providers and information (clauses 56 to 65)

The following provisions are similar to existing provisions contained in the *Education Act 1996*. In some cases the remit of the provision has been expanded to reflect the extended age remit of the proposed new framework. Provision is made to:

- enable local authorities to arrange special educational provision otherwise than in a school, college or provider of relevant early years education;

²⁹¹ Ibid.

- enable local authorities to arrange special educational provision for a child or young person with a Plan outside England and Wales in an institution that specialises in providing SEN;
- require local authorities to pay fees where an institution is named in an Education, Health and Care Plan or where there is no Plan but the authority is satisfied that the person requires special educational provision at the institution in question;
- empower local authorities to supply goods and services to institutions that are likely to be attended by children and young people with an Education, Health and Care Plan to assist the institution in making special educational provision;
- give local authorities the right to have access at any reasonable time to premises of schools or other institutions at which education and training is provided to a child or young person with an Education, Health and Care Plan;
- require the governing bodies, proprietors or management committees of those institutions listed in clause 61(1) to use their best endeavours to secure that the special educational provision that is called for by a pupil or student's SEN is made;
- require governing bodies and proprietors of mainstream schools (including academies) and maintained nursery schools to ensure that there is a member of staff designated as a Special Educational Needs Co-ordinator (SENCO). Regulations may require SENCOs to have prescribed qualifications or prescribed experience, or both;
- require the governing bodies of maintained schools, maintained nursery schools, the management committees of pupil referral units, and the proprietors of academy schools and Alternative Provision Academies, in the case of a child or young person who does not have an Education, Health or Care Plan, to tell a child's parent or a young person when special educational provision is being made for them;
- require the governing bodies of maintained schools and maintained nursery schools and proprietors of Academy schools to prepare a report containing 'special educational needs information' (as defined in clause 64(3)); and,
- require the Secretary of State in exercising his information-gathering powers to publish annually special needs information that would be likely to help in improving the well-being of children and young people with SEN.

Code of Practice (clauses 66 and 67)

The Secretary of State would be required to issue a code of practice giving guidance to the bodies listed in clause 66(1) on how to carry out their functions under Part 3 of the Bill. The First-tier Tribunal must also take account of guidance in the code that it considers to be relevant to any questions arising out of a SEN appeal. Under clause 67 the Secretary of State must consult such persons as he thinks fit when drafting the code, and must lay a copy before Parliament under the negative resolution procedure. The code would come into a force on a day appointed by order by the Secretary of State. The draft legislation did not make provision for the code to be subject to Parliamentary procedure. Although the current

code is subject to the affirmative procedure, the Government now believes that the negative procedure is appropriate.²⁹²

Supplementary provisions (clauses 68 to 72 and schedule 2) and general provisions (clauses 105 to 110)

Supplementary provisions relating to parents and young people lacking mental capacity, detained children and young people, consequential amendments contained in Schedule 3, definitions, and general provisions including commencement, extent etc are described in detail in the Explanatory Notes.

4.8 Some initial reaction to the Bill

The following notes a selection of initial comment on the Bill's SEN provisions. (Members who are interested in particular organisations not covered below may ask the Library to seek further information).

Local Government Association

The Local Government Association (LGA) said that it supported the principles underlying the Bill's approach to SEN. It welcomed the provisions that apply directly to academies and further education colleges, and the extension of the right to express a preference for a school or college. The change to allow local authorities to continue an Education, Health and Care Plan for young people who drop out of education was also welcomed. However, the LGA remained concerned about a number of aspects of the Bill. In particular, it said that it did not go far enough to secure health provision in accordance with an Education, Health and Care Plan. It also expressed concern about provision for 19 to 25 year olds.

The LGA supports the principles outlined the Government's proposals for changes to the approach to Special Educational Needs (SEN). The LGA is pleased that the clauses in the Bill will apply directly to Academies and Further Education colleges, rather than through centralised contracts held by the Secretaries of State for Education and Business, Innovation and Skills and we welcome the extension of the rights for young people to express a preference for the school or college they wish to attend.

We also welcome the provision for local authorities to continue an Education Health and Care Plan where a young person has dropped out of education (i.e. is not in education employment or training NEET) which allows them to take into account whether the educational outcomes specified in the EHC Plan have been achieved.

However, we remain concerned that where the Bill sets out the roles and responsibilities of a broad range of organisations, it still does not go far enough regarding health bodies, in particular concerning duties to keep health care under review or to secure health provision in accordance with an Education Health and Care Plan.

We are also concerned that provision for 19 – 25 year olds has not been made clear. We do not think that requiring local authorities to take a young person's age into account will make clear to parents and young people what they might expect for an EHC plan to continue up to the age of 25 or when it will end sooner than that.

The draft provisions do not contain clauses on transitional arrangements. We urge the Government to ensure that the transitional arrangements should be thought through as

²⁹² Delegated Powers Memorandum on the Children and Families Bill prepared by the Department for Education for the Delegated Powers and Regulatory Reform Committee, 5 February 2013

soon as possible with input from the Pathfinders based on their experience of working with both systems.²⁹³

Nasen

Lorraine Petersen, the CEO of Nasen²⁹⁴ said she was delighted that children and young people would be included in the development of the local offer and at any review stages in the future, and she also welcomed the change to the mediation provisions. However, she said that the Bill would need much greater clarification.

I believe that as well as the Local Authority Local Offer there should also be a School Offer - What does this school provide for every pupil every day? Nasen's Every Teacher campaign reinforces this message by emphasising that Every Teacher is a responsible and accountable for every pupil - this must be reinforced by ensuring that we have a school workforce that has the knowledge and skills to meet the needs of all pupils and is able to manage and implement all of these reforms as they are embedded in schools.

Of course this is only the next step in the process, there are still a great many questions unanswered and clauses that will need much greater clarification. We also need to be aware that this radical reform of SEN legislation comes at a time of major change across the education sector - reforms to how schools are funded, the curriculum they follow and changes to the examination system alongside raising the participation age, reduction in local authority support services and the growth in Academies and Free School all need to be considered together to ensure that schools and colleges are able to provide the outstanding educational provision that should be available for all children and young people.²⁹⁵

Independent Parental Special Advice

The Independent Parental Special Advice (IPSEA) described the Bill as having "the potential to do great good for children with SEN and/or a disability." While it welcomed various changes to the draft legislation, nevertheless, it remained concerned about specific aspects of the provisions.

A single assessment across a child or young person's Education, Health and Social Care (EHC) needs

An EHC assessment will only be carried out if the LA feel it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

There is no indication of a duty to respond to a parent's request for assessment within a time limit.

It will not be available to those children who are disabled and have health and social care needs but no special educational needs.

A single Education, Health and Social Care plan with equal entitlement and enforceability across all three areas

²⁹³ LGA, [On the day briefing: Children and Families Bill, 5 February 2013](#) (free registration to access)

²⁹⁴ Nasen formerly the National Association for Special Educational Needs was formed in 1992 when the National Association for Remedial Education (NARE) amalgamated with the National Council for Special Education (NCSE). Further details about it are on its website: <http://www.nasen.org.uk/about-nasen/>

²⁹⁵ [NASEN press release, 5 February 2013, 2013 Children and Families Bill](#)

Any EHC plan issued as the result of an assessment still only creates an entitlement to the education element of the plan. There will be no entitlement to receive the health or social care provision specified in a EHC Plan. C & F Bill clause 42 (1), so no remedy if the provision judged to be necessary is not made.

No appeal process has been identified to appeal the health and social care provision detailed in a EHC Plan. Appeal to the SEND Tribunal remains limited to educational issues.

However, C & F Bill clause 21(5) looks to widen the scope of what can be determined as special educational provision: "Health care provision or social care provision which is made wholly or mainly for the purposes of the education or training of a child or young person is to be treated as special educational provision (instead of health care provision or social care provision)." This may well include therapies such as speech and language, occupational therapies and physiotherapy. It may also be relevant where a child or young person needs a residential school placement on educational and social care grounds.

Specification of provision

We are very pleased that the duty remains to specify the provision a child or young person requires in a EHC Plan and that it was not changed to a duty to 'set out' provision as in the draft legislation.

Compulsory mediation

We welcome the fact that mediation will not become compulsory. We will be interested in the development of the role of mediation adviser and how the issuing of a certificate as required by C & F Bill clause 51(3) will affect a parent or young person's right to appeal against a LA's decision in respect of special educational needs.

Special Academies

We remain concerned that Special Academies will be able to admit children permanently without having undergone assessment of their EHC needs or a plan being in place. C & F Bill clause 34(9)²⁹⁶

Every Disabled Child Matters

The Every Disabled Child Matters (EDCM) campaign and Irwin Mitchell Solicitors said that the Bill would fail to establish a joined-up system of health and social care support for children with SEN, and would exclude disabled children who do not have SEN from integrated support.

Irwin Mitchell Solicitors said: "Although the draft Bill proposes modest additional obligations in relation to the integration of education, health and care services for children with special educational needs, it establishes no new duties on any public bodies to actually provide health or care services to disabled children. This is, in our view, the major shortcoming in the draft legislation."

Laura Courtney, EDCM Campaign Manager said: "This is a deeply disappointing lost opportunity. We cannot understand why the Government is so set on excluding the disabled children who do not have SEN, but need health and care support, from the system proposed in the draft Bill - e.g. a local offer, joined up services, etc. These children will be accessing the same services within health and social care,

²⁹⁶ [IPSEA press release 5 February 2013, Children & Families Bill](#)

commissioned through the same processes as those with SEN. We are concerned that if commissioners are required to consider their needs separately, a two tier system of support will be created, in which disabled children without SEN risk being marginalized and given a lower priority. We will be calling on MPs and Peers who are supportive of disabled children to ask the Government to amend the Bill as it goes through Parliament."²⁹⁷

EDCM and the Special Educational Consortium (SEC)²⁹⁸ have produced a briefing on the key changes between the draft SEN provisions and the Children and Families Bill.²⁹⁹

Council for Disabled Children

Christine Lenehan, Director of the Council for Disabled Children, welcomed the Bill and changes made to the draft legislation.

"We are particularly pleased to see changes in the clauses around mediation and the clauses which strengthen the participation of children and young people."³⁰⁰

National Autistic Society

The National Autistic Society (NAS) said that it was pleased that the Government had responded to concerns about parental rights; however, it emphasised the need for minimum standards to underpin the local offer, for greater clarity about what is expected of schools, and how health and social care parts of an Education, Health and Care Plan would be enforced. Chief Executive, Mark Lever, said:

Much more needs to be done if all children and young people with autism are to receive a fulfilling education.

The local offer, which lists the services a local authority expects to be available, must be strengthened to state what is actually provided, in the context of a national framework and minimum standards. Only then can families (including those without an EHCP) hold the local authority to account effectively.

We are still concerned about the lack of information on what will replace School Action and School Action Plus. We are calling for clarity on what is expected of schools in delivering better outcomes for pupils who are not entitled to an EHCP.

Although the Bill introduces new duties in relation to integration of Education, Health and Social Care, we are still concerned that families will not be able to enforce the Health and Social Care parts of the Plan.³⁰¹

Ambitious about Autism

Jolanta Lasota, Chief Executive of Ambitious about Autism, felt that there was a growing gap between the aspirations of the Bill and the reality of diminishing budgets.

This Bill is being introduced against a backdrop of deepening cuts to frontline services for families of children with autism, and at the same time as schools and colleges are grappling with an entirely new funding system. We want to see young people with

²⁹⁷ [EDCM press release, 5 February 2013, Children and Families Bill represents a 'lost opportunity' for disabled children](#)

²⁹⁸ EDCM and SEC membership includes professional, voluntary sector, provider organisations and individual supporters.

²⁹⁹ [Key changes between the draft SEN provisions and the Children and Families Bill, EDCM and SEC, February 2013](#)

³⁰⁰ [Director of the Council for Disabled Children press release, 5 February 2013](#)

³⁰¹ [NAS press release, 5 February 2013, Government publishes Children and Families Bill](#)

autism getting better coordinated support from early years to 25, but there is a growing gap between the aspirations of the Bill and the reality of diminishing budgets, fewer services, and the increased battles for support families are facing on the ground.

We appreciate that Government has listened to families supporting our Finished at School campaign and amended the Bill to protect support for young people who fall out of education beyond school or who are on apprenticeships.

However, there are serious questions about how the Government will provide improved educational support for disabled 16 - 25 year olds, when local authorities are reporting a significant gap in the funding for young people with complex needs in this age group. We ask Government to address this funding gap as a matter of urgency. Without the right resources, the aims of the Bill will simply not be realised.

We will be holding the Minister for Children and Families to his commitment that all existing statutory rights for families will be protected, and that they will be extended to cover young people up to the age of 25. The current drafting of the Bill leaves young people aged 19 - 25 vulnerable to losing support. We will be working with Parliamentarians to amend this and fighting for the holistic 0 - 25 Plan that families have been promised.³⁰²

Sense

Sir Paul Ennals, Interim Director of Strategy at the Sense, the charity supporting deafblind people, welcomed the Bill but wanted the local offer to be underpinned by national standards which set a minimum level of provision for SEN.

'We welcome the publication of the Children and Families Bill which aims to reform the current system of support for children with Special Educational Needs (SEN).

The Bill will introduce integrated assessment and provision for children with SEN, through new Education, Health and Care Plans. Local authorities will also be obliged to publish a 'local offer' in which they describe the education, health and care services they expect to be available.

To ensure that the bill delivers improvements to the quality and the availability of services, Sense considers that the local offer must be underpinned by national standards which set a minimum level of provision for SEN, that includes specifying specialist support services for deafblind children.

Sense will also campaign to ensure that assessments of education, health and care recognise the specific needs of deafblind children and their families.³⁰³

Mencap

Mencap described the Bill as disappointing and a "missed opportunity".

Families up and down the country will be deeply disappointed by today's Children and Families Bill," says Dan Scorer, Mencap's senior campaigns and policy manager. "The government had promised the biggest reform of Special Educational Needs for 30 years, finally bringing together health, education and care support.

³⁰² [Ambitious about Autism press release, 5 February 2013, Our response to the publication of the Children and Families Bill](#)

³⁰³ [Sense press release, 5 February 2013, Government publishes Children & Families Bill](#)

This bill is a missed opportunity, which will change very little for parents, who currently face a long, hard fight to get the right education and health support for their child with a learning disability.

Mencap is disappointed that the government has ignored some of the key recommendations of charities and the Education Select Committee.

The bill fails to prevent a postcode lottery, by not introducing national standards for special educational needs. Without this, the quality of a young person's education will continue to be determined by where they live, rather than what needs they have.

To add further disappointment, the bill doesn't place a duty on the NHS to deliver the support that children need to meet their health needs.

Many children with a learning disability – particularly those with profound disabilities – have serious health issues, which have a huge impact on their educational development. Mencap believes that young people will never reach their potential if these health needs are not also addressed.³⁰⁴

Scope

Scope's Chief Executive, Richard Hawkes, said that the parents of disabled children have been badly let down by the Bill.

The Government said its Special Educational Needs (SEN) reform would prevent parents being forced to go from "pillar to post" in a battle between different authorities and agencies.

But instead the Government risks heaping more pressure onto parents, telling them they will have to fight for every last bit of support. "This was a once in a generation opportunity to reform SEN. The bill is a huge missed opportunity.

Parents say it's a battle to get their children support such as childcare or nursery places, appropriate schools, essential therapies or even healthcare in their local area.

Joint education, health and social care plans could make a real difference by getting agencies to work together. But if the plan doesn't meet a child's needs, glaring holes of accountability will make it harder not easier to appeal.

But the vast majority of disabled children don't even get a plan. For these children, the Government is asking councils to publish a list of services, and asking parents to provide comments.

This is simply not good enough. Parents need a guarantee that their children will get the right therapy, nursery or support – not the 'SEN yellow pages'. That guarantee just won't be there. Parents want to see services improved. There is no imperative for this to happen.

The plans put the onus on parents themselves to ensure services are good enough - either through comparing different local authority offers, or by taking individual services to task. Neither of these will remove the battles for support that parents currently face - exactly what this Bill was supposed to rectify.³⁰⁵

³⁰⁴ [Mencap press release, 5 February 2013, Children and Families Bill is "missed opportunity"](#)

³⁰⁵ [Scope responds to Children and Families Bill, 5 February 2013](#)

Dyslexia Action

Dyslexia Action felt that SEN is still being viewed too much in terms of those with low-incidence high-severity needs, with insufficient attention to those with high-incidence, lower - severity needs, such as dyslexia.

To-date the draft Bill has been vague on how the needs of children with mild to moderate learning difficulties (including dyslexia) will be met with the proposed removal of School Action and School Action Plus and the introduction of the Education Health and Care Plan.³⁰⁶

National Institute of Adult Continuing Education

The National Institute of Adult Continuing Education (NIACE) welcomed many of the aims of the Bill but said that the real challenge will be in developing a system that supports young people in their transition to and progression in further education. Yola Jacobsen, Programme Manager at NIACE, welcomed the extended rights for young people but was concerned about how the changes would be implemented.

The new rights and protections in the Bill for young people with disabilities aged 16-25 in further education are welcomed. Young people and their families will now have the right to request an assessment and to name a college. However, whilst we do welcome clarity on the rights of young people - we are worried that there will be problems in implementation. Funding cuts, capacity to deliver and understanding amongst local authorities, who may lack experienced staff in this field, will all be big challenges to tackle if young people are to get the education provision they need.

NIACE welcomes the fact that some of the issues raised in the report of the Education Committee in its pre-legislative scrutiny of the Bill have been addressed. This includes Education Health and Care Plans to be extended to young people undertaking apprenticeships and for those not in education, employment or training and, the inclusion of independent specialist colleges in the list of providers for which parents can express a preference.

There are potential opportunities in the wider education reforms that have been taking place; in particular the flexibilities of the Study Programmes that could support the development of personalised learning that focuses on meaningful outcomes for the young person, including the opportunity to move into employment. The challenge will now be how the aims of the Bill can be met in the difficult funding environment, so that the system supports young people in their transition to, and progression in, further education.

NIACE is committed to supporting local authorities and colleges to ensure this happens as people with learning difficulties and disabilities are some of the most vulnerable people in our society. We will be responding to the consultation on the new SEN code of practice that is due out this Spring. And we will continue to work with providers and partner organisations to support development of person-centred learning for learners with learning difficulties and/or disabilities who have complex needs.³⁰⁷

National Union of Teachers

The teachers' unions have also commented on the Bill. Christine Blower, General Secretary of the National Union of Teachers (NUT), for example, said that the provisions were untested and were a voyage into the unknown.

³⁰⁶ [Dyslexia Action press release, 5 February 2013, Update on The Children and Families Bill](#)

³⁰⁷ [NIACE responds to Children and Families Bill, 7 February 2013](#)

This Bill represents a significant overhaul of the statementing system for pupils with Special Educational Needs (SEN), the most drastic for a decade. The proposals in the Bill are untested and are a voyage into the unknown. There is significant disquiet across the SEN sector and among parents' groups. The Government has no coherent replacement for the loss of knowledge and expertise within local authorities in terms of specialist SEN and behaviour support to schools.

The Government is dismantling the current SEN system which allows schools a graduated system of drawing down support to meet the needs of the children in their school, including outside-trained experts where needed. There is no evidence that removing the 'School Action' and 'Action Plus' stages will improve education or accessibility of the curriculum.

SENCOs – the special educational needs co-ordinators who uphold the SEN system in schools – do not believe that replacing statements with Education Health and Care plans will make any difference to the level or quality of support for children with SEN. An inclusive school system needs to allow schools to work together to meet the needs of all local pupils. Schools competing with each other will not achieve this end.³⁰⁸

National Association of Head Teachers

Russell Hobby, the general secretary of the National Association of Head Teachers (NAHT), stressed that the changes would need to be “properly resourced and funded”.

This bill contains important changes and will be wide-ranging in its impacts on children, parents and those within the education system. Those in the profession will doubtless have insights and suggestions for best practice as it moves through Parliament.

Although there is much that can and must be done to improve our support for the most vulnerable, children with special needs should not be the focus of cost-cutting and we will watch carefully to ensure we are able to continue to provide the highly skilled and talented support their parents expect. There are concerns in this regard with the revision of statementing, for example.

We need to unpick the details to see how its contents will work in practice and look forward to the debate. Any recommendations the bill makes will need to be properly resourced and funded, and nor are we clear how legislation can bridge the cultural, procedural and structural gaps between education and health which have consistently hampered joint working in the past.³⁰⁹

4.9 Background on funding issues

As noted above, there is concern about whether funding will be adequate to implement the changes and also about the legislation being introduced at the same time as a major overhaul of the education funding system.

The green paper, [*Support and aspiration: A new approach to special educational needs and disability – A consultation*](#), outlines the current SEN funding arrangements as follows.

Funding for school-based SEN support for children at School Action is part of each school's general budget share of the Individual Schools Budget and not identified separately. Resources for School Action Plus, where some additional help is provided from outside the school, are usually allocated to schools through an SEN delegated budget. This is calculated using proxy indicators such as social deprivation, prior

³⁰⁸ NUT press release, 5 February 2013, [Children and Families Bill](#)

³⁰⁹ NAHT press release, 5 February 2013, [School leaders comment on Children and Families Bill](#)

attainment and other factors (rather than the numbers of children identified as having SEN). In some areas resources for School Action Plus are held by the local authority for schools to draw on. Local authorities are responsible for arranging funding for the special educational provision set out in statements; some fund this direct but increasingly local authorities have been delegating funding for statements to schools. Local Schools Forums are consulted by local authorities when they draw up their schemes for delegating SEN funds.³¹⁰

Under a new funding system which begins in April 2013, local authorities will start to move towards standardising the amounts they delegate to mainstream schools for pupils with SEN, so that schools are expected to provide from their notional SEN budget, the first £6,000 of the additional support costs of high needs pupils. Funding above this level will be agreed with the local authority and paid in the form of a top-up. The changes will mean that some local authorities will have to delegate more funding to schools than they do at present, and others to delegate less.

Details of the new funding system were set out in Department for Education documents: *School funding reform: Next steps towards a fairer system*, 26 March 2012, and *School funding reform: Arrangements for 2013-14*, 28 June 2012.

School funding reform: Arrangements for 2013-14 said that “an unreformed high needs funding system would frustrate and impede, rather than facilitate and support, the development of personal budgets, the local offer, and a single assessment and plan from birth to 25.” It explained that

The new high needs funding arrangements will be introduced for all providers in the schools sector in April 2013, including local authority maintained schools, and special and Alternative Provision Academies. They will be phased in for mainstream Academies by September 2013. The new arrangements for providers in the further education (FE) sector will be introduced from the start of the 2013/14 academic year.³¹¹

The DFE document, *School funding reform: Next steps towards a fairer system*, which preceded the Next Steps document, set out the new high needs funding arrangements, to be called “place-plus”:

Under a place-plus approach high needs funding will comprise three elements, which can be applied across all provision for high needs pupils and students.

Element 1, or “core education funding”: the mainstream unit of per-pupil or per-student education funding. In the school sector for pre-16 pupils, this is the age-weighted pupil unit (AWPU), while for post-16 provision in schools and in the FE [further education] sector this is the mainstream per-student funding as calculated by the national 16-19 funding system.

Element 2, or “additional support funding”: a clearly identified budget for providers to provide additional support for high needs pupils or students with additional needs up to an agreed level.

³¹⁰ *Support and aspiration: A new approach to special educational needs and disability – A consultation*, Cm 8027, March 2011, p18, footnote 4

³¹¹ p16, paragraph 85

Element 3, or “top-up funding”: funding above elements 1 and 2 to meet the total cost of the education provision required by an individual high needs pupil or student, as based on the pupil’s or student’s assessed needs.^{312]}

The DfE’s *School funding reform: Arrangements for 2013-14* document set out how the place-plus approach would apply to the different settings of mainstream, specialist SEN, and alternative provision. In relation to top-up funding, it said that

109. We stated in March that the setting of top-up funding is a matter for local determination, and that local authorities may choose to use local banding frameworks to manage top-up funding. Top-up funding must, however, reflect a pupil’s needs and the cost of the provision they receive in a particular setting. This is likely to mean that the level of top-up funding will be different in different settings. Further information about setting top-up rates and frameworks are set out in our operational guidance document.³¹³

These funding reforms are being introduced alongside the identification of a ‘High Needs Block’ within Dedicated Schools Grant (DSG) which covers core funding for school education. The High Needs Block is notional rather than ring-fenced funding as local authorities are allowed to move funding between the different blocks of DSG. One of the aims of creating this block is to improve transparency by setting out an amount from which local authorities can fund their statutory duties relating to high needs pupils and students. The High Needs Block will make up £4.9 billion of the £38.0 billion total DSG in 2013-14 and will be distributed on the basis of planned spending in 2012-13 and earlier student numbers.³¹⁴

Some of those giving evidence to the Education Committee questioned the timing of the proposed reforms when, they said, the implications of changes to the funding system may not be fully understood. Some witnesses were also concerned about the introduction of personal budgets and the possible funding implications for schools.

The Education Committee questioned the Minister as to how a new birth to 25 system for SEN would be funded. The Minister said that the purpose of the reforms was not to save money and noted increased spending on SEN. However, the Committee stressed the importance of ensuring that, by extending statutory protections to 16-25 year olds, the quality or quantity of provision for others is not compromised. On this point, the Government’s response said that

The Education Funding Agency already provides funding to colleges and other providers to meet the additional needs of all young people aged 16-18 with learning difficulties/disabilities, and up to 25 for those with a Learning Difficulty Assessment. Overall funding for post-16 High Needs Students will increase by 9% from £585m to £639m between 2011/12 and 2013/14.

9. From the 2013/14 academic year, funding for students with additional needs will be provided to all institutions through three distinct elements. Element 1, the core education funding for the course being studied; Element 2, the first £6,000 of additional support; and Element 3, any top-up funding required to meet the total costs of the education provision. Elements 1 and 2 will be provided direct from the Education Funding Agency and Element 3 will be provided by the relevant local authority from its

³¹² Department for Education, *School funding reform: Next steps towards a fairer system*, 26 March 2012, p37, paragraph 3.3.32

³¹³ Department for Education, *School funding reform: Arrangements for 2013-14*, 26 March 2012, p19

³¹⁴ Dedicated Schools Grant: 2013-14 Allocations, DfE

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

10. Decisions will be more transparent and, as local authorities will establish a single high needs budget from within their DSG to cover their education funding responsibilities for all high needs children and young people aged 0-25 resident in their area, there should be fewer delays in making decisions on provision for the young person. The greater transparency about funding in the new arrangements will encourage collaboration between education institutions and across health and social care services in developing packages of support for individual children and young people.³¹⁵

5 Childcare

5.1 Local Authority duties: Sufficiency of childcare

Section 6 of the *Childcare Act 2006* puts local authorities under a new duty to secure, so far as is reasonably practicable, that the provision of childcare (whether or not by them) is sufficient to meet the requirements of parents in their area in order to enable them to work or undertake education or training leading to work. Section 11 of the 2006 Act gives local authorities a related duty to undertake childcare sufficiency assessments, a duty that came into effect in April 2007. The departmental guidance on [sufficiency assessments](#) provides an overview of the section 11 duty, under which an assessment must be carried out every three years:

Section 11 of the 2006 Act places a duty on local authorities to have undertaken a childcare sufficiency assessment, in accordance with regulations and having regard to this guidance document, within one year of the duty coming into force. This assessment is a necessary first step towards securing sufficient provision, enabling local authorities to identify gaps and establish plans to meet the needs of parents so that they can fulfil their Section 6 childcare sufficiency duty.³¹⁶

In November 2011, the Government launched a consultation on early education which, amongst other topics, sought opinions on whether statutory guidance on for local authorities relating to childcare could be reduced by removing the child sufficiency assessment.³¹⁷ The paper proposed a “more frequent, simpler report” to enable parents to hold local authorities to account in fulfilling the sufficiency duty, and proposed that local authorities prepare an annual report to achieve this.³¹⁸

The subsequent Government response to this consultation noted support for both the annual report and the repeal of the sufficiency duty, and stated that it would “seek a legislative vehicle to repeal this duty at the earliest opportunity and introduce the new annual report in the statutory guidance.”³¹⁹

5.2 Extended services for schools

‘Extended services’ are schools’ extra-curricular activities or wider services provided to the local community before and after the school day. These may include learning opportunities,

³¹⁵ [Children and Families Bill 2013: Contextualised Information and Responses to the Pre-legislative Scrutiny](#) Annex C, paragraphs

³¹⁶ Department for Education and Skills, [Childcare Sufficiency Assessments: Guidance for Local Authorities](#), p3

³¹⁷ Department for Education, [Consultation launched on free early education](#), 11 November 2011

³¹⁸ Department for Education, [Supporting Families in the Early Foundation Years: Proposed Changes to the Entitlement to Free Early Education and Childcare Sufficiency](#), November 2011, p16-17

³¹⁹ Department for Education, [Government response to Supporting Families in the Foundation Years: Consultation on Proposed Changes to Free Early Education and Childcare Sufficiency](#), p17

access to childcare services or activities, and community use of facilities, such as for adult learning.³²⁰ Section 27 of *Education Act 2002* gives governing bodies of maintained schools the power to make the facilities or services of the school available for the benefit of the pupils at the school or their families, and the people who live and work locally.³²¹ Sections 28(4) and 28(5) of the 2002 Act stipulate that the school's governing bodies must consult with the local authority, staff and parents of pupils at the school if they want to make this kind of provision, and also require governing bodies to have regard to guidance from the Secretary of State or the local authority when offering extended services.

Childcare Commission

In June 2012, the Prime Minister, announced a commission on childcare to look at three broad areas that might to look at how to reduce the costs of childcare and burdens on childcare providers:

- Ways to encourage the provision of wraparound and holiday childcare for children of school age.
- Identifying any regulation that burdens childcare providers unnecessarily because it is not needed for reasons of quality or safety.
- How childcare supports families to move into sustained employment and out of poverty.³²²

The Childcare Commission has not yet reported, but the contextual information provided with the *Children and Families Bill* indicated that it will do so shortly.³²³

5.3 Government proposals on Childcare

On 29 January 2013, the Government published [More great childcare: Raising quality and giving parents more choice](#), setting out proposals for the childcare market and the early years workforce. The document includes a wide variety of Government proposals to improve childcare provision, including reforms to qualifications for the workforce, changes to inspection and the introduction of childminder agencies for registering childminders.

The current provision for the regulation of childminders is set out in Part 3 of the [Childcare Act 2006](#) and various regulations made under the Act. Subject to certain exceptions,³²⁴ sections 33 and 52 of the *Childcare Act 2006* make it an offence for an individual to provide childminding services on domestic premises unless registered on the appropriate Ofsted register as a childminder. Section 39 of the 2006 Act makes provision for regulations to be made by the Secretary of State setting out the current learning and development requirements for childcare providers. Related sections in Part 3 set out further duties. The legal duties on Ofsted to inspect and regulate childcare in England, including registered childminders, are also set out in Part 3 of the 2006 Act.

Ofsted register and inspect those who provide early education or childcare for children aged from birth up to their eighteenth birthday. Two different registers exist for childcare providers: the Early Years Register and the Childcare Register (many providers are on both). The Childcare Register is in two parts – a compulsory part and a voluntary part. Providers on the Early Years Register will be inspected at least once every three to four years. Newly registered early years providers are normally inspected about six to seven months after

³²⁰ Department for Education, [What are extended services?](#), 25 May 2010 [Accessed 6 February 2013]

³²¹ *Education Act 2002*, s27

³²² Department for Education, [Commission on childcare](#) [accessed 12 February 2013]

³²³ [Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny](#), p19

³²⁴ See section 18 of the 2006 Act and the [Childcare \(Exemptions from Registration\) Order 2008 \(SI 2008/979\)](#)

registration, if they have children on their roll. Every year, a 10 per cent sample of all providers who are only registered on the Childcare Register will be inspected. Ofsted select the sample using a geographical spread of each type of provider and do not normally inspect any provider until they have been registered for a period of six months.³²⁵

Childminder Agencies

The *More great childcare* document sets out the Government's rationale for introducing childminder agencies:

At the moment, most childminders are self-employed individuals running their own business. Many childminders are happy with these arrangements. But many other current and former childminders have found the requirements of setting up and running their own business far too burdensome. In some cases, it has prevented childminders from concentrating on delivering high quality early education and care, and in others it has driven people out of the profession altogether. This is one reason why the number of childminders has almost halved over the last twenty years.

We will therefore enable the creation of childminder agencies to provide childminders with a new framework of training, support and quality improvement. Childminders who join agencies will find they can concentrate on childminding rather than administrative tasks such as arranging training and finding clients.

Parents will also benefit. Instead of having to investigate every prospective childminder to check they are happy to entrust their children to their care, they could instead approach a childminder agency to match them with a nearby childminder. The agency would be quality assured and inspected by Ofsted, offering parents reassurance. There could be many practical benefits too. For instance, agencies could arrange for cover when childminders fall ill, saving parents the hassle of finding someone else at short notice – or even having to take a day off work to look after the children themselves.

We will legislate so that, subject to the will of Parliament, childminder agencies will be able to:

- **provide regular training and quality assurance;**
- **match supply and demand**, helping to fill places and act as a point of contact with parents. They will also be able to resolve complaints and other issues;
- **take on administrative tasks**, for example, around registration and insurance. This will allow childminders to focus on caring for children; and
- **be registered with, and inspected, by Ofsted**, who will inspect and report on agencies' quality. Agencies will have their performance assessed so that parents and childminders know exactly how well agencies are fulfilling their duties and supporting childminders. Ofsted will also inspect a sample of childminders under an agency, with a reduction in the overall bureaucracy of inspection without compromising quality.³²⁶

³²⁵ Summary drawn from Ofsted, *Are You Ready for Your Inspection: A guide to inspections of provision on Ofsted's Childcare and Early Years Registers*, August 2012, and Ofsted, *Information for parents about Ofsted's role in regulating childcare*, January 2013

³²⁶ Department for Education, *More great childcare: Raising quality and giving parents more choice*, January 2013, p38

Early re-inspection of childcare providers

The *More great childcare* paper also proposed allowing early re-inspections at the request of childcare providers who feel their service has improved and would like to be reassessed and improve their Ofsted rating:

There is currently no means for nurseries, schools and childminders with an 'inadequate' or 'satisfactory' rating to request an early re-inspection if they believe their service has improved. Providers should not have to suffer the reputational damage of an 'inadequate' or 'satisfactory' Ofsted rating for several months, or even years, if they believe they have taken rapid action to improve quality.

We intend to make it possible for providers to request and pay for an early re-inspection. We are considering with Ofsted how best to deliver this re-inspection route. This will encourage providers to improve their practice and give those who are serious about improving the quality of their provision an opportunity to be recognised. We will look for an early opportunity to bring forward legislation, which will – subject to the will of Parliament – enable such inspections to take place.³²⁷

5.4 The Bill

- **Clause 73** of the Bill introduces provisions to enable the creation of new childminder agencies;
- **Schedule 4** provides a framework for the regulation of early years childminder agencies and later years childminder agencies, including their registration, assessment and inspection, how their registration may be cancelled, and how childminders registered with agencies will be regulated and assessed;
- **Clause 74** introduces a power for Ofsted to charge for an early re-inspection at the request of a childcare provider; and
- **Clause 75** removes the existing duty on local authorities to assess the sufficiency of childcare provision in their area;
- **Clause 76** removes the duties on schools in England to consult local authorities, parents and staff, and to have regard to advice and guidance given by the local authority or the Secretary of State, before offering facilities or services (such as school-based childcare) to the community.

These changes apply to England only.

5.5 Some initial reaction to the Bill

Labour Party

Sharon Hodgson, the shadow Minister for Children and Families, expressed concerns about the removal of local authority duties to assess local sufficiency of childcare:

This Bill removes the duty on councils to determine if there are sufficient childcare places. This will hit families who are having a hard time finding appropriate childcare.³²⁸

³²⁷ Ibid., p36

³²⁸ Labour Party, *Children and Families Bill will do little to help hard working families - Hodgson and Nandy*, 5 February 2013

Pre-school Learning Alliance

The Pre-school Learning Alliance published a response to the Bill, welcoming the decision to allow early years settings to be re-inspected by Ofsted, but raised concerns about the introduction of childminder agencies, noting that similar agencies in the Netherlands “provide very little in the way of childminding support or training.” The Alliance also suggested that the new agencies would increase bureaucracy and duplicate work already done by other organisations, and possibly increase costs for parents and childminders.³²⁹

National Day Nurseries Association

The chief executive of the National Day Nurseries Association, Purnima Tanuku, was quoted in press as being “disappointed” that the reform to introduce childminder agencies had not been consulted upon, but welcomed the measure to give early years providers the option to pay for re-inspection from Ofsted, stating it will “incentivise and reward providers to improve quality quickly.”³³⁰

6 Office of the Children’s Commissioner for England

6.1 Children’s Commissioners in devolved authorities

The Bill’s provisions reform the Office of the Children’s Commissioner for England. The Office in England was established later than similar bodies in other countries.

Children’s Commissioner for Wales: the Care Standards Act 2000

In early 2000, Sir Ronald Waterhouse published his report ‘[Lost in Care](#)’³³¹ after a long inquiry into child abuse in children’s homes in North Wales. He recommended that Wales establish a Children’s Commissioner to try and prevent such abuses happening again. The post of Children’s Commissioner for Wales was subsequently established by section 72 of the [Care Standards Act 2000](#). The [Children’s Commissioner for Wales Act 2001](#) substantially amended the 2000 Act, broadened the Commissioner’s remit and set out its principal aim, which is to safeguard and promote the rights and welfare of children in Wales.³³²

A Children and Young People’s Commissioner for Northern Ireland

A Children and Young People’s Commissioner for Northern Ireland was established by the [Commissioner for Children and Young People \(Northern Ireland\) Order 2003](#). The order states that “the principal aim of the Commissioner in exercising his functions under this Order was to safeguard and promote the rights and best interests of children and young persons”.³³³ The Commissioner may undertake general inquiries into issues where it is believed children are being adversely affected, deal with individual complaints and start or take over legal proceedings if a general principle is at stake, and should promote children’s rights.³³⁴

Scotland’s Commissioner for Children and Young People

The [Commissioner for Children and Young People’s \(Scotland\) Act 2003](#) provides the legislative basis for the post of Commissioner for Children and Young People in Scotland.

³²⁹ Pre-school Learning Alliance, [Alliance welcomes re-inspection clause in Children & Families Bill](#), 6 February 2013

³³⁰ [Children and Families Bill introduces childcare reforms without consultation](#), *Children and Young People Now*, 6 February 2013

³³¹ Department of Health, *Lost in care, report of the tribunal of inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974*, 2000

³³² [Children’s Commissioner for Wales Act 2001](#). See s2, 5 and 6

³³³ [The Commissioner for Children and Young People \(Northern Ireland\) Order 2003](#), s6

³³⁴ Children and Young People’s Commissioner for Northern Ireland, [What We Do](#) [accessed 9 February 2013]

The general function of the Commissioner is to promote and safeguard the rights of children and young people, and the Commissioner may carry out investigations into whether service providers have regard to the rights, interests and views of children and young people when making decisions or taking actions that affect those children and young people.³³⁵

6.2 A Children's Commissioner for England

The statutory basis for the Commissioner in England is provided by the *Children Act 2004*. The 2004 Act specifies the Commissioner's general functions:

- to encourage people who are planning or providing services or activities that affect children, to take account of their views and interests;
- to advise the Secretary of State on the views and interests of children;
- to consider or research the operation of complaints procedures in so far as they relate to children;
- to consider or research any matter relating to the interests of children; and
- to publish reports on any of the above.

In carrying out these functions, the Office of the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child.³³⁶

The first Children's Commissioner for England was appointed in March 2005. The post is currently held by Dr Maggie Atkinson, who took office on 1 March 2010.

6.3 United Nations Convention on the Rights of the Child (UNCRC)

The United Nations Committee on the Rights of the Child encourages states to establish special mechanisms, structures and activities for children and has placed particular emphasis on the development of independent offices to promote the human rights of children. In carrying out its functions the Office of the Children's Commissioner must have regard to the *United Nations Convention on the Rights of the Child*. This duty is set out in section 2 of the *Children Act 2004*:

(11) In considering for the purpose of his function under this section what constitutes the interests of children (generally or so far as relating to a particular matter) the Children's Commissioner must have regard to the United Nations Convention on the Rights of the Child.

(12) In subsection (11) the reference to the United Nations Convention on the Rights of the Child is to the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20th November 1989, subject to any reservations, objections or interpretative declarations by the United Kingdom for the time being in force.

Summary of the UNCRC

The UNCRC lists the rights that every child and young person should be guaranteed. All children have the same rights and it is the responsibility of both young people and adults to ensure that these rights are realised. All children up to 18 years have:

³³⁵ Scotland's Commissioner for Children and Young People, *Commissioner role and responsibilities* [accessed 9 February 2013]

³³⁶ Department for Education, *Office of the Children's Commissioner* [accessed 11 February 2013]

- the right to life
- the right to a name and nationality
- the right to have their best interests considered by people making decisions about them
- the right to be with their parents or those who will care for them best
- the right to have a say about things that affect them and for adults to listen and take their opinions seriously
- the right to have ideas and say what they think
- the right to practise their religion
- the right to meet with other children
- the right to get information they need
- the right to special care, education and training, if needed
- the right to health care
- the right to enough food and clean water
- the right to free education
- the right to play and rest
- the right to speak their own language
- the right to learn about and enjoy their own culture
- the right not to be used as cheap workers
- the right not to be hurt or be neglected
- the right not to be used as soldiers in wars
- the right to be protected from danger
- the right to know about their rights and responsibilities.³³⁷

6.4 Dunford Review of the Office of the Children's Commissioner for England

Dunford Review

In July 2010, the Secretary of State for Education, Michael Gove, announced a review of the role of the Children's Commissioner by Dr John Dunford, then General Secretary of the Association of School and College Leaders. In a written ministerial statement to the House, the Secretary of State set out the reasons for the review and its remit:

³³⁷ Summary provided in Appendix 2 of Department for Education, *Review of the Office of the Children's Commissioner (England)*, December 2010, p77-78

It is now over five years since the first Children's Commissioner for England took up office but the role and remit have not yet been reviewed. There is continued debate about the remit of the post: as compared to its counterparts in other countries and the devolved Administrations; its public profile; and the impact it has had.

The Government have committed, in our coalition agreement, to increase accountability and review the cost of quangos and, therefore, I agree with the broad consensus that it is now time to take stock of the office, role and functions of the Children's Commissioner for England through a detailed and considered review. This will provide an opportunity for the Government to consider the views of a wide range of partners on how Government can best promote children's interests.

The review will take a wide-ranging and independent look at the office, role and function of the Children's Commissioner. Dr Dunford will determine how the review will be conducted but I have asked him to ensure maximum opportunities to consult are taken and to consider the broad spectrum of opinions on this issue including the views of children and young people. With this in mind, I understand that Dr Dunford will be launching a call for evidence and I am sure he will be keen to secure the opinion of parliamentarians.

In particular I have asked for the review to cover three key aspects:

- 1) The powers, remit and functions of the Children's Commissioner.
- 2) The relationship with other related functions supported by Government.
- 3) Value for Money.³³⁸

The final report of the [Dunford Review](#) was published in December 2010.³³⁹ It recommended the strengthening of the remit, powers and independence of the Commissioner. The [press notice](#) accompanying the publication of the Review provided an overview of its recommendations:

- a strengthened remit – a new rights-based Children's Commissioner for England;
- greater independence from Government – the Children's Commissioner should report direct to Parliament, rather than just the Department for Education, and should not have to consult the Secretary of State before undertaking an inquiry;
- the Commissioner should be in post for a single seven-year term of office;
- increased powers – advising Government on new policies and undertaking an assessment of the impact of new policies on children's rights, and a duty on Government and local services to issue a formal response to concerns raised by the Children's Commissioner;
- a merger between the Office of the Children's Commissioner and the Office of the Children's Rights Director in Ofsted to create a new Office of the Children's Commissioner for England.

³³⁸ HC Deb 12 Jul 2010 col 17-18WS

³³⁹ Department for Education, [Review of the Office of the Children's Commissioner \(England\)](#), December 2010

In addition, Dr Dunford recommends that the Children's Commissioner needs to improve the credibility of the role by always basing advice on evidence and not offering opinions on subjects relating to children without that evidence.³⁴⁰

Government Response to the Review

The Government welcomed the Review and accepted its recommendations. In a written ministerial statement, the then Minister for Children and Families, Sarah Teather, set out the Government's position and announced a consultation on legislative changes in the light of the Review:

The conclusions that Dr Dunford has drawn are powerful. His review makes a convincing argument for the need for a Children's Commissioner, and I accept that without one there would be significant implications for children's lives and for the UK's international standing. Dr Dunford has assessed whether the role of the Children's Commissioner meets the Cabinet Office tests against which all arm's length bodies have been reviewed, and I accept his view that it does so.

I have noted that despite some achievements on specific issues, the impact of the Office of the Children's Commissioner to date shows a clear need to reform its remit and operating model. I accept Dr Dunford's proposals that the role should be in accordance with the United Nation's Paris Principles for Human Rights organisations, with responsibility for promoting and protecting children's rights on the basis of the UNCRC, and reporting directly to Parliament as well as to the Department for Education. I also agree with Dr Dunford that within these rights lies the responsibility for children to respect the rights of others, and that this should better enable children to act as young citizens and reinforces the proper exercise of authority by parents and other adults such as teachers.

The Secretary of State is clear that the Children's Commissioner must represent value for money in exercising its powers and functions, and Dr Dunford has identified opportunities in this regard. While accepting that the commissioner needs to be adequately resourced to fulfil the role, I believe that all public funding should be used in accordance with the Cabinet Office's efficiency guidelines for arm's length bodies, and that this need not compromise independence or statutory powers and duties. Dr Dunford recommends merging the functions of the Office of the Children's Commissioner with the children's rights director in Ofsted, providing the opportunity for greater coherence and impact, and scope for savings. I believe that this is a sensible way forward, and will be discussing next steps with Her Majesty's chief inspector. Dr Dunford has also identified that the salary of the Children's Commissioner is excessive in comparison to others in similar roles and I will address this in setting up the new arrangements.

Dr Dunford's recommendations mean that the statutory basis and form of the Office of the Children's Commissioner must change. I will consult in due course on legislative changes. In the interim, the current role and functions of the Children's Commissioner will continue. This includes the commissioner's remit over non-devolved matters impacting on children and young people in Northern Ireland, Scotland and Wales. I do understand the difficulties that the current position presents for the Children's Commissioners in the devolved Administrations. I will want to work with them to achieve a situation, within the devolution settlements, where the interests of children in Scotland, Wales or Northern Ireland can be fully represented by the commissioner for that jurisdiction.

³⁴⁰ Department for Education, [Review of the Children's Commissioner for England](#), 6 December 2010

While it will take some time for any legislative changes to take effect, I am determined to act in the spirit of Dr Dunford's recommendations as soon as possible.³⁴¹

A consultation on changes to the role of Children's Commissioner was [announced](#) on 7 July 2011.³⁴² A statement from the Children and Families Minister announcing the Review stated the Government's intentions:

Children should have a strong advocate to promote and defend their rights and speak on their behalf. The Government wants the views and interests of children to be championed at the highest level. That's why we accepted all of John Dunford's sensible recommendations to give the Children's Commissioner greater independence, influence and impact. We are listening to young people, and everyone working with children, on how we change the law. We want to change the role to best suit the needs of children, particularly looked after children and those who have just left the care system, as they do not have a parent or guardian to promote their rights and views.³⁴³

A [summary of responses](#) was published,³⁴⁴ and subsequently a [Government response](#) to the consultation was also produced. The Government's response contained several key changes to the Commissioner's role, including that:

- The Commissioner's role should be explicitly focused on the promotion and protection of children's rights;
- The Commissioner's role should incorporate the work of the Children's Rights Director within Ofsted;
- The Commissioner should become more independent from Government through several measures including the removal of the requirement that the Children's Commissioner should consult the Secretary of State before launching an inquiry, and the removal of a provision that allows the Secretary of State to direct the Children's Commissioner to carry out an inquiry;
- Further improving the independence of the Commissioner by giving the Children's Commissioner a new power to carry out child impact assessments on new Government policies and legislation and extending the existing power for the Children's Commissioner to request a written response from the relevant government department or agency within a specified time-frame to recommendations made in light of an impact assessment;
- The Children's Commissioner should be appointed for a single, six-year term only.³⁴⁵

Ministerial evidence session with the Joint Committee on Human Rights

On 24 April 2012, the then Children and Families Minister, Sarah Teather, gave [evidence to the Joint Committee on Human Rights](#) on the role of the Children's Commissioner, following on from a session with the Commissioner and her deputy. The Minister confirmed that the

³⁴¹ HC Deb 6 Dec 2010 col 6WS

³⁴² Department for Education, [Establishing a new Office of the Children's Commissioner: Consultation on Legislative Proposals](#), July 2011

³⁴³ Ibid.

³⁴⁴ Department for Education, [Establishing a new Office of the Children's Commissioner for England \(OCCE\): Summary of Consultation Responses](#), December 2011

³⁴⁵ Department for Education, [Government response to the consultation on Establishing a new Office of the Children's Commissioner for England](#), December 2011, pp2-4

Government intended to bring forward legislation reforming the Commissioner's office, with a period of pre-legislative scrutiny of its proposed changes.³⁴⁶

6.5 Draft Legislation

The Queen's Speech on 9 May 2012 announced a *Children and Families Bill* that included provisions to strengthen the powers of the Children's Commissioner. As recommended by the Dunford Review, the proposed Bill included a merger of the Commissioner's office with that of the Children's Rights Director. The office of the [Children's Rights Director for England](#), based at Ofsted, works to ensure that young people who live away from home, or who are receiving social care support, have a say on issues that are important to them, as well as advising on children's rights and issues.³⁴⁷

The reforms would apply primarily to England because, as previously noted, the devolved administrations have their own Children's Commissioners.

Draft clauses

On 11 July 2012, [draft clauses with explanatory notes](#) on reforms to the Office of the Children's Commissioner were [published](#) by the Government for pre-legislative scrutiny.³⁴⁸ In her [statement](#) to Parliament on publication, Sarah Teather stated:

The draft legislation laid before the House today would create a new role for the Children's Commissioner, focused on promoting and protecting the rights of children, in line with the articles of the UN Convention on the Rights of the Child, to which the Government are a committed signatory. In order to carry out the role effectively, the Children's Commissioner would have powers to:

- carry out investigations;
- carry out assessments of the impact of new policies and legislation on children's rights;
- undertake research;
- monitor the effectiveness of complaints and advocacy services for children and young people;
- access places where children are cared for or accommodated away from home, so that their concerns can be heard;
- request the information needed to carry out full and robust investigations;
- require those to whom recommendations are made to set out how they intend to respond.

The draft legislation would make the Children's Commissioner more independent from Government and more directly accountable to Parliament, in particular through an annual report to Parliament that will allow for more effective scrutiny of the impact that the Children's Commissioner's activities have had on the promotion and protection of children's rights. The draft legislation also includes measures designed to make the Commissioner's business planning processes more transparent, by making it a

³⁴⁶ Joint Committee on Human Rights, *The Role and Independence of the Office of the Children's Commissioner for England*, HC 1953-i 2010-12, Q57. Please note that this citation is taken from the uncorrected transcript of the session, as the corrected version was not yet available at the time of writing.

³⁴⁷ Children's Rights Director for England, [About us](#) [accessed 11 February 2013]

³⁴⁸ Department for Education, [Reform of the Office of the Children's Commissioner](#), 11 July 2012

requirement for the Commissioner to consult on his or her future priorities and to appoint an advisory board.

In line with John Dunford's recommendations, the draft legislation would also result in the functions of the children's rights director in Ofsted being incorporated within the remit of the Children's Commissioner, but with safeguards to ensure that the current levels of support provided to this vulnerable group of children were not diluted.

Under the draft legislation, the Children's Commissioner for England would retain responsibility for non-devolved matters, but would be able to delegate his or her powers of investigation to the Children's Commissioners in the devolved Administrations. The Children's Commissioner for England would also be required to consult the Children's Commissioners in the devolved Administrations before conducting an investigation on a non-devolved matter within their jurisdictions or across the UK.³⁴⁹

6.6 Pre-Legislative Scrutiny: Joint Committee on Human Rights report

The Joint Committee on Human Rights undertook pre-legislative scrutiny on the draft clauses. On 7 December 2012, it [published its report](#). The Committee welcomed the draft clauses, but highlighted some areas where it felt there was cause for concern.

Definition of the role of the Children's Commissioner

The Committee recommended that the definition of the Commissioner's role relating to children's rights should be strengthened:

We welcome the proposed change in the Commissioner's primary function, from one of 'promoting awareness of the views and interests of children in England' to one of 'promoting and protecting the rights of children in England'.

We recommend, however, that the Bill should expressly define "the rights of children in England" to include the rights in the UNCRC and the rights of children in any other international treaty ratified by the UK for the purposes of defining the Commissioner's primary function. In addition, we expect the Government to ensure that the definition of the UNCRC rights in the Bill include the rights in the Optional Protocols ratified by the UK. We also consider that the Children's Commissioner should be required to have regard to all relevant international standards concerning the rights of children.³⁵⁰

Title

The Committee also recommended that the Commissioner's title should include reference to the office's duties to young people:

We recommend that the title of the Commissioner be changed to include "young people" as well as "children", both in order to encourage older teenagers to consider the Commissioner of relevance to them, and to reflect the fact that the Commissioner will have functions in relation to certain 18–24-year-olds.³⁵¹

Powers

The Committee recommended clarity in the Commissioner's powers, and also said that the role could be further strengthened in several areas. The Committee recommended that:

³⁴⁹ HC Deb 9 Jul 2012 col 4WS

³⁵⁰ Joint Committee on Human Rights, [Reform of the Office of the Children's Commissioner: draft legislation](#), HC 811, HL 83, p3

³⁵¹ Ibid.

[...] the Commissioner be invested with the power to undertake all of the activities recommended by the UN Committee on the Rights of the Child in paragraph 19(a) to (t) of [General Comment No. 2](#).³⁵² If the Government does not intend to grant the power to undertake any of those activities, it should make that clear on the face of the Bill; in doing so, the Government should identify which specific activities the Commissioner is not intended to undertake.³⁵³

It also recommended that:

[...] the Commissioner should have express power to advise persons exercising functions or engaged in activities affecting children how to act compatibly with children's rights. We also recommend that it should be made clear on the face of the Bill that the Commissioner has the power to carry out investigations. The Commissioner should expressly be given the power to investigate any issue which raises important questions of compatibility with children's rights. This express power should be in addition to the proposed powers to "consider and research".

The Commissioner should have the power to initiate legal proceedings, including judicial review, in the Commissioner's own name, and also to intervene as a third party where appropriate, equivalent to the power of the Equality and Human Rights Commission. We acknowledge that the use of such a power could be resource intensive and we would expect it to be used sparingly in practice.

In addition, the obligations to respond to the Children's Commissioner's recommendations and to provide information reasonably requested by the Commissioner should not be confined to persons exercising statutory functions, but should be extended to include persons exercising "functions of a public nature" within the meaning of the Human Rights Act.³⁵⁴

Independence

The Committee's report supported the independence of the Commissioner, in particular in relation to the Secretary of State:

The Bill should provide that the Commissioner should decide whether requests for advice made by the Secretary of State to the Commissioner, and any advice from the Commissioner in response to such requests, be made public. We also recommend that the Bill should expressly provide that the Children's Commissioner is not obliged to respond to and can decline a request for advice from the Secretary of State. This will ensure accountability and transparency, and prevent the risk of a perception of a lack of independence.³⁵⁵

Annual Report and appointment and dismissal of a Commissioner

The Committee also recommended that the Commissioner's annual report be the subject of a Parliamentary debate, and that the Government explore ways of "securing greater Parliamentary involvement in the selection, appointment and removal of the Children's

³⁵² The UN Committee on the Rights of the Child publishes its interpretation of the content of human rights provisions, in the form of General Comments on thematic issues. [General Comment No.2](#) relates to the role of Independent Human Rights institutions.

³⁵³ Joint Committee on Human Rights, *Reform of the Office of the Children's Commissioner: draft legislation*, HC 811, HL 83, p25

³⁵⁴ *Ibid.*, p4

³⁵⁵ *Ibid.*

Commissioner, having regard to other models for appointment and removal of independent office holders.”³⁵⁶

Commissioners in Devolved Authorities

The draft clauses include provision for the Children’s Commissioner for England to delegate the exercise of functions to the devolved Commissioners for Scotland, Wales, and Northern Ireland. This followed concerns in the Dunford Report that the UK-wide role of the Children’s Commissioner for England in respect of non-devolved matters compromised the ability of the Commissioners in the devolved administrations to respond to non-devolved issues raised by children within their jurisdiction. The Committee felt this was unnecessary, particularly in light of evidence given by each of the four Commissioners and said that the existing system, with a memorandum of understanding within the current legislative framework, was preferable to this reform:

In light of the unanimous view of the four commissioners, we are not persuaded that there is any evidence of a need to change the current arrangements concerning the relationship between the English Commissioner and the devolved Commissioners. We recommend that the draft clauses allowing the Children’s Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill. We also recommend that the four Commissioners consider whether the Memorandum of Understanding could be improved and make that document publicly available.³⁵⁷

6.7 Government response to the JCHR report

Definition of the Role of the Children’s Commissioner

The Government did not accept many of the Committee’s recommendations relating to the Commissioner and the UNCRC:

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

- firstly, defining children’s rights expressly by reference to the UNCRC would not be appropriate in my view given that that the UNCRC has not been directly incorporated into UK law. It is also the case that the UNCRC contains a mixture of rights and aspirations that are often imprecisely defined, and I believe this is another reason why the “must have regard to” formulation is a better approach.
- secondly, Article 41 of the UNCRC already recognises that where other rights exist in domestic law or international law applicable to that State, which afford children greater protection than the UNCRC, these should apply. I therefore do not believe that it is necessary or appropriate to define other rights specifically on the face of the Bill. In practice, this will give the Commissioner greater flexibility in how he or she interprets children’s rights and therefore greater flexibility in deciding on which particular issues to focus.³⁵⁸

Title

The Government also did not accept the Committee’s recommendation to include the term ‘young people’ in the Commissioner’s title:

³⁵⁶ Ibid., p5

³⁵⁷ Joint Committee on Human Rights, *Reform of the Office of the Children’s Commissioner: draft legislation*, HC 811, HL 83, p73

³⁵⁸ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540, p74

I recognise that some young people do not see themselves as children and that the Commissioners for Northern Ireland and Scotland include the term “young people” in their titles. At the same time, it has been pointed out to me that in some circumstances it is beneficial for under-18s to be classified as children – for example, where it is important that they are not treated the same as adults. This issue arose in particular in the context of the Commissioner’s inquiry into child sexual exploitation. It is also the case that Children’s Commissioner is the term generally used by the UN and internationally to describe the post. On balance, I am not persuaded that there are compelling arguments for making this change and therefore propose to leave the Commissioner’s title as it is. I know this decision is supported by the current Children’s Commissioner.³⁵⁹

Powers

The Government gave assurances that the Commissioner’s powers and remit would enable him or her to carry out all of the activities listed in paragraph 19 of UN General Comment No. 2., noting a small number of activities where, due to the terminology that the UN Committee uses, the Commissioner’s role would not be fully compliant: these were a mediation and conciliation role, the inspection of facilities responsible for the care of children, and to ensure that national economic policy makers take children’s rights into account in setting and evaluating national economic and development plans.³⁶⁰

In response to the Committee’s recommendation that the Commissioner’s remit should include the ability to initiate or intervene in legal proceedings, the Government stated that the Commissioner already had that power and had used it in previous instances, and that, particularly given the proposed change to the Commissioner’s primary function, the Commissioner would continue to have a sufficient interest in relation to any matters before the courts which relate to children’s rights. The Government therefore did not accept the need to give the Commissioner an explicit statutory power in this area, and raised concerns that if it did so, an expectation might arise that the Commissioner would take legal action on cases brought to his or her attention, and also that significant costs might arise from such a power.³⁶¹

The Government accepted the Committee’s recommendation that provisions that relate to the Commissioner’s ability to request information, and the requirements on public bodies to respond to the Commissioner’s recommendations, should apply to private providers delivering contracted-out services.³⁶²

Independence

The Government expressed its confidence that the Bill would give the Commissioner proper independence from Government. It noted that the power that currently enables the Secretary of State to direct the Commissioner to undertake an inquiry and the obligation on the Commissioner to consult the Secretary of State before he or she launches an inquiry, was being removed. The removal of the former power from the Secretary of State, the response stated, “makes it clear that any requests for advice from a Secretary of State would be at the discretion of the Commissioner.”³⁶³ The response also stated the Government’s belief that,

³⁵⁹ Ibid., p75

³⁶⁰ *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny*, Cm 8540, p75

³⁶¹ Ibid., p76

³⁶² Ibid.

³⁶³ Ibid., pp77-78

because of the legislation's existing provisions, there was no need to make a separate provision stating that the Commissioner's Office was independent.³⁶⁴

Annual Report and appointment and dismissal of a Commissioner

The Government's response indicated that an annual debate on children's issues in Parliament was for Parliament's Business Managers to decide, and so a commitment could not be given to hold one.³⁶⁵

On approval and dismissal of Commissioners, the Government's response welcomed the idea of Parliament becoming more involved in the appointment of a Commissioner, but stated that the final decision on appointment and dismissal should rest with the Secretary of State:

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

28 On dismissal, I believe that the existing provisions are appropriate. The specified circumstances in which the Secretary of State could dismiss the Commissioner represent a high threshold for dismissal. A dismissal would potentially be subject to legal challenge and a decision could be overturned if it were found to have been made for inappropriate or unjustified reasons. It is also the case that reasons for dismissal may be confidential and therefore it may not be appropriate for the reasons for dismissal to be disclosed.³⁶⁶

Commissioners in Devolved Authorities

The Government agreed with the Committee that the draft clauses allowing the Children's Commissioner for England to delegate the exercise of functions to the devolved Commissioners be left out of the Bill and stated that the provisions would be removed.³⁶⁷

6.8 The Bill

- **Clause 77** gives the Commissioner a statutory remit to 'promote and protect children's rights', provides that the Commissioner must have regard to the UNCRC and sets out revised powers for the Children's Commissioner, including to carry out investigations and assess the impact of policy on children's rights;
- **Schedule 5** makes minor and consequential amendments to the legislation relating to the Commissioner, including granting future Commissioners a single, six-year term of office.
- **Clauses 78 and 84** combine the functions of both the existing Office of the Children's Commissioner and the Office of the Children's Rights Director (currently located in

³⁶⁴ Ibid., p78

³⁶⁵ Ibid., p79

³⁶⁶ Ibid.

³⁶⁷ Ibid.

Ofsted, with a remit to advise on the rights and interests of children living away from home or receiving social care), within the Office of the Children's Commissioner;

- **Clause 79** gives the Commissioner an extended power to enter premises where children are accommodated or cared for, to interview children. This power does not extend to private dwellings;
- **Clause 80** broadly replicates an existing duty for people exercising public functions to provide information to the Commissioner as long as that request is lawful and reasonable;
- **Clause 81** imposes a new requirement on the Commissioner to appoint an advisory board to advise and assist the Commissioner;
- **Clause 82** imposes requirements on the Commissioner to consult on and publish a business plan;
- **Clause 83** requires Commissioner to produce an annual report on its activities and impact, to be laid before both Houses of Parliament rather than the Secretary of State, as current provision directs;
- **Clause 86 and Schedule 6** repeal the requirement to appoint a Children's Rights Director

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

6.9 Some initial reaction to the Bill

The Office of the Children's Commissioner for England [welcomed](#) the Bill but expressed concerns about some of the detail, and said it would write to the Bill Committee on these issues:

We wholeheartedly support the objectives of the Children and Families Bill but are concerned about some of the detail. Some measures proposed could be interpreted as overriding the principle that all decisions are to be made in the best interests of the child, and in general, there needs to be more emphasis on listening to children and young people's views. We will be writing to the Bill Committee with our concerns.

We welcome the proposal to strengthen the role and remit of the Office of the Children's Commissioner to both protect and promote children's rights and also to take on the functions of the Children's Rights Director in Ofsted. We very much hope that if this passes into law, we will be provided with 'reasonable financial provision' to do so, in accordance with the United Nations Convention of the Rights of the Child General Comment 2 (2002).³⁶⁸

7 Shared Parental Leave

7.1 Introduction

The provisions of the Bill that concern leave and pay related to pregnancy and childcare take forward proposals contained in the Government's response to the Modern Workplaces consultation.³⁶⁹ They would implement a system of shared parental leave and pay, whereby

³⁶⁸ Office of the Children's Commissioner for England, [Children's Commissioner comment on the Children and Families Bill](#), 5 February 2013

³⁶⁹ BIS, [Modern Workplaces Consultation - Government Response on Flexible Parental Leave](#), November 2012

a mother or “primary adopter”³⁷⁰ may bring their leave to an end and transfer to a shared leave and pay system, consisting of one week blocks that can be distributed between two parents.

7.2 The development of parental rights

The provisions would amend statutory rights that have changed many times over the past 40 years and have been criticised for their complexity. The first of these was the right to maternity leave, introduced by the *Employment Protection Act 1975* and re-enacted by the *Employment Protection (Consolidation) Act 1978*. The 1975 Act introduced a right to return to the same work for up to 29 weeks after childbirth for women who had been employed with the same employer for two years or more.

The *Employment Act 1980* introduced the right to paid time off for ante-natal care. The complexity of the statutory framework at that time led an Employment Appeal Tribunal to observe:

These statutory provisions are of inordinate complexity, exceeding the worst excesses of a taxing statute; we find that especially regrettable bearing in mind that they are regulating the everyday rights of ordinary employers and employees. We feel no confidence that, even with the assistance of detailed arguments from skilled advocates, we have now correctly understood them: it is difficult to see how an ordinary employer or employee is expected to do so.³⁷¹

The statutory rights to maternity leave and pay are two separate rights, governed by different legislative schemes. The provisions underpinning the system of maternity pay were introduced by the *Social Security Act 1989*, and later consolidated into the *Social Security Contributions and Benefits Act 1992*.

In October 1994, substantial changes were made to implement the EC *Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth*.³⁷² This Directive required that all women, regardless of length of service, were entitled to 14 weeks’ maternity leave, two of which must be compulsory. It also required that women must be paid “an adequate allowance” during this time, although the Directive permitted restriction of this entitlement to women with at least one year’s service.

The Directive was implemented by sections 23-25 of the *Trade Union Reform and Employment Rights Act 1993*, which covered maternity leave and by the *Maternity Allowance and Statutory Maternity Pay Regulations 1994*³⁷³ and the *Social Security Maternity Benefits and Statutory Sick Pay (Amendment) Regulations 1994*³⁷⁴ which dealt with maternity pay.³⁷⁵

Notwithstanding this remodelling of the statutory framework, the complexity of the legislation still attracted criticism. In 1995 an Employment Select Committee report described the system as “difficult for women and employers to understand and use” and recommended that

³⁷⁰ The two members of an adoptive couple may elect which of them is the “primary” and which is the “secondary” adopter. The primary adopter’s leave and pay rights resemble those of birth mothers. “Secondary” adopters are entitled to paternity leave and pay.

³⁷¹ *Lavery v Plessey Telecommunications Ltd* [1982] I.C.R. 373, 379

³⁷² Directive 92/85/EEC

³⁷³ SI 1994 No. 1230

³⁷⁴ SI 1994 No. 1367

³⁷⁵ For further information see: Lourie, J. *Fairness at Work*, House of Commons Library Research Paper 98/99, 17 November 1998

the Government “overhaul and simplify the system of maternity pay and maternity leave, to make it accessible and understandable to employers and employees alike”.³⁷⁶

Reform came by way of the *Employment Relations Act 1999*, the *Employment Act 2002* and later the *Work and Families Act 2006*. The *Employment Act 2002* also introduced a statutory entitlement to paternity leave and adoption leave, the details of which were provided in the *Paternity and Adoption Leave Regulations 2002*,³⁷⁷ which came into force on 8 December 2002. With the exception of maternity pay, the relevant legislation was consolidated into the *Employment Rights Act 1996*. Many of the maternity rights in the *Employment Rights Act 1996* also appear in regulations made under the *Employment Relations Act 1999*, principally the *Maternity and Parental Leave etc. Regulations 1999* (the *MPL Regulations*).³⁷⁸ The *MPL Regulations* gave effect to *EU Parental Leave Directive 96/34*³⁷⁹ and created a right to unpaid parental leave.

7.3 Current statutory provisions for leave and pay related to pregnancy and childcare

The current law provides different rights for mothers, fathers and adopters. Each of these is addressed below.

Maternity leave and pay

The statutory right to maternity leave is set out in [Part 8, Chapter I](#) of the *Employment Rights Act 1996* and the *MPL Regulations 1999*.³⁸⁰ Maternity leave is a “day one” right in that all eligible employees are entitled to it irrespective of how long they have worked for their employer. There are three types of maternity leave:

- Ordinary Maternity Leave
- Compulsory Maternity Leave
- Additional Maternity Leave

In order to claim **Ordinary Maternity Leave**, the employee must, at least 15 weeks before the week the baby is due, notify her employer of:

- her pregnancy
- the expected week of childbirth; and
- the date on which she intends her ordinary maternity leave period to start³⁸¹

Ordinary Maternity Leave commences:

- on the date which the employee notifies her employer as being the date on which she intends it to start; or
- the first day, after the beginning of the fourth week before the expected week of childbirth, on which she is absent from work because of pregnancy; or

³⁷⁶ Employment Select Committee, *Mothers in employment* (first report of session 1994-95), HC 227

³⁷⁷ SI 2002 No. 2788

³⁷⁸ SI 1999 No. 3312

³⁷⁹ Council Directive 96/34/EC of 3 June 1996

³⁸⁰ SI 1999 No. 3312

³⁸¹ SI 1999 No. 3312, regulation 4

- the day following the day of childbirth³⁸²

Ordinary Maternity Leave lasts for 26 weeks from commencement or until the end of Compulsory Maternity Leave if later.

Compulsory Maternity Leave lasts for two weeks from the date of childbirth, except as regards factory workers, where it lasts for four weeks.³⁸³ During that period the employer must not permit the mother to work, on penalty of a fine not exceeding Level 1 on the standard scale (currently £200).³⁸⁴

Additional Maternity Leave commences on the day after the last day of Ordinary Maternity Leave, and lasts for 26 weeks.³⁸⁵ The distinction between Ordinary Maternity Leave and Additional Maternity Leave relates to the employee's right to return to the same job. If the employee returns to work during Ordinary Maternity Leave she is entitled to the same job, with the same terms and conditions. If she returns to work during Additional Maternity Leave she is entitled to return to the same job or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is appropriate for her to do in the circumstances.³⁸⁶

In order to qualify for **Statutory Maternity Pay** the worker must have worked for the same employer for 26 weeks as at the 15th week before the expected week of childbirth, earn £107 per week (or an average of £107 per week if the hours vary from week to week), notify her employer at least 28 days before she wants the payments to start and have given her employer proof that she is pregnant.³⁸⁷

Statutory Maternity Pay is paid for up to 39 weeks:

- for the first six weeks it is paid at a weekly rate of 90% of average weekly earnings ("the enhanced rate")
- for the next 33 weeks it is 90% of average weekly earnings or £135.45, whichever is lower ("the flat rate")

Maternity Allowance is available to individuals that do not qualify for Statutory Maternity Pay, for example, if the individual is self-employed. Maternity Allowance is paid for up to 39 weeks at the flat rate.³⁸⁸

Ante-natal leave and pay

[Sections 55-57](#) of the *ERA 1996* set out the right to paid time off for ante-natal care. Section 55 provides a right to time off for ante-natal care for an employee who is pregnant and has, on the advice of a registered medical practitioner, registered midwife or registered nurse, made an appointment to attend at any place for the purpose of receiving ante-natal care.

There is no minimum qualifying period of employment for this right. For all ante-natal appointments, apart from the first, the employee is not entitled to take time off to keep an appointment unless, if her employer requests her to do so, she produces for inspection:

³⁸² SI 1999 No. 3312, regulations 6-7

³⁸³ *Employment Rights Act 1996*, [section 72](#); *Public Health Act 1936*, [section 205](#)

³⁸⁴ *Criminal Justice Act 1982*, [section 37](#)

³⁸⁵ SI 1999 No. 3312, regulation 7(4)

³⁸⁶ SI 1999 No. 3312, regulation 18(2)

³⁸⁷ *The Social Security Contributions and Benefits Act 1992*, [section 35A](#)

³⁸⁸ *Ibid*, [section 35](#)

- a certificate from a registered medical practitioner, registered midwife or registered nurse stating that the employee is pregnant; and
- an appointment card or some other document showing that the appointment has been made

An employee who is permitted to take time off is entitled to be paid by her employer for the period of absence at the appropriate hourly rate.³⁸⁹

Paternity leave and pay

The statutory right to paternity leave is set out in [Chapter 3](#) of the *ERA 1996*, [Paternity and Adoption Leave Regulations 2002](#)³⁹⁰ and the [Additional Paternity Leave Regulations 2010](#).³⁹¹ Paternity leave is available to both males and females, provided the individual in question is parenting a child and is the partner of the mother or adopter. The rights to paternity leave apply to the member of an adopting couple who is not eligible for adoption leave and pay (ie not the “primary” adopter; see below). There are two types:

- Ordinary Paternity Leave
- Additional Paternity Leave

To qualify for **Ordinary Paternity Leave** an individual must have been employed with the same employer for not less than 26 weeks as at the end of the 15th week before the expected week of the child’s birth.³⁹² The individual must have or expect to have:

- if he is the child’s father, responsibility for the upbringing of the child
- if he or she is the mother’s or primary adopter’s husband or partner but not the child’s father, the main responsibility (apart from any responsibility of the mother) for the upbringing of the child

Those eligible for Ordinary Paternity Leave are entitled to be absent from work for one or two weeks. The two weeks must be taken together and must be within the first 56 days of the child’s arrival.

In order for the individual to qualify for **Additional Paternity Leave**, his or her partner must have started working again and have been eligible to receive either:

- Statutory Maternity Leave
- Statutory Maternity Pay
- Maternity Allowance
- Statutory Adoption Leave or Pay

Unlike Ordinary Paternity Leave, individuals wishing to take Additional Paternity Leave need only to have been with their employer for one week prior to taking the leave. Those eligible for Additional Paternity Leave may take up to 26 weeks of leave, which can only be taken

³⁸⁹ *Employment Rights Act 1996*, [section 56](#)

³⁹⁰ SI 2002 No. 2788

³⁹¹ SI 2010 No. 0000

³⁹² SI 2002 No. 2788, [regulation 4](#)

from 20 weeks after the child's arrival and only if the mother/primary adopter has returned to work.

There are two types of **paternity pay**:

- Ordinary Statutory Paternity Pay
- Additional Statutory Paternity Pay

Both are paid at the flat rate.

In order to qualify for **Ordinary Statutory Paternity Pay** the individual must earn at least £107 per week and qualify for Ordinary Paternity Leave. Ordinary Statutory Paternity Pay is payable for one or two consecutive weeks, during the period of Ordinary Paternity Leave.

Additional Statutory Paternity Pay is paid during the period of Additional Paternity Leave, and only during the period of the partner's 39-week Maternity Allowance, Statutory Maternity Pay or Statutory Adoption Pay.

Parental leave

An employee who has, or expects to have responsibility for a child is entitled to take unpaid parental leave for the purpose of caring for the child, provided that employee has one year's continuous service with their current employer.³⁹³ The entitlement is for 13 week's leave, up to the child's fifth birthday. This is due to increase to 18 weeks from 8 March 2013, in order to implement EU *Parental Leave Directive 2010*.³⁹⁴ For each child that qualifies for Disability Living Allowance, the entitlement is already for 18 week's leave.

Adoption leave and pay

There are different provisions for adoption leave and pay in respect of "primary" and "secondary" adopters, similar to the differences between maternity leave/pay and paternity leave/pay. Only the primary adopter of an adopting couple is entitled to full adoption leave and pay. The couple is entitled to decide who this is. The secondary adopter's entitlement to leave and pay is covered by the provisions for paternity leave and pay (see above).

The primary adopter's entitlement to leave mirrors the provisions of Ordinary and Additional Maternity Leave; eligible employees can take up to 52 weeks' leave, divided into 26 weeks of Ordinary Adoption Leave and 26 weeks of Additional Adoption Leave.³⁹⁵

Statutory Adoption Pay for the primary adopter differs from Statutory Maternity Pay in one important respect; primary adopters are paid the flat rate for up to 39 weeks of adoption leave; thus, unlike maternity pay, there is currently no entitlement for a higher rate during the first six weeks.

To qualify for adoption leave and pay, employees must have worked continuously for their employer for 26 weeks, have been matched with a child by an adoption agency and have agreed the date for the child's placement.³⁹⁶

³⁹³ SI 1999 No. 3312, [regulation 13](#)

³⁹⁴ Council Directive 2010/18/EU of 8 March 2010

³⁹⁵ *Employment Rights Act 1996*, [sections 75A-75B](#); *Paternity and Adoption Leave Regulations 2002*, Part 3

³⁹⁶ SI 2002 No. 2788, [regulation 15](#)

7.4 The Government's proposals for reform

The Coalition Agreement set out the Government's intention to promote a system of flexible parental leave "to encourage shared parenting from the earliest stages of pregnancy".³⁹⁷

The Deputy Prime Minister, Nick Clegg, outlined the Government's plans in a [speech](#) on 17 January 2011:³⁹⁸

... in the coming weeks we will be launching a consultation on a new properly flexible system of shared parental leave that we aim to introduce in 2015 ...

We want to create an environment that encourages parents and their employers to discuss leave plans openly and constructively. And we want to help businesses keep the staff that they have invested in. But I want to make clear that these reforms are a priority of mine, and of the Prime Minister's. We don't have a final, fixed view on the precise details of the new system. But we do know the principles we want it to embody.

One: any new arrangement must absolutely maintain women's guaranteed right to time off in the first months after birth, paid as it is now; and we must protect the rights of lone mothers.

Two: the reforms must transform the opportunities for fathers to take time off to care for their children.

Three: it must be possible for mother and fathers to share part of their leave, splitting it between them, in whatever way suits them best.

Four: the new system must take into account the needs of employers and it must be simple to administer.

There are a number of ideas on the table. For example, we're looking at how we can keep mothers' existing rights following the birth, as well as fathers' existing two week entitlement, but then, beyond that, share the overall allowance between parents - pay as well as leave.

And share it in a whole range of ways. So both parents could, say, be off at the same time if they wanted to be. And leave could - in agreement with employers - be taken in a number of chunks rather than a single block.³⁹⁹

The comments were broadly welcomed by business representatives and trade unions, although the Confederation of British Industry (CBI) voiced concerns that any system of flexible leave would need to take account of the need for companies to plan ahead and stated that it favoured parents taking bigger blocks of leave at a time.⁴⁰⁰

The Government consulted on the implementation of flexible parental leave as part of the Modern Workplaces consultation, which ran from 16 May to 8 August 2011. The consultation document detailed the Government's view that reforming the current system of parental leave would benefit both employers and families:

³⁹⁷ HM Government, *The Coalition: our programme for government*, May 2010, p20

³⁹⁸ [Speech by Rt.Hon. Nick Clegg MP](#), Cabinet Office website, 17 January 2011 (accessed 8 January 2013)

³⁹⁹ *Ibid*

⁴⁰⁰ Trades Union Congress, *Parents, not government, should decide who looks after their baby*, 17 January 2011 (accessed 8 January 2013); CBI, *CBI comments on government shared parental leave proposals*, CBI website, 17 January 2011 (accessed 8 January 2013)

By increasing the flexibility of how parental leave can be taken, we will give parents the freedom to make arrangements that suit their families and allow a balance between work and family commitments, while also meeting their responsibilities to their employers. By enabling employers and employees to negotiate how leave is taken (e.g. part-time, full-time, discrete periods), we are also increasing flexibility for business and getting the state out of the way of deciding arrangements that best suit any particular employer and employee. Sharing parental leave in a balanced way between mothers and fathers will enable and encourage both parents to take control of their childcare responsibilities; and will give them greater choice over their family arrangements.⁴⁰¹

It also highlighted specific problems with the current arrangements, particularly the rigid requirement that leave must be taken in large blocks and the imbalance between the entitlements of mothers and fathers.⁴⁰² The document referred to research into the beneficial effects of encouraging fathers to participate in early childcare:

There is strong evidence of the benefits of shared parenting and in particular that fathers who are engaged in caring for their children early on are more likely to stay involved. This involvement has been shown to have a range of positive effects, including better peer relationships, fewer behavioural problems, lower criminality, higher educational and occupational mobility, higher self-esteem and higher educational outcomes at age 20. A growing number of fathers say they want to spend more time with their children, but that they are discouraged by the existing system.⁴⁰³

The Government's view that the extended period of maternity leave is inflexible and disproportionately favours mothers is informed in part by the difficulties employers face in managing staff absence, and in part by its consequences for workplace equality. The consultation document noted that employers concerned by the current extended period of maternity leave may discriminate against women during the recruitment process, and that it may also exacerbate the gender pay gap. The Government argues that implementing a system of shared leave could ameliorate this inequality:

The pay gap between men's and women's median earnings is 10.2 per cent, and much of this is associated with women taking time out of the workplace to care for children. If childcare responsibility is shared more equally between mothers and fathers, maternal employment and earnings may therefore increase, enabling businesses to maximise the pool from which they recruit and to retain skilled employees.⁴⁰⁴

This relationship between parental leave and workplace inequality was noted in a [debate about gender discrimination](#), prior to the publication of the consultation, on 27 January 2011, when the then Minister for Women and Equalities, Theresa May, stated:

The introduction of flexible parental leave will do two important things. First, it will give families the choice to decide which parent stays at home to look after the child in the early stages, beyond a period that will be restricted for the mother only. Secondly, it means that, in future, employers will not know whether it will be the male or the female in front of them seeking employment who will take time off to look after a baby. I think that is an important step in dealing with discrimination.⁴⁰⁵

⁴⁰¹ BIS, [Consultation on Modern Workplaces](#), 16 May 2011, p2

⁴⁰² *Ibid*, p14

⁴⁰³ *Ibid*

⁴⁰⁴ *Ibid*, p15

⁴⁰⁵ [HC Deb 27 January 2011, c444](#); see also [HC Deb 8 June 2011, c193](#)

The consultation document stated that, in designing the new scheme, the Government sought to embed the following values, which broadly reflect the principles enumerated by Mr Clegg in his January 2011 speech:

Protection: to continue the long held principle of protection for pregnant women and mothers in the period immediately before and after childbirth;

Flexibility: to increase flexibility for both employers and employees while protecting fairness in order to give choice in how employment and caring is balanced;

Simplicity: to keep any system as straightforward as possible for both parents and employers to access and manage; and

Responsibility and fairness: to create a system that is more fairly balanced between men and women and that provides a basis for responsible negotiation of parental leave between employers and working parents.⁴⁰⁶

The Government's response to the Modern Workplaces consultation set out the Government's proposals for the scheme:

Flexible parental leave and pay

- flexible parental leave and pay would be introduced in 2015
- 52 weeks of maternity leave and 39 weeks of maternity pay would be retained as the default position, but mothers could end this, or commit to end it at a future date, and share the unused balance of maternity leave and pay
- flexible parental leave could be taken by the mother and partner either consecutively, non-consecutively or concurrently, although the total amount of leave could not exceed what is jointly available
- flexible parental leave would be available in one-week blocks

Paternity leave and pay

- the system of flexible parental leave and pay would operate alongside the current arrangements for paternity leave and pay; this would retain a period of leave reserved for fathers during the first 56 days of the child's arrival
- a new right for fathers/partners to take unpaid time off work to attend up to two ante-natal appointments

Parental leave

- unpaid parental leave would be extended from 13 to 18 weeks from March 2013
- the age limit of children in respect of which parental leave could be taken would be increased from five to 18 years, providing each parent with the right to up to 18 weeks' unpaid leave for each child under 18

Adoption and surrogacy

- statutory adoption leave would be brought into line with maternity leave by removing the qualifying period

⁴⁰⁶ BIS, *Consultation on Modern Workplaces*, 16 May 2011, p17

- statutory adoption pay for the primary adopter would be paid at the enhanced rate of 90% of the primary adopter's salary for the first six weeks, thereby mirroring the arrangements for statutory maternity pay
- couples who adopt would also be entitled to flexible parental leave and pay
- intended parents of a child born through surrogacy would be eligible for statutory adoption leave and pay, flexible parental leave and unpaid time off to attend two ante-natal appointments⁴⁰⁷

Commenting on the proposals, Mr Clegg said:

I can announce today that, from 2015, the UK will shift to an entirely new system of flexible parental leave. Under the new rules, a mother will be able to trigger flexible leave at any point, if and when she feels ready. That means that whatever time is left to run on her original year can be taken by her partner instead. Or they can chop up the remaining time between them – taking it in turns. Or they can take time off together – whatever suits them. The only rule is that no more than 12 months can be taken in total, with no more than 9 months at guaranteed pay. And, of course, couples will need to be open with their employers, giving them proper notice.

I had originally been very attracted to a period of time reserved, specifically, for fathers. The international evidence shows, overwhelmingly, that these so-called 'use-it-or-lose-it-blocks' of paternity leave drive take-up. So we looked at extending paternity leave – that's the two weeks fathers get, guaranteed, after the birth. Any extension would, of course, have to be in addition to the total time parents already get, otherwise you'd end up taking time away from mothers – which wouldn't be right. But, both within Government and among business, there has been real concern over the cost of doing that now. So I've accepted that extending paternity leave should be revisited when the economy is in a stronger state.

These are major reforms and, at a time of continuing economic difficulty, it's sensible to do them in a number of steps rather than one giant leap. More and more men are taking on childcare duties – or want to – and flexible leave builds on that.

The next stage will be assessing if couples are using this new freedom. So flexible leave will be reviewed in its first few years, by 2018, and extending paternity leave will be looked at as part of that.

I can however confirm that we are going to create a new legal right for men to take unpaid leave in order to attend two antenatal appointments, so that they can be more involved from the earliest stages of pregnancy. Lots of fathers will tell you that these moments are when it can start to feel real for them. Whether that's at the 12 week scan – the first time they see their child on a screen - or a bit further down the track, when they can find out if they're having a girl or a boy. This new right means no father will ever need to miss out.

I can also announce today that parents who adopt their children will be eligible for the new flexible parental leave. They will have equal rights to biological parents. That will end a couple of big discrepancies which currently exist. Right now, if a couple are adopting a baby, they can only take their equivalent of maternity and paternity leave if they've been in a job for 6 months. If a couple are having a baby, they can take their leave no matter how long they've been in post. In the future, leave will be a day-one

⁴⁰⁷ BIS, *Modern Workplaces Consultation - Government Response on Flexible Parental Leave*, November 2012, pp5-8

right for all parents. And, at the moment, if a woman gives birth to a baby she gets the first six weeks at 90% of her pay. On average, if she's working full time, that's around £400 a week. However, if a woman, or man, adopts a baby that's capped at £135 a week. It's ridiculous that adopters should be financially worse off, so we'll make sure the primary adopter is guaranteed 90% of their salary too.

We expect around 4000 families to benefit from these changes each year.⁴⁰⁸

7.5 The Bill's provisions about leave, pay and ante-natal appointments

Statutory rights to leave and pay

Part 6 of the Bill (clauses 87-96) would enable reforms to the statutory rights to leave and pay related to pregnancy and childcare. The provisions of this Part would confer powers on the Secretary of State to make regulations which would underpin a new system of shared parental leave and statutory shared parental pay. The precise details of the new system will not be known until such regulations are published.

Clause 87 would enable the introduction of a system of shared parental leave by inserting a new Chapter 1B (sections 75E-75K) into Part 8 of the *ERA 1996*. The clause would enable the system of shared parental leave to be introduced by way of regulations. Section 75E deals with the entitlement of birth parents to shared parental leave, and confers powers on the Secretary of State to make regulations entitling employees to be absent from work for the purposes of caring for a child if they satisfy certain conditions. The section provides that the conditions may relate to a number of requirements which are detailed in section 75E(1)-(5).

Section 75F would provide for the making of regulations to determine the amount of leave available to the employee. It would allow leave to be taken more flexibly than in one single continuous block. Regulations enacted under this section would provide the mechanism for calculating the amount of available shared leave by reference to the amount of leave the employee and/or the employee's partner has used. It provides that regulations may entitle an employer to require the shared leave to be used in one continuous block. Sections 75G-H deal with the same matters in relation to adoption. Section 75I-J would enable regulations to specify the rights and responsibilities of employees whilst on, and after, shared parental leave. The effect of this is that the regulations may determine the employee's entitlement to return to work on the same terms and conditions, as well as their rights in relation to redundancy and dismissal whilst on leave. Section 75K would allow for regulations to determine the evidence and notice an employee must give in order to be entitled to shared leave.

Clause 88 would provide for regulations to make provision to enable a birth mother or primary adopter to bring their maternity or adoption leave to an end. Thus, the Bill envisions that the default position is for mothers and primary adopters to retain their entitlement to maternity or adoption leave but, when they choose to bring this leave to an end, to switch over to shared parental leave.

Clause 89 would provide for the implementation, by way of regulations, of a system of statutory shared parental pay, available to biological and adoptive parents. It would insert a new Part 12ZC into the *Social Security Contributions and benefits Act 1992*, which would entitle the Secretary of State to make regulations to implement the system. These would provide that the statutory shared parental pay period cannot exceed the length of the maternity pay or adoption pay period (39 weeks). Thus, this clause envisions that statutory shared parental pay would operate in a similar way to Additional Paternity Pay (see above).

⁴⁰⁸ [Greater Equality for a Stronger Economy - speech by the Deputy Prime Minister](#), 13 November 2012

Section 171ZY would provide that statutory shared parental pay would be available at such fixed or earnings related weekly rate as may be prescribed by regulations.

Clause 90 would amend the *Social Security Contributions and Benefits Act 1992* to enable the system of statutory shared parental pay to operate in relation to maternity pay, maternity allowance and adoption pay. It would allow for regulations to reduce the periods of such pay where statutory shared parental pay has been paid, thereby avoiding an overlap of statutory entitlements.

Clause 91 would support the changes which would be made by Part 1 of the Bill. It would enable rights to paternity pay and adoption pay to apply to approved adopters who have looked after children placed with them as part of the fostering to adopt or concurrent planning process.

Clause 92 would create a new right for intended parents in surrogacy arrangements to be entitled to adoption leave and pay, paternity leave and pay and shared parental leave.

Clause 93 would amend the existing provisions for paternity pay, allowing the Secretary of State to set the number of weeks of paternity pay, subject to a minimum of two weeks.

Clause 94 would bring statutory adoption pay into line with statutory maternity pay. Currently, statutory maternity pay is paid at the enhanced rate of 90% of gross weekly earnings for the first six weeks, whereas the first six weeks of adoption pay is paid at the flat rate. Clause 94 would change this so that statutory adoption pay would be paid at the same rate as statutory maternity pay for the entire period of pay.

Clause 95 would abolish additional paternity leave and additional statutory paternity pay, as these would be replaced by shared parental leave.

Clause 96 would make consequential amendments.

Time off work: ante-natal care etc

Part 7 of the Bill would give parents greater rights to attend ante-natal appointments. **Clause 97** would create a new right for an employee to take paid time off work to accompany a pregnant woman to an ante-natal appointment made on the advice of a designated healthcare professional (the current law restricts the right to take time-off for ante-natal appointments to pregnant mothers). This new right would be available to husbands, civil partners, the biological parent of the expected child and intended parents in a surrogacy situation. The right would also be available to agency workers (also see **clause 99**, which would provide that agency workers have the right not to be subjected to detriment for exercising or seeking to exercise the right).

Clause 98 would insert new sections into Part 6 of the *ERA 1996* which would make provision for adoptive couples or employed single adopters to take time off work to attend appointments related to the placement of a looked after child, to enable the adopters to bond with the child and meet professionals involved with the child's care.

Clause 100 would provide that, if an employment tribunal found that a pregnant employee or agency worker had been unreasonably refused paid leave to attend an ante-natal appointment, the tribunal could award that person twice their hourly salary for the period they were absent to attend the appointment.

7.6 Comment

Responses to the proposals were mixed. Concerns about the impact on small firms were matched by broad support from family welfare charities.

Katja Hall, CBI chief policy director said that shared parental leave could be “a win-win for employers and employees”, but stated that for the benefits to be felt the system must be simple to administer, especially for small firms.⁴⁰⁹

The *Telegraph* reported comments from Simon Walker, director general of the Institute of Directors, who said that the system would inevitably increase uncertainty for employers, and that it may be difficult for businesses, particularly small ones, to manage the disruption.⁴¹⁰

The national chairman of the Federation of Small Businesses, John Walker, said that allowing parents to take blocks of maternity and paternity leave of as little as one week would place a disproportionate strain on small firms and would be complicated to administer.⁴¹¹

Helen Hargreaves, senior policy and research officer at the Chartered Institute of Payroll Professionals (CIPP), is reported as having said that the CIPP cautiously welcomed the proposal, although expressed concerns about the additional burdens it may place on organisations due to an increase in requests for leave.⁴¹²

The then general secretary of the Trades Union Congress, Brendan Barber, welcomed the proposal, stating that parents should be entitled to decide for themselves who looks after their baby in the first year, and pointed out that shared parental leave arrangements are already in place in other parts of Europe.⁴¹³

Sarah Jackson, chief executive of the charity Working Families, said that employers who allow flexible working would benefit from better retention rates, reduced absenteeism and motivated employees.⁴¹⁴ Ms Jackson stated that over time these changes would result in a change in attitude in the workplace, allow fathers to spend more time with their children, and would help to tackle discrimination in the workplace.⁴¹⁵

Anand Shukla, the chief executive of the Family and Parenting Institute, a charity that promotes family friendly policies, said the proposals would help parents balance their work and home life in a more modern way.⁴¹⁶

Some lawyers have criticised the proposals as being damaging for businesses, which they say would struggle to cover intermittent absences in view of the entitlement to alternate leave.⁴¹⁷ These concerns were echoed in a human resources briefing from the international law firm Eversheds, which also noted that employers would be waiting to see the administrative detail behind the scheme, and questioned how the proposal would affect enhanced (contractual) maternity pay offered by many employers.⁴¹⁸

⁴⁰⁹ CBI, [CBI responds to parental leave and flexible working reforms](#), 5 February 2013 (accessed 8 February 2013)

⁴¹⁰ ["Flexible working isn't practical for all firms, says CBI"](#), *The Telegraph* [online], 13 November 2012 (accessed 8 February 2013)

⁴¹¹ ["Flexible parental leave to give mothers 'real choice' over work-life balance"](#), *BBC News* [online], 13 November 2012 (accessed 8 February 2013).

⁴¹² ["Shared parental leave and extending the right to request flexible working"](#), *HR Bullets* [online], 5 February 2013 (accessed 8 February 2013)

⁴¹³ TUC, [Parents, not government, should decide who looks after their baby, says TUC](#), 17 January 2011 (accessed on 8 February 2013)

⁴¹⁴ ["Children and families bill to provide "greater balance" to work and home life"](#), *HR Magazine* [online], 05 February 2013 (accessed 8 February 2013)

⁴¹⁵ Ibid

⁴¹⁶ Ibid

⁴¹⁷ ["Flexible parental leave introduced"](#), *Payroll Word* [online], 6 February 2013 (accessed 8 February 2013)

⁴¹⁸ Eversheds, [UK HR ebrief - Where we are with family friendly rights](#), Eversheds website, 5 February 2013 (accessed 8 February 2013)

8 Flexible working

8.1 Introduction

The provisions contained in Part 8 of the Bill concern the right to request flexible working. They would extend this right to all employees. The statutory right to request flexible working entitles qualifying employees to apply to their employers for a change to their terms and conditions of employment relating to their hours, times or location of work. As currently framed, the right applies to limited categories of employees with parental or caring responsibilities, although since its inception additional categories have been added. Employers in receipt of an application must follow a statutory procedure in handling it and may only refuse it on grounds identified by statute.

8.2 The development of the right to request flexible working

Following a report by the Work and Parents Taskforce into flexible working, published on 20 November 2001, the right to request flexible working was introduced by [section 47](#) of the *Employment Act 2002*.⁴¹⁹ It inserted a new Part 8A into the *ERA 1996*, which came into effect on 6 April 2003 at the same time as associated regulations.⁴²⁰ The legislation initially gave the right to parents of children under six or disabled children under 18.

The scope of the law was widened by the [Work and Families Act 2006](#) so that applications for flexible working could be made for the purpose of caring for a person age 18 or over who fell within a description set by regulations.⁴²¹

A Department of Trade and Industry report noted in 2008 that the statutory right to request flexible working had led to an increase in the number of employees requesting a change to their working patterns:

Comparisons in the availability of flexible working arrangements between 2002 and 2005 reveal some dramatic changes. In 2002, 22 per cent of fathers claimed that part-time working was provided by their employer, 22 per cent had access to flexi-time and 20 per cent could work at home occasionally. By 2005 these figures had roughly doubled to 47, 54 and 39 per cent respectively.

Greater provision led to greater use. Whereas few worked part-time, the use of flexi-time trebled from 11 to 31 per cent and working at home doubled from 14 to 29 per cent ... in 2002 less than half the mothers took advantage of this provision compared with three-quarters of mothers in 2005 ... This growth in mothers' take-up of part-time opportunities may well indicate the effectiveness of the right to request flexible working introduced in 2003.⁴²²

On 6 November 2007, the Labour Government announced a review to “to determine how to extend the right to request flexible working, not just to the parents of younger children but to the parents of older children as well”.⁴²³ An independent review led by Imelda Walsh, the Director of Human Resources at J Sainsbury plc, reported on 15 May 2008, and recommended that the right be extended to those with parental responsibility for children

⁴¹⁹ Work and Parents Taskforce, *About Time: Flexible Working*, 20 November 2001; see European Industrial Relations Observatory, New rules on flexible working come into force, EIRO online (accessed 11 February 2013)

⁴²⁰ [The Flexible Working \(Eligibility, Complaints and Remedies\) Regulations 2002](#) SI 2002 No. 3236; [The Flexible Working \(Procedural Requirements\) Regulations 2002](#) SI 2002 No. 3207.

⁴²¹ [The Flexible Working \(Eligibility, Complaints and Remedies\) \(Amendment\) Regulations 2006](#) SI 2006 No. 3314 came into force on 6 April 2007. They amended the [Flexible Working \(Eligibility, Complaints and Remedies\) Regulations 2002](#) SI 2002 No. 3236 to cover employees who care for dependant adults.

⁴²² DTI, [Maternity and Paternity Rights and Benefits: Survey of employees 2005](#), March 2006, p7&61

⁴²³ [HC Deb 6 November 2007, c27](#)

under 17.⁴²⁴ The Walsh review also considered whether the right should be extended to all employees, but concluded that this was not the right approach. Instead, she stated that she would “encourage all employers, when looking at flexible working arrangements, to consider including all employees”.⁴²⁵ In 2008 the Government published a consultation on implementing the recommendations of the Walsh review.⁴²⁶ The Government’s response to the consultation was published in March 2009,⁴²⁷ and confirmed its intention to extend the right to those with parental responsibility for children under 17.⁴²⁸

The *Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2009*⁴²⁹ came into effect on 6 April 2009. They amended regulation 3A of the *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002*,⁴³⁰ extending the statutory entitlements to those with parental responsibility for children under 17.

On 30 September 2010 the Coalition Government announced plans to extend the right to request flexible working to all parents of children under the age of 18.⁴³¹ This was implemented by *the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010*,⁴³² which came into force on 6 April 2011.⁴³³

HC Library note SN1086, *Flexible Working*, 21 December 2011 provides further background.⁴³⁴

8.3 Current statutory provisions for flexible working

The statutory entitlement to flexible working is set out in [Part 8A](#) and [section 47E](#) of the *ERA 1996* as well as several regulations. The law provides that an employee who has been employed continuously for 26 weeks or more may apply in writing to his or her employer to require a change in hours, times or location (as between his home and a place of business of his employer) of work. The application may be made where the purpose of the change is to enable the employee to care for someone who, at the time of application, is a child under the age of 18 or an adult in need of care who is the applicant’s spouse, partner, civil partner, relative or lives at the same address as the applicant.⁴³⁵

The 2011 *Consultation on Modern Workplaces* provides some examples of flexible working:

Part-time: employees are contracted to work less than normal full-time hours.

Flexi-time: employees work a standard core time, but can vary your start, finish and break times each day within agreed limits.

⁴²⁴ Imelda Walsh, *Flexible working: A review of how to extend the right to request flexible working to parents of older children*, May 2008, p19

⁴²⁵ Ibid, p8

⁴²⁶ BERR, *Consultation on Implementing the Recommendations of Imelda Walsh’s Independent Review*, August 2008

⁴²⁷ BERR, *Extending the Right to Request Flexible Working to Parents of Older Children: Government Response to Consultation on Implementing the Recommendations of Imelda Walsh’s Independent Review*, March 2009

⁴²⁸ Ibid, p4; *HC Deb 17 December 2008*, c1095

⁴²⁹ SI 2009 No. 595

⁴³⁰ SI 2002 No. 3236

⁴³¹ BIS, *Family friendly working – next steps*, BIS website, 30 September 2010 (accessed on 8 February 2013)

⁴³² SI 2010 No. 2991

⁴³³ *Explanatory Memorandum to the Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2010*

⁴³⁴ Vincent Keter and Tim Jarrett, *Flexible Working*, House of Commons Library Standard Note SN/BT/1086, 21 December 2011

⁴³⁵ *Employment Rights Act 1996*, section 80F; SI 2002 No. 3236, regulations 3-4

Compressed hours: employees work their total number of contracted weekly hours in fewer than the usual number of working days each week by working longer individual days.

Homeworking: employees work all or part of their contracted hours from home.

Annualised hours: employees average out working time across the year so they work a set number of hours per year rather than per week. Normally, they are split into core hours that are worked each week and unallocated hours that can be used for peaks in demand.

Term-time working: employees' work follows school term patterns. They work as normal during term-time. During school holidays they do not go to work but are still employed.

Structured time off in lieu: employees work longer hours during busy periods and take an equivalent amount of time off (with pay) at a less busy time. There may be limits on the number of hours individuals can build up and when they can take time off.

Job-sharing: employees work part-time (which could be part-day, part-week or part-year) and share the duties and responsibilities of a full-time position with another worker.

Varied-hours working or time banking: prospective employees advertise which hours they are available to work for the day and employers employ them for short periods of time to manage specific pieces of work, such as covering a telephone help-line. For example, an individual might be employed between 6pm and 9pm on a Tuesday evening.⁴³⁶

Only one application may be made by an employee in any 12 month period. The employer must hold a meeting with the employee within 28 days of the application to discuss the request, and must notify the employee in writing of the outcome.⁴³⁷ There are only limited grounds on which an employer can refuse a request, namely:

- the burden of additional costs
- detrimental effect on ability to meet customer demand
- inability to re-organise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- insufficiency of work during the periods the employee proposes to work
- planned structural changes⁴³⁸

Should the application be refused, the employee has the right to appeal within 14 days.⁴³⁹ The employee is protected from being subjected to detriment by their employer for having

⁴³⁶ BIS, *Consultation on Modern Workplaces*, 2011, p31

⁴³⁷ *Flexible Working (Procedural Requirements) Regulations 2002*, regulation 3

⁴³⁸ *Employment Rights Act 1996*, section 80G

⁴³⁹ SI 2002 No. 3207, regulation 6

made an application.⁴⁴⁰ The employee may complain to an employment tribunal if the employer fails to comply with its duty to consider the application, or if the employer rejects the application on the basis of incorrect facts.⁴⁴¹ An employment tribunal which finds in favour of the applicant should make a declaration to that effect and may order a reconsideration of the application or award compensation.⁴⁴²

8.4 The Government's proposals for reform

As foreshadowed in the Coalition Agreement, on 30 September 2010 the Government announced plans to extend the right to request flexible working to all parents of children under the age of 18.⁴⁴³ As indicated above, this was implemented by secondary legislation laid before Parliament on 14 December 2010, which came into force on 6 April 2011.⁴⁴⁴

In a speech on 17 January 2011 the Deputy Prime Minister, Nick Clegg, articulated part of the rationale for extending the right to request flexible working:

...the Coalition Agreement commits us to a universal right to request flexible working. Extending flexible working beyond mothers and fathers is essential if we are to dispel the stigma many men, and some employers, still attach to it. By extending flexible leave, for example to grandparents, or close family friends, we hope to make it much more common – a cultural norm.⁴⁴⁵

The Government consulted on the proposed extension of the right as part of the Modern Workplaces consultation. The consultation document presented the Government's case for change:

Through the right to request flexible working, many parents and carers have already benefited from flexibility in balancing their personal and working lives. Extending this right and encouraging flexible working generally will give all employees the opportunity to contribute more widely to society, whether as carers, disabled people, volunteers, or simply as citizens. It will also help employers to recruit, motivate and retain their workforces, and so build successful businesses as well as increasing productivity. By responsibly negotiating working patterns that suit the needs of both parties, businesses can access a labour pool of experienced and skilled staff, who in turn will be able to find work that fits around their other commitments.⁴⁴⁶

It highlighted research undertaken by Industrial Relations Services which indicated wide support for flexible working amongst human resources professionals.⁴⁴⁷ That study, a survey of human resources practices in 162 organisations, found that approximately two-thirds of employers that had introduced flexible working during the recession had managed to cut costs and reduce job losses.⁴⁴⁸

Alongside identifying potentially beneficial effects for employers and employees, the consultation document noted that an extension of flexible working would support a number of the Government's other key policies, namely: welfare reform, tackling child poverty, closing the gender pay gap, supporting carers who provide unpaid support for friends or family,

⁴⁴⁰ *Employment Rights Act 1996*, section 47E(1)(b)

⁴⁴¹ *Employment Rights Act 1996*, section 80H

⁴⁴² *ERA 1996*, section 80I

⁴⁴³ See: HM Government, *The Coalition: our programme for government*, May 2010, p18

⁴⁴⁴ SI 2010 No. 2991; see above

⁴⁴⁵ [Speech by Rt.Hon. Nick Clegg MP](#), Cabinet Office website, 17 January 2011 (accessed 8 January 2013)

⁴⁴⁶ BIS, *Consultation on Modern Workplaces*, 16 May 2011, p2

⁴⁴⁷ *Ibid*, p33; IRS, *IRS flexible working survey 2010: take-up and employee requests*, 22 March 2010

⁴⁴⁸ ["Flexible working being used by one-fifth of employers to avoid job cuts, survey shows"](#), *Personnel Today* [online], 22 March 2010 (accessed 8 February 2013)

supporting older workers, facilitating shared parenting and supporting family and community cohesion.⁴⁴⁹ The extension is also in line with the Government's strategy to promote economic growth through a labour market that is flexible, effective and fair.⁴⁵⁰

The consultation document set out the Government's intention to:

- extend to all employees the statutory right to request flexible working
- reduce the administrative burden of considering such requests by replacing the statutory process for considering requests with a requirement that employers give "reasonable" consideration to requests
- introduce a statutory Code of Practice to provide guidance on what consideration is likely to meet the requirement of reasonableness
- leave unchanged the grounds on which a request can lawfully be refused
- retain the 26 week qualifying period for the statutory right
- consider the possibility of allowing for more than one flexible working request in any 12 month period, provided the employee states in their original request that they expect the change to last less than a year
- encourage more recruitment agencies to provide services in relation to part-time or varied-hours working⁴⁵¹

The Government's consultation response was published on 13 November 2012, and confirmed its intention to bring forward legislation to extend the right to request flexible working. The responses to the proposals were overwhelmingly positive.⁴⁵²

On the 13 November 2012 Mr Clegg summarised the Government's plan to legislate to extend the right to request flexible working:

Currently any parent with a child under 17, or under 18 if the child is disabled, can ask for more flexible working patterns. Compressed hours, flexi-time, working from home – that kind of thing. So can anyone caring for a close relative or someone within the home. But people don't always take advantage of it, and there can still be stigma attached – especially for fathers.

So, in the Coalition Agreement, we committed to extending this right to all employees. We've consulted on the best way to do that and we'll be changing the law as soon as parliamentary time allows, giving everyone this new right will help drive a culture shift in the workplace.

And it will be possible for other relatives, grandparents and even close family friends to change the way they work in order to help with childcare.

Employers will have a duty to consider all requests in a reasonable way – we'll publish guidance on that and we're working closely with business to get the detail right.

⁴⁴⁹ BIS, *Consultation on Modern Workplaces*, 16 May 2011, pp33-34

⁴⁵⁰ BIS, *Flexible, effective, fair: promoting economic growth through a strong and efficient labour market*, October 2011

⁴⁵¹ *Ibid*, pp36-44

⁴⁵² *Ibid*

Ultimately this change is good for business: firms will be able to retain their best staff and it's good for our economy. A modern workforce is a flexible workforce too.⁴⁵³

In a [Written Ministerial Statement](#), also on 13 November 2012, the Parliamentary Under-Secretary of State for Business, Innovation and Skills, Jo Swinson, indicated the Government's intention to implement the reforms by 2015:

We believe that flexible working will benefit employers as well; employers report that employees who work flexibly are more productive, less likely to take sick leave and more likely to stay with their employers. Additionally we have set out the intention to remove the existing statutory procedure for considering flexible working requests, which can be bureaucratic and costly, replacing it with a duty on employers to consider requests in a "reasonable manner". We will set out in a code of practice guidance for employers on how to consider requests and what we mean by "reasonable".

The Government intend to introduce legislation as soon as parliamentary time allows, in order to implement the reforms by 2015.⁴⁵⁴

8.5 The Bill's provisions about flexible working

Clause 101 would remove the requirement that employees must have parental or caring responsibilities. **Clause 102** deals with changes to the procedure which employers must follow when dealing with a flexible working request. Subsection (2) would amend section 80G of the *ERA 1996* to remove the requirement that employers follow a statutory procedure when dealing with a request. It would replace this with a duty that employers consider requests "in a reasonable manner". **Clause 103** would amend the rules which apply to the making of a complaint to an employment tribunal relating to a request for flexible working.

Clause 104 would require the Secretary of State to review sections 101-103 and set out the conclusions of this review in a report which must be published at intervals of no more than seven years. The purpose of the review would be to assess whether the objectives of the sections "could be achieved in a way that imposes less regulation".

8.6 Comment

Reaction to the proposals has been mixed. For example, *BBC News* reported that "unions welcomed the plans but small businesses warned of the cost". The report stated that Brendan Barber, the then general secretary of the Trades Union Congress, had said that too many businesses are reluctant to modernise working practices and that "the government is right to give them a nudge with this new universal right to request flexible working".⁴⁵⁵

The *Telegraph* reported comments from Dr Adam Marshall, director of policy at the British Chambers of Commerce (BCC), who said that the BCC supported the concept of flexible working, but that the proposal to extend the right could make it more difficult for employers to offer flexibility to employees who are parents or who have caring duties.⁴⁵⁶

⁴⁵³ [Greater Equality for a Stronger Economy - speech by the Deputy Prime Minister](#), 13 November 2012

⁴⁵⁴ [HC Deb 13 November 2012, c8WS](#)

⁴⁵⁵ [Flexible parental leave to give mothers 'real choice' over work-life balance](#), *BBC News* [online], 13 November 2012 (accessed 8 February 2013).

⁴⁵⁶ [Flexible working isn't practical for all firms, says CBI](#), the *Telegraph* [online], 13 November 2012 (accessed 8 February 2013)

More recently, CBI chief policy director, Katja Hall, stated that the Bill's extension of the right to request flexible working reflects practice in many workplaces, but that businesses "must retain the right to say no" to flexible working requests.⁴⁵⁷

Sarah Jackson, chief executive of the charity Working Families welcomed the Bill, and stated that Working Families' research indicates that flexible working brings performance gains, with employers who allow flexible working benefitting from better retention rates, reduced absenteeism and more loyal and motivated staff.⁴⁵⁸

⁴⁵⁷ CBI, [CBI responds to parental leave and flexible working reforms](#), CBI website, 5 February 2013 (accessed 8 February 2013)

⁴⁵⁸ [Working Families welcomes the publication of the Children and Families Bill](#), Working Families website, 5 February 2013 (accessed 8 February 2013)