Department for Education

Ministry of JUSTICE

Evidence Pack

Family Justice: Children and Families Bill 2013

This evidence pack pulls together the information that has informed the joint Departmental assessment of the impact of the provisions in Part 2 of the Children and Families Bill, including in relation to equalities. It is provided in support of Parliamentary scrutiny because formal regulatory impact assessments were not required in these areas of the Bill. Work continues to inform developing plans for implementation of the Bill provisions and the Departments would be pleased to receive any additional relevant evidence. Please contact: TheBillTeam.MAILBOX@education.gsi.gov.uk to make contact with the policy teams concerned.

March 2013

Evidence of Impact for the Children and Families Bill: Part 2 - Family Justice

The Family Justice Review was commissioned by the DfE, MOJ and Welsh Government in January 2010 to consider how the Family Justice System could better meet the needs of the children and families who come into contact with it. In November 2011 the review panel reported, making a number of recommendations to tackle many of the entrenched problems in the system. The Government responded in February 2012 and set in train a number of reforms to the system including legislative changes that will affect the way in which both public and private law cases are managed in the courts.

These legislative measures are designed to tackle a wide range of problems in the system. These problems include delays in concluding care and supervision cases and the fact that many disputes between separating parents are played out before the courts, with damaging consequences for children, when family mediation could help to secure better outcomes for families. As a result of the wide ranging nature of the family justice reforms, 6 individual economic impact assessments have been produced which outline specifically the rationale for the individual measures. These cover shared parenting, child arrangement orders, compulsory MIAMs, the 26 week time limit and changes to expert evidence. We have also produced Equalities Impact Statements for both the Public and Private Law changes.

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Further Discussion and Evidence for Specific Measures within Policy Area	
Policy Area	Family justice: experts
Specific Measures within Policy Area Appraised	*1.* Introduce primary legislation to allow expert evidence in family proceedings concerning children only when necessary to resolve the case, 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.

Appraisal of primary legislation on expert evidence

What are the problems that the measure addresses?

1. Expert evidence assists the court by providing advice on matters requiring specialist expertise outside the knowledge of the court. In family proceedings relating to children, experts may come from many different professions and disciplines including doctors, nurses, psychologists and independent social workers. Evidence suggests that expert evidence is commissioned in the vast majority of public law cases and cases in which more experts are instructed tend to take longer. A review of a sample of approximately 400 public law case files where an order was made in 2009 found, for example, that expert reports were commissioned in 87% of cases and in 74% of cases more than one expert was commissioned[1]. In these cases, the most common type of reports were adult psychiatric (35%

[1] Cassidy, D., and Davey, S. (2011). *Family Justice and Children's Proceedings – Review of Public and Private Law Case Files in England and Wales.* Ministry of Justice, London .

of cases), independent social workers (33%) and parent's psychological (33%)[2].

2. Whilst we cannot say that the increased use of experts necessarily causes delay in public law family cases, higher numbers of experts are associated with longer cases. In the case files reviewed public law family cases involving expert reports were longer on average than cases where no expert reports were requested. Cases with no expert reports lasted an average of 26 weeks, cases where between one and three expert reports were requested took an average of 50 weeks, cases where four to six expert reports were requested took an average of 52 weeks, and cases where seven or more expert reports were requested took an average of 65 weeks.[3]

3. These findings corroborated an earlier study of 362 care applications in 2004. This also found that cases with more expert reports were more likely to take longer; about 60% of cases where there were no experts or one expert took less than 6 months, whereas about 85% of cases that had three or more experts took over 18 months[4].

4. Evidence shows that delays can be damaging to children. The longer a child spends in temporary care arrangements, the more likely they are to form attachments to their carers, and the more distress they are likely to feel when they are moved to another temporary or permanent placement[5]. For the minority of children for whom adoption is the best outcome, evidence indicates that swift adoption can be beneficial. One study found that children who were adopted before their first birthday made attachments with carers that were just as secure as their non-adopted peers, but those who were adopted after their first birthday formed less

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[2] Cassidy, D., and Davey, S. (2011). *Ibid.*

[3] Cassidy, D., and Davey, S. (2011). *Ibid.*

[4] Masson et al. *Care profiling study* (2008) Ministry of Justice.

[5] Davies, C and Ward, H. (2011), *Safeguarding children across services; messages from research.* https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-RR164

secure attachments.[6] A research paper summarising the available evidence in this area also emphasised the impacts of maltreatment and delay on child development. [7]

5. In some cases expert reports are necessary and beneficial to the case. However, feedback received via the Family Justice Review call for evidence and consultation[8] suggested that in other cases expert reports are not adding value to the case and are increasing delays for children. The Family Justice Review made the following recommendations for legislative change in relation to experts:

    i). Primary legislation should reinforce that in commissioning an expert's report regard must be had to the impact of delay on the welfare of the child. It should also assert that expert testimony should be commissioned only where necessary to resolve the case.

    ii). The court should seek material from an expert witness only when that information is not available, and cannot properly be made available, from parties already involved.

6. The Family Justice Review focused on the impact of expert reports in public law proceedings. Public law family cases are those in which local authorities have concerns about the welfare of children, and where local authorities seek a determination from the court about whether children should be taken into local authority care. Evidence from a file review exercise[9] indicates that expert reports are ordered less frequently in private law proceedings concerning children (37% of cases, with an

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[6] V an den Dries, L., Juffer, F., Van IJzendoorn, M.H. and Bakermans-Kranenburg, M.J. (2009) 'Fostering

security? A meta-analysis of attachment in adopted children.' *Children and Youth Services Review 31*, 410–421.

[7] Childhood Wellbeing Research Centre (2012) 'Decision-Making Within a Child's Timeframe' http://www.cwrc.ac.uk/news/1091.html.

[8] See Family Justice Review Interim Report, March 2011, pp108-109

[9] Cassidy, D., and Davey, S. (2011). *Ibid.*

average of two reports in those cases). Private law children cases concern the making of arrangements for the future care of children (e.g. contact and residence). In private law proceedings relating to children, the most commonly requested reports were drug tests (10% of all private law cases), independent social worker (8% of all cases) and adult psychiatric reports (6% of all cases). Cases where at least one expert was requested were longer (at 65 weeks) than the average of 46 weeks. As with public law proceedings, we cannot say that increased use of experts necessarily causes delay in private law family cases concerning children.

7. The Family Justice Review provided no evidence that private law family cases concerning children face significant problems with unnecessary commissioning of expert reports or that expert reports are contributing to significant delays. Therefore we have not anticipated that this legislation will directly affect how experts are commissioned in private family law proceedings. This view is considered further in the risks and assumptions section of this assessment. Nevertheless, the Government considers that it is important that there is a consistent message across all family proceedings concerning children and that the impact on children is given sufficient weight in the decision making process. In addition, the Family Justice Review expressed concern about the effect of multiple assessments on children who are required to tell their stories again and again. The Government therefore intends that the primary legislation would apply to private law cases concerning children where permission must be sought for an expert to be instructed.

8. Expert reports themselves generate a significant direct expense for the legal aid fund and for local authorities. Lengthier cases involving more hearings can generate other additional costs for the legal aid fund if legal costs are higher. The cost of expert reports is usually split between all parties in the case. Parents and children involved in public law family cases are entitled to legal aid without a means or merit test[10] so their share of these costs is met by legal aid. Information on the exact cost of expert reports is not collected by the Legal Services Commission (LSC); payments to experts are recorded as disbursements along with other expenses such as travel. In 2011-12 about £62m was spent on disbursements in special Children Act 1989 cases (such as care and supervision cases) by the legal aid fund. Anecdotal evidence suggests that

[10] Civil legal aid is means and merits tested. It is only available to those who cannot afford it, or who have a case that has a reasonable chance of winning and is worth the money it will cost to fund it.

expenditure on experts accounts for a large proportion of LSC's overall disbursement spend across all categories of funding.

9. Local authorities are also party to public law cases and incur expenses for expert reports. In addition the costs of some assessments, such as residential assessments, are paid entirely by local authorities. Lengthier cases involving more hearings can generate other additional costs for local authorities including legal costs and care costs.

What is the policy measure and what is the rationale for its introduction?

10. The proposed legislation implements Family Justice Review recommendations that expert evidence should be commissioned only where necessary and with regard to the impact of delay on the welfare of the child. The intervention is necessary to improve welfare outcomes for children through quicker case resolution as well ensuring that resources are allocated to their most valuable activities. One intention is to achieve a better balance between the timeliness of court case decisions and the extent and nature of material commissioned to inform court case decisions.

11. The Government's intention is that the primary legislation will:

- Require the court's permission for an expert to be instructed or for expert evidence to be used;
- Require the court's permission for a child to be medically or psychiatrically examined or assessed for the purpose of obtaining expert evidence for use in the proceedings;
- Restrict expert evidence to that which is necessary to resolve the proceedings justly; and
- Require the court to consider a number of factors when determining whether to permit an expert to be instructed. These include the impact on the welfare of the child; the impact on timetable for the proceedings; what other expert evidence is available; and whether the information could be obtained from another person (such as one of the parties). This should ensure that expert reports are more tightly focussed on the issues at hand.

12. These requirements would apply to all family proceedings relating to children.

13. The Family Justice Review considered carefully whether primary legislation was necessary, following a range of views expressed during consultation, and concluded that it was for a number of reasons. These include that the proper use of expert witnesses is vital for the effective running of public law proceedings; the Family Procedure Rules and other guidance are too often ignored; primary legislation does not sufficiently address the use of expert witnesses and that amendments to primary legislation would more firmly drive a change of culture. The Government believes that a statement in primary legislation remains necessary to ensure a change in the culture, identified by the Review, of routine acceptance of the need for expert evidence. The judicious use of expert witness evidence is critical to the effective running of public law proceedings and yet the existing statutory framework (the Children Act 1989) contains no provisions on expert evidence[11]. The proposals should ensure parties come to court prepared to make a clear case about why expert evidence is needed, and give guidance to the courts about the circumstances in which they should refuse permission where expert evidence is requested.

14. While it has always been the Government's intention that there should be a statement on the use of experts in primary legislation, the Government considered that there was a pressing need to make progress to tackle delays in the system as soon as possible in order to prepare the ground for the introduction in primary legislation of a 26 week time limit on care and supervision proceedings. The Government therefore asked the Family Procedure Rule Committee to make early changes to secondary legislation (the Family Procedure Rules and associated Practice Directions) on experts in line with the Family Justice Review recommendations. These changes took effect on 31 January 2013.

What are the impacts of the measure and which groups of people does it affect?

[11] Other than in specific circumstances (when children are under interim care or supervision orders the court has the power to order assessments under Section 38 (6)).

15. The objective is to reduce the duration of public law proceedings without having an adverse impact on case outcomes. This is intended to reduce uncertainty for the children involved in these cases and increase the likelihood of them achieving a stable placement. We expect that this legislative change will lead to a reduction in the number of expert reports commissioned in public law family proceedings. However, expert reports will still be commissioned where the court considers that they are necessary to resolve the proceedings justly. We cannot therefore predict how many expert reports will no longer be commissioned.

16. The proposals may affect everyone involved in family justice, specifically the following groups:

- Parties involved in public law proceedings including families and children.
- HM Courts and Tribunals Service (HMCTS).
- The Judiciary.
- Local authorities.
- Cafcass (Children and Family Court Advisory and Support Service) and CAFCASS Cymru.
- The Legal Services Commission (LSC), which administers the legal aid fund.
- Legal professionals working in family justice.
- Experts commissioned in care proceedings. These experts come from a wide range of professions including social workers, psychiatrists, psychologists and medical professionals.
- Charities and other voluntary groups working in family justice.
- Other court users.

<u>Families and children</u>

17. Reducing the number of expert reports commissioned in public law cases is expected to lead to shorter cases, reducing uncertainties for the families and children involved and helping to reduce the negative welfare outcomes for children associated with spending a long time in transitional arrangements. If children experience multiple placements while proceedings are ongoing, this can cause distress in the short term and directly impact on a child's long term life chances by damaging the ability to form positive attachments. For some children it may improve the

likelihood of them finding a stable placement – the longer proceedings last, the older a child gets and the less likely it is that a child will find a secure and stable placement, particularly through adoption[12]. Case outcomes are assumed to remain the same, as is the degree of certainty and reassurance that these are the right outcomes.

HMCTS and the judiciary

18. HMCTS and the judiciary will incur some small familiarisation costs associated with the time taken to learn about the revised decision making process. These costs will also apply to local authorities, Cafcass/CAFCASS Cymru practitioners and legal professionals, for they must ensure they are familiar with the provisions in primary legislation and any supporting amendments to rules of court and guidance.

19. However, there are also likely to be benefits for HMCTS and the judiciary. Reducing the number of expert reports commissioned may reduce the number of hearings required in each case and therefore the resources required to process each case.

20. In terms of administrative staff time, we estimate that on average a public law case in the County Court requires about 16.5 hours of time to process[13]. An average salary for administrative court staff equates to approximately £260[14]. We do not have data about the administrative processes of the Family Proceedings Court, but we expect that administrative requirements are similar for those cases which are heard there. There are other HMCTS costs in addition to staff time which have not been quantified, e.g. other facilities costs.

21. There is also considerable judicial involvement in these cases. We do not have reliable estimates of the average amount of judicial time used in each case but a recent review of case files found that there was an average (mean) of 8.1 hearings in public law cases. In cases involving a care

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[12] Evidence taken from the interim report *Family Justice Review Interim Report* (2011) paragraphs 4.57 – 4.64

[13] The figure relates to cases that have started and concluded in the County Court. The majority of care and supervision cases will commence if the Family Proceedings Court (FPC) and then transfer to the County Court, so some of the administrative and judicial workload will be completed by FPC staff.

[14] This is based on an administrative salary of £21898, uprated by 25% for on-costs. Hourly figures are based on a working week of 37 hours, 47 weeks a year.

application there were an average of 8.8 hearings. In addition to the time spent in hearings, judges have to prepare for cases.

22. We do not collect data on the number of hearings scheduled to consider whether expert reports should be commissioned or to consider their assessment, and so we cannot estimate the time spent on these matters. However, anecdotal evidence suggests that reducing the number of reports would reduce the number of hearings required and would allow hearings to be scheduled more quickly because there would be no need to wait for experts to be appointed and complete their reports. This should reduce the amount of judicial and administrative resources required per case. This should still be the case if information which was previously provided by an expert is in future provided by other parties to the case.

23. It is not expected that overall court capacity or staffing numbers and infrastructure would be reduced or rationalised as a result of this policy and therefore the reduction in court capacity, including staff resources, would generate an efficiency benefit but not a financial saving. It is expected that the spare court capacity, including staff resources, generated by these reforms would be used to reduce delay in other cases.

24. There may be an increase in economic efficiency if the same outcomes in cases are achieved with fewer resources.

25. We assume that court fee levels per case will not change as a result of this proposal. HMCTS recover some court costs through fee income; in family cases HMCTS currently under-recover costs. Our assumption is that the proposals in this assessment would not lead to any changes to court fees; therefore any overall reduction in court costs per case would lead to an economic efficiency gain through improved cost recovery.

Experts

26. Experts may experience a fall in income as fewer reports may be commissioned and those that are commissioned may take less time. Therefore experts may experience a fall in workload. The impacts on them depend on the extent to which they can substitute to other work.

Legal professionals

27. A secondary impact of reducing the volume of experts is that legal professionals working in family justice may also experience a fall in workloads if the number of hearings and preparation associated with hearings can be reduced. The impacts on them depend on how they are paid and the extent to which they can substitute to other work.

Legal Services Commission

28. The LSC pays for the majority of the cost of expert reports in public law proceedings. A reduction in the number of these reports would therefore reduce costs for the legal aid fund. It is not possible to quantify this benefit because we cannot predict which expert reports would no longer be commissioned. As an illustration, if 10% of the costs of expert reports could be saved we might save approximately £5m per year. This is based on the assumption that expert costs are a large proportion of disbursement costs in care and supervision cases. In addition a reduction in claims for these reports should lead to an administrative time saving for the LSC, although we expect this to be minimal.

29. As explained above a reduction in the number of expert reports could lead to a reduction in the number of hearings. This may reduce the legal costs associated with public law cases. These legal costs are largely met by the LSC. Legal aid costs in public law cases are paid through a series of graduated fees. Hearing fees under the Family Advocates Scheme range from £75.83 to £286.16 depending on the court and the length of the hearing. An additional 25% may also be claimed if an expert has to be challenged in court. If the number of expert reports could be reduced it is possible that legal aid costs relating to lawyers could be reduced. However, as we do not collect information on the number of hearings connected to expert reports, we cannot accurately predict the impact on legal aid costs.

Cafcass/CAFCASS Cymru

30. In all care and supervision cases a Guardian will be appointed to represent the child. Guardians are always provided by Cafcass/CAFCASS Cymru, and may be Cafcass/CAFCASS Cymru employees or self-employed contractors. If there are fewer hearings in a case then each case would require less resource from Cafcass/CAFCASS Cymru in terms of the Guardian's time. It is not expected that staffing numbers would be reduced as a result of this policy and therefore the staff resource would be used in other ways to reduce delay in other cases. It is possible that information currently provided by experts might in future be provided by Cafcass/CAFCASS Cymru, which might have resource implications at the margin.

Local authorities

31. Local authorities are parties to all care and supervision cases. Local authority social workers attend court and spend time preparing for court. In addition, local authorities pay directly for a proportion of the cost of expert

reports, including the full cost of residential parenting assessments which are understood to be more expensive than other types of expert reports.

32. We expect the total number and the scope of expert reports to reduce as a result of this proposal. As with legal aid costs, this would mean reduced costs for local authorities. We do not know how much local authorities currently spend on expert assessments and we cannot accurately predict how many expert assessments might no longer be commissioned.

33. If the number of hearings was reduced then each case may require less resource from social workers. It is not expected that staffing numbers would be reduced as a result of this policy and any reduction in staff resources would generate an efficiency benefit but not a financial saving. It is expected that any spare staff resources would be used in other ways to reduce the duration of other cases. It is possible that information currently provided by experts might in future be provided by local authorities, which might have resource implications for local authorities.

34. In addition local authorities pay legal costs for bringing public law cases, both for their in-house legal staff and for barristers (if they are instructed). If there were fewer hearings and less work was required for each case on average, there could be resource savings here. As with HMCTS, Cafcass, CAFCASS Cymru and social workers, it is expected that any spare staff resources would be used to reduce delays in other cases. If less work was required from barristers this may result in lower costs for local authorities. Local authorities might also make savings in relation to their legal costs and care costs if cases are resolved more quickly with fewer hearings.

Non-legally aided parties in public law cases

35. Parents are entitled to legal aid in public law cases without a means or merits test. Other parties to these cases such as grandparents are only eligible to receive legal aid if they meet the legal aid means and merit tests. Some parties to the case may, therefore, pay their own legal costs or may represent themselves in court. If there were fewer hearings in future these legal and time costs could be lower.

Other impacts

36. It is possible that there may at least initially be an increase in appeals against case management decisions of the court to refuse requests for an expert to be instructed or expert evidence to be put to the court. Any increase in appeals would bring additional costs for HMCTS, local authorities, Cafcass/CAFCASS Cymru and the legal aid fund. However, we do not expect this to be significant.

Were any other measures considered and why were they not pursued?

37. We considered a 'do-nothing' option. Under this option, changes would be made only to secondary legislation (rules of court). While early changes to court rules were introduced in January 2013, the Government accepted the Family Justice Review's reasoning, as outlined in the rationale section above, that a strong statement was necessary in primary legislation to address a culture of routine reliance on expert reports.

Are there any key assumptions or risks?

38. A key assumption underpinning the expected impacts is that reducing the number of expert reports and focusing reports on the determinative issues will not generate an adverse impact on case outcomes in care and supervision proceedings (e.g. whether the order is granted or not), or on the quality of decision-making, nor on the certainty or reassurance associated with decisions that have been made, and nor on the perceived justice of the court process itself. However, it is possible that at least initially there may be more appeals against case management decisions where the court has refused a request for permission to instruct an expert or for expert evidence to be used in court, or where a court has sought to narrow down the issues on which an expert should focus.

39. The basis of this assumption is that the Family Justice Review panel concluded, on the basis of the evidence it received including following a full public consultation, that in some cases expert evidence has been sought when it has added little to the understanding of the court and the information could have been obtained from one of the parties, such as the local authority. Judges will retain discretion to permit experts to be instructed when necessary to resolve the case and therefore information that is integral to good quality decision making will remain available to the court. This should ensure that the interests of the child and the parents will be considered when the court is determining whether or not to permit expert evidence.

40. There is a risk that this assumption might not hold. If so then the costs of worse case outcomes could potentially be significant, and might affect children, their families, HMCTS, Cafcass, CAFCASS Cymru, local authorities and the LSC. This may be so even if outcomes were worse in relation only to a small number of individual cases rather than in relation to

the generality of cases. However, we consider that this risk is likely to be low because the welfare of the child and child's interests are taken into account when the courts make case management decisions about expert evidence. Furthermore, the welfare of the child is the paramount consideration when the court makes the final determination in a case concerning the upbringing of a child under the Children Act 1989. It is also possible that information currently provided by experts might in future be sought from Cafcass/CAFCASS Cymru.

41. There is anecdotal evidence that expert reports, particularly independent social worker reports, may sometimes be used to replace or replicate local authority assessments. If this is happening then restricting expert reports may lead to greater pressure for local authority social workers to enhance the quality of the evidence they offer or to be more consistent in meeting their current obligations to submit evidence to time. If so there is a risk that the reforms would generate increased costs for local authorities, and/or there is a risk that cases might be delayed if local authorities could not complete this work without requiring additional time.

42. When deciding whether to permit an expert to be instructed, the courts will need to undertake a balancing exercise which includes considering the impact of that decision on the overall timetable for the case. If local authorities are unable to complete the work within the court's timetable or to the court's requirements, there is a risk that an expert will still need to be commissioned, reducing the effectiveness of the measures designed to reduce the use of expert evidence.

43. However, action to support local authorities in their work on care proceedings is also under development via the Children's Improvement Board. The Department for Education are also facilitating discussions with the College of Social Work to ensure that court preparation and presentation skills become an integral part of initial and continuing social work training in England. Similar discussions are being facilitated by the Welsh Government with the Care Council for Wales, and being progressed through the Family Justice Network for Wales.

44. It has been assumed that court fees will remain unchanged. In all cases where court capacity including staff time might be saved, it has been assumed that the spare court capacity, including staff resources, would be re-deployed to reduce care duration in other cases and hence to generate benefits in other cases. As such an efficiency gain would be generated.

45. The evidence and concerns collected through the Family Justice Review relating to experts focused on problems arising in public law cases. The Family Justice Review provided no evidence to suggest that private law

family proceedings relating to children face equivalent issues with experts, including delays or unnecessary commissioning of expert evidence. Whilst the proposed changes will apply to these proceedings, it has been assumed that in such cases experts are currently being instructed in appropriate cases. Therefore a requirement on courts to commission expert evidence only when necessary to resolve the case should have no impact on private law proceedings.

46. There is a risk that this assumption might not hold. If private law cases displayed similar characteristics in this regard to public law family cases then similar types of impact might apply albeit to a lesser extent given the lower incidence of expert reports in private law cases. One difference is that in private law cases legal aid is not provided to all parents. Changes to the scope of legal aid funding which are due to take effect in 2013 may lead to more self-represented litigants in private law family cases. Self-represented litigants may be more or less likely to seek permission from the court to instruct an expert than represented litigants.

47. We have assumed that in future the costs of expert reports will be unchanged i.e. that experts will not increase their required rates in public law family cases as a result of any reduced demand for their work. The LSC applies codified hourly rates in relation to costs for the most commonly instructed types of expert.

48. We have assumed that expert costs represent a large proportion of the disbursement costs in legal aid cases.[15]

Policy Area of Bill	Family Justice: 26 week time limit
Summary of the measures in the policy area	
What are the problems that the measures address?	

[15] MoJ Internal Assumption

These measures are designed to reduce the duration of care and supervision cases and improve outcomes for children.

An application for a care or supervision order is made by a local authority when they consider that a child is suffering, or is likely to suffer significant harm if a care or supervision order is not made. This is referred to as the threshold criteria. When deciding whether to grant an order, the court will consider the views of the parties involved in the case before deciding whether the threshold criteria have been met and which order (if any) needs to be made.

By making a care order, the court gives the local authority the power to determine to what extent the parents can exercise their parental responsibility. This may mean that the child is placed with a foster family**.** The granting of a supervision order allows the LA to give the family a period of support.

A combination of factors has led to a steady increase in case durations. These include inefficient or overlapping processes, long-standing skill gaps and a lack of effective collaboration between the various agencies involved. As a result applications for care or supervision orders currently take an average of 47.7[16] weeks to be determined in the family courts.

This causes uncertainty for the children involved and may reduce the likelihood of them achieving a stable placement.

The changes take forward a number of recommendations from the Family Justice Review (FJR) which set out changes needed to improve children's and families' outcomes, as well as the efficiency of the operation of the family justice system. The FJR was undertaken in light of increasing pressures on the system and growing concerns that it was not delivering effectively for children and families.

The proposals have recently been through the pre-legislative scrutiny process by the Justice Select Committee and some amendments have been made based on their recommendations.

What are the measures and what is the rationale for their introduction?

The measures make several changes to the way public family law cases are processed in the court. These include:

- Putting into legislation a maximum time limit of 26 weeks for the completion of care and supervision proceedings.
- Removing the requirement to renew interim care orders (ICO) and interim supervision orders (ISO) after eight weeks and then every four

[16] July- September 2012 Court stats quarterly http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly July- September 2012

weeks. Courts will have the discretion to grant interim orders for the time they see fit although no ICO or ISO will be able to endure beyond the end of the proceedings themselves. Should an ICO or an ISO expire before the proceedings have been resolved, the court will be able to make a further order.

- Focusing the court, in its scrutiny of the care plan, on those issues which are essential to the court's decision as to whether an order should be made.
- Ensuring that when making decisions regarding the timetable for the case, decisions are child focused and made with explicit reference to the child's welfare.

The measures are collectively intended to ensure that resources are used more efficiently so that care and supervision cases are completed within 26 weeks with flexibility to extend beyond this if that is considered necessary to resolve proceedings justly.

What are the impacts of the measures and which groups of people do they affect?

These measures are designed to improve outcomes for children involved in care and supervision cases by reducing the delay which can be so damaging to children. They will also have an administrative impact on HMCTS, legal services commission, Cafcass (the Children and Family Court Advisory Support Service), CAFCASS Cymru and Local Authorities.

Improved Outcomes for Children

In 2011/12, 21,553 children were involved in applications for a care or supervision order, this corresponds to around 12,400 cases, based on a Ministry of Justice internal estimate of 1.8 children per case.

The latest data available (3rd quarter of 2012) shows that care and supervision applications took on average 47.7 weeks to be completed in the courts in England and Wales, down from an average of 56 week at the time of the Family Justice Review. During this period about 19% of these orders were completed within 26 weeks, 65% were completed in 52 weeks and 88% were completed in 78 weeks (these percentages are cumulative).[17]

The FJR reported evidence that lengthy care cases may:

- deny children a chance of a permanent home, particularly through

[17] http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly

adoption;

- can have harmful long term effects on a child's development
- expose children to more risk; and
- cause already damaged children distress and anxiety.

These legislative changes complement each other and are aimed at directly reducing these case durations.

HMCTS, Legal services Commission, Cafcass, CAFCASS Cymru and Local Authorities

Overall, we anticipate that these measures will lead to efficiency savings for LAs that will outweigh short terms costs, but it is hard to monetise these savings. We expect there to be some economic efficiency benefits in the way resources are being used. In particular the ICO/ISO measure should lead to resource savings in court and judicial time estimated over the ten year policy to be around £5.1m in the lower case, around £28.2m in the higher case and around £16.7m in the central case.[18]

In addition, we anticipate that by introducing the proposed measures to reduce case durations there should be fewer or shorter hearings per case. It logically follows that this reduction in hearings should also lead to fewer resources being used by per case by Cafcass, CAFCASS Cymru and Local Authorities. This could lead to a resource releasing effect as the resource savings from shorter cases are used to enhance inputs to other cases. It is, however, difficult to monetise the value of this saving.

There are some transitional costs involved for these measures. For LAs we expect that the cost of familiarisation could range between £9,800 (lower case scenario) and £63,000 (higher case scenario)

Were any other measures considered and why were they not pursued?

An alternative option considered during the early policy development did not require regulation, but instead considered using the publication of data on care case duration to encourage courts, in partnership with other relevant agencies, to reduce care duration. This option was dismissed for a number of reasons, including:

[18] For detailed calculations- see paragraph 36

- The data published on care duration refers to case averages and do not provide a clear framework within which cases should be delivered; and
- Previous changes to court rules and guidance have not succeeded in reducing the delays, nor prevented them from increasing. Adding a legislated expected time limit into legislation would, however, send a clear and unambiguous signal to all parts of the system that unnecessary delay is unacceptable.

The chosen policy measures have been developed in response to the Family Justice Review (FJR) which was commissioned by the **DfE, MOJ and Welsh Government in January 2010 to consider how the Family Justice System could better meet the needs of the children and families who come into contact with it. The review took into account views raised in the formal consultation and the call for evidence. We have also continued to consult with interested parties during the policy development process.**

Are there any key assumptions or risks?

We have assumed that delay in family cases is, at least in part, the result of inefficient use of court resources. However, it is likely that in some cases lengthy case duration is also caused by other parties linked to the case. For example, a local authority, Cafcass or CAFCASS Cymru may not be able to submit a report sufficiently quickly or to a sufficient standard for the court to make a determination. The new Family Justice Board has been tasked with improving performance in all the agencies and this will help lay the ground for the introduction of the time limit.

We have assumed that these proposals would not alter the decisions made by the court (i.e. whether an order is to be granted or not) or have any impact on the number of appeals. For example, on the scrutiny of the care plan, the legislative change seeks to ensure that courts retain their discretion to consider the detail of the care plan where, in individual cases, this is important to their decision on whether to grant an order or not. However it is possible that at least initially there may be more appeals against case management decisions.

We have assumed that the volume of cases will not change from the current trajectory. If cases did increase at a faster rate than at present, the system may struggle to cope with the proposed changes around a 26 week time limit

without further resources.

We have assumed that court fees will remain unchanged. In all cases where staff resources might be saved, it has been assumed that spare staff resources would be used to reduce delay in other cases and hence to generate benefits in other cases. As such, an efficiency gain would be generated.

At this stage we believe that in all four assumptions the risks are low.

Further Discussion and Evidence for Specific Measures within Policy Area	
Policy Area	*Family Justice: 26 weeks*
Specific Measures within Policy Area Appraised	2. Putting into legislation a maximum time limit of 26 weeks for the completion of care and supervision proceedings. *3.* Removing the requirement to renew ICOs /ISOs after eight weeks and then every four weeks 4. Focusing the court, in its scrutiny of the care plan, onto those issues which are essential to its decision on whether an order should be made. 5. Ensuring that when making decisions regarding the timetable for the case, decisions are child focused and made with explicit reference to the child's welfare.

Appraisal of – 1. Putting into legislation a time limit of 26 weeks for the completion of care and supervision proceedings.

What are the problems that the measure addresses?

1. The Family Justice Review (FJR) found evidence that the lengthy duration of care and supervision cases:

- may deny children a chance of a permanent home, particularly through adoption;
- can have harmful long term effects on a child's development;
- may expose children to more risk; and
- cause already damaged children distress and anxiety.

2. The longer a child spends in temporary care arrangements, the more likely they are to form attachments to their care givers, and the more distress they are likely to feel when they are moved to another temporary or permanent placement.[19]

3. For the minority of children for whom adoption is the best outcome, evidence indicates that swift adoption can be beneficial. One study found that children who were adopted before their first birthday made attachments with carers that were just as secure as their non-adopted peers, but those who were adopted after their first birthday formed less secure attachments. [20] A research paper summarising the available evidence in this area, and produced by the Childhood Wellbeing Research Centre (November 2012)[21] with DfE funding, also emphasised the impacts of maltreatment and delay on child development.

4. Delays in securing permanent arrangements for a child may cause lasting harm and deprive children of the best chance of securing love

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[19] Davies, C and Ward, H . (2011), *Safeguarding children across services; messages from research.* https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-RR164

[20] V an den Dries, L., Juffer, F., Van IJzendoorn, M.H. and Bakermans-Kranenburg, M.J. (2009) 'Fostering

security? A meta-analysis of attachment in adopted children.' *Children and Youth Services Review 31*, 410–421.

[21] Childhood Wellbeing Research Centre (2012) 'Decision-Making Within a Child's Timeframe' http://www.cwrc.ac.uk/news/1091.html.

and stability in a new family. A study of the case histories of 130 older looked after children for whom adoption had been identified as the best permanency option, concluded that: 'delay in decision making and action has an unacceptable price in terms of the reduction in children's life chances and the financial costs to local authorities, the emotional and financial burden later placed on adoptive families and future costs to society'.[22]

What is the policy measure and what is the rationale for its introduction?

5. This measure is to take a power in legislation to set a maximum time limit of 26 weeks for the completion of care and supervision cases in order to improve outcomes for children. This measure aims to send a clear and unambiguous signal to all parts of the system that long case duration is unacceptable. Changes to court rules, guidance and other initiatives have not succeeded in reducing the delays, nor prevented them from increasing. Setting a clear goal of this kind will provide the focus that is needed.

6. The 26 week time frame is derived from the FJR research on practices in other countries and, in particular, France and the United States where this is the time frame used there. In addition, it would be consistent with the time frames specified in existing care planning regulations and guidance.

7. We recognise that not all cases will be able to be completed within this timeframe. The court will therefore retain the discretion to extend the case beyond the time limit if that is considered necessary to resolve proceedings justly. We intend to invite the Family Procedure Rule Committee to set out the factors which might lead to an extension in secondary legislation. However, we remain clear that extensions should only be used in those cases where it is necessary to resolve the proceedings justly. Extensions should not be the norm.

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[22] Selwyn, J.; Sturgess, W.; Quinton, D. and Baxter, C. (2006) *Costs and outcomes of non-infant adoptions*, British Association for Adoption and Fostering.

8. Wider legislative reforms will also have an impact on the ability of the family justice system to reduce case duration in public law cases. These include:

    - The creation of a single family court; and
    - A reduction in the number of expert reports commissioned (Further information can be found in the 'Expert evidence in family proceedings concerning children' impact assessment).

9. These legislative provisions are only one part of the package of work that we, and partners in the system, are taking forward to reduce duration of care cases. This includes:

- The formation of the Family Justice Board (FJB) and the multi-agency Local Family Justice Boards (LFJBs) which have been set up to drive performance improvement across the system;
- Judicial work to develop new approaches to case management;
- The introduction of a new Case Monitoring System (CMS) which will enable cases to be tracked and the causes of delay to be addressed;
- Action to support local authorities in their work on care proceedings; and
- Discussions with the College of Social Work to strengthen CPD for social workers around court skills.

What are the impacts of the measure and which groups of people does it affect?

Children and Families

10. Children and families in care proceedings are expected to benefit through quicker decisions. We expect more timely decision making on their futures and therefore reduced periods of uncertainty. We also expect permanent placements to be found more swiftly for children, meaning stability for the child will be achieved earlier. There is an extensive research literature detailing the benefits of stability and the costs of delay on the welfare of children.

11. The swift securing of a permanent placement for a child has been found to lead to a better sense of wellbeing and improvements in overall life chances. Davies et al (2011) found that, delays –which lengthy public

law proceedings may contribute to - in securing permanent arrangements for a child may cause lasting harm and deprive children of the best chance of securing stability.[23] A research paper summarising the available evidence in this area, also emphasised the impacts of maltreatment and delay on child development.[24]

12. Selwyn et al (2005)[25] found that children with unstable placements have high levels of anxiety, depression and were often violent. Rubin et al (2007)[26] estimated that children with unstable placements have a 36 to 64 per cent increased risk of behavioural problems compared with children who achieved stability in foster care (see Chart 1). Related to this effect, a survey from the Office for National Statistics (2005)[27] suggests that an increased risk in behavioural problems is linked to an increased risk in conduct disorder, the most common type of diagnosable mental health problem amongst children and young people

13. The economic cost to society as a whole of poor mental health is high. Mental illness during childhood and adolescence results, according to the World Health Organisation, an estimated annual cost of £11,000 to £59,000 per child[28], depending on the ages included and conditions examined. This includes monetised costs relating to the health system, social services, the education system, the criminal justice system and voluntary services.

14. The study by the World Health Organisation also provides a picture of the overall burden. Costs accrued by the health system comprise only a very small proportion of the overall costs (an average across studies of

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[23] Davies, C and Ward, H. (2011), '*Safeguarding children across services, messages from research*' https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-RR164

[24] Childhood Wellbeing Research Centre (2012) 'Decision-Making Within a Child's Timeframe' http://www.cwrc.ac.uk/news/1091.html.

[25] Selwyn et al (2005), "Paved with Good Intentions: The Pathway to Adoption and the Costs of Delay", University of Bristol

[26] Rubin et al (2007), "The Impact of Placement Stability on Behavioural Wellbeing for Children in Foster Care", American Academy of Pediatrics

[27] ONS (2005), "Mental health of children and young people in Great Britain"

[28] World Health Organisation (2008), "Economic aspects of mental health in children and adolescents", WHO European Office for Investment for Health and Development

6.1%). A large part of the burden appears to fall on the education system (an average of 45% across studies). The criminal justice system also seems to carry a considerable economic burden, especially with respect to young offenders with mental health problems or children in foster care who have been previously abused or neglected. Only a very small share of the costs falls on voluntary services. Productivity costs were found to be the highest on average (55.5% on average between studies), but were only estimated in two studies, indicating that the other studies, which omitted this component, may be underestimating the overall economic burden.

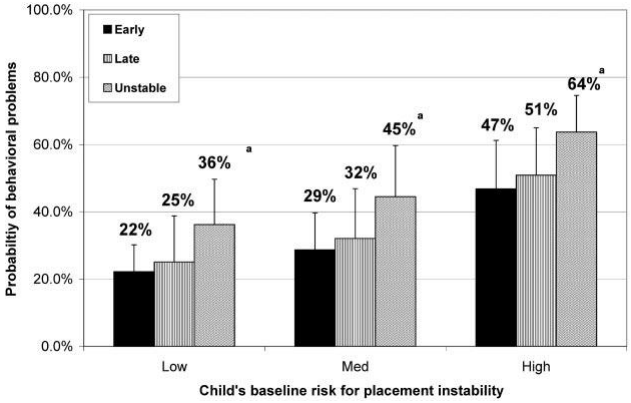

Chart 1 – Probability of behavioural problems at 18 months by child's placements stability; Source: Rubin et al (2007)

The analysis assumes that court case outcomes will remain the same as before, that the level of reassurance and certainty that these are the right outcomes remains unchanged, as does the level of fairness or justice which applies to the court processes themselves. As such it has been assumed that there will be no costs for children and families.

Potential Costs and benefits

HMCTS, Cafcass, CAFCASS Cymru and Local Authorities

15. In the short term, the proposal is expected to lead to one-off familiarisation costs as well as some additional resource costs for the agencies involved. Familiarisation costs relate to the time taken for these stakeholders to familiarise themselves with the proposed measure. Based on discussions with local authorities, we have estimated that there will be 1 FTE LA member of staff for each of the 174 LAs in England and Wales that would be engaged with the changes for between 0.5 - 2 days. Based on wage data from the ONS annual

survey of hourly earnings (ASHE)[29] and a 27% uplift to account for non-wage costs[30], this gives a one-off monetised cost of between £9,800 and £63,000. We do not have robust enough evidence to monetise such familiarisation costs borne by HMCTS, Cafcass and CAFCASS Cymru.

16. As case durations have come down (from an average of 56 weeks at the time of the FJR to the current average of 47.7 weeks) so have the average number of hearings per case. This creates an efficiency saving for HMCTS, LAs and Cafcass as fewer resources are required per case. We anticipate that with the introduction of the proposed measures this trend should continue and this could lead to a resource releasing effect as the resource savings from shorter cases are used to enhance inputs to other cases. It is, however, difficult to monetise the value of this saving.

17. Turning to the ongoing *additional resource costs*, it has been assumed that the same amount of work will be required per case and that new cases will be managed more efficiently, without extra case management resource being needed. It has also been assumed that cases currently under consideration will be managed in the same way as now. Assuming that in future the flow of care and supervision cases entering the court remains at current levels, as soon as the 26 week limit is introduced the combination of these two assumptions implies that additional resource would be needed in the short term in order to work through existing cases, many of which will already have been in the system for longer than 26 weeks. This has transitional resource implications for HMCTS, local authorities, Cafcass and CAFCASS Cymru. Each month a proportion of older cases within the system would continue to be completed. Until significant reductions in the older stock are achieved, there will be a period during which total resource demands could be higher than usual. This would diminish and then end once existing cases have worked their way through the system.

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[29] Office for National Statistics (2010), "Annual Survey of Hours and Earnings (ASHE)", http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-235202

18. We cannot quantify the amount of additional resources required during this transitional period because we cannot predict how many cases may be extended beyond 26 weeks, nor do we have information on the resources required to complete those cases already in the court or how these resources break down across different parts of the process as a case progresses. These issues will depend upon the precise cause of current long timescales in each case.

19. However, it is unlikely that additional staff would be recruited to meet them. Instead resources may have to be re-prioritised from other cases or other work to ensure that these cases are completed in a timely way. It is possible that the time taken to complete these other cases would increase which could have an impact on cases that have resources diverted from them to address these cases as well as potentially increasing the time taken for participants in those cases to receive a decision.

Legal Services Commission

20. In the case of the Legal Services Commission, as lawyers in public law cases are paid according to a series of set fees for activities such as hearings or preparing for court, we expect that the work involved in preparing for and attending court will remain the same as a result of the 26 week time limit. As above, it has been assumed that there will be no costs from legally aided lawyers undertaking the same amount of work to a quicker timescale.

Legal Professionals

21. Similarly, there may be some familiarisation cost to 2,400 private family law practices in England and Wales[31] to take account of what the time limit may imply for processes. We believe that these costs should be minimal.

22. As explained above, on an ongoing basis it has been assumed that legal services providers would undertake the same amount of work to the same standard but would do so more quickly, and that there would be no costs from these case management efficiencies.

[31] Source: Law Society (2010), http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=429572

Were any other measures considered and why were they not pursued?

23. See Page 2- summary sheet.

Are there any key assumptions or risks?

24. Although we have good qualitative evidence we do not at this stage have much quantitative evidence to underpin the evidence base for how we reduce the time limit to 26 weeks and what the impact of this on different players within the system. The research that has been undertaken and examined as part of FJR, as well as the qualitative evidence we received from all those involved in family justice system emphasised the importance of reducing case duration in care and supervision cases and the positive impact this can have on the most vulnerable children's lives. It has been assumed that court case outcomes will remain the same as before as will:

    - the level of reassurance and certainty that these are the right outcomes; and
    - the level of fairness or justice which applies to the court processes themselves.

    It has also been assumed that the same amount of work will be required in each case and that this work will be organised more efficiently in future so that case duration falls. It has been assumed that these case management efficiency improvements do not themselves require additional resources.

25. During the Justice Select Committee's call for evidence as part of PLS a number of respondents referred to the work already being established to help achieve the 26 week time limit in local areas. DfE and MoJ received similar submissions during our informal consultation on the draft Bill clauses.

26. For example, the Law Society stated "*The 26 week time limit is being brought into operation in many courts and it is proving possible to*

timetable certain cases within this period."[32] In particular, the Justice Select Committee received positive evidence from the London Tri-borough Care Proceedings Pilot Working together with the judiciary, the court services, Cafcass and other key stakeholders, the Tri-borough local authorities (Hammersmith and Fulham, Kensington and Chelsea, and Westminster) have begun a pilot project which aims to minimise unnecessary delay. This 12 month pilot began on 1st April 2012 and intends to track the progress of approx 100 cases. The target duration for Care Proceedings within the pilot is 26 weeks (the average duration for Care Proceedings during the year 2011/12 in these areas was between 50 and 60 weeks) and aims to halve the number of hearings per case from 8 to 4.

27. Results from September's 6 month interim report show promising findings with a number of the early cases meeting the target, though inevitably the most straightforward cases have completed first and more complex cases will raise the figure[33]. There is evidence of a change in patterns of behaviour within the court and associated agencies. Lessons from the Pilot are being disseminated to other London boroughs with some funding to support this provided via Capital Ambition, an organisation comprising representatives from the 33 London Boroughs.

28. An independent evaluation assessing benefits and impacts on outcomes for children will be commissioned and is expected to report its findings by the end of June 2013. This will include an analysis of savings over the 12 month period. The project anticipates a reduction in costs will follow from a reduced number of hearings.

Appraisal of 2 - Removing the requirement to renew ICOs /ISOs after eight weeks and then every four weeks

What are the problems that the measure addresses?

[32] Law Society submission on the Draft Family Law Legislation

[33] To date, six cases have completed in an average time of 14.2 weeks and with an average number of 3.7 hearings; a further 11 cases have final hearing dates set and if they are not postponed, will bring this figure to an average of 20.3 weeks with an average 4.4 hearings).

29. As with the previous measure this change is designed to reduce the duration of care and supervision cases and improve outcomes for children, by reducing the burden of having to renew ICOs and ISOs.

30. The current average length of time taken to complete an application is 47.7 weeks[34]. A case that lasts 56 weeks (the average at the time of the FJR) could require up to 12 renewals. In 2011/12, 21,553 children were involved in care and supervision applications. According to Cafcass, this translates into around 12,000 cases in England (there can be more than one child involved in a case) per year subject to renewals. We estimate that in the county courts in 2010 processing an ICO took about 45 minutes of administrative staff time and 10 minutes of judicial time.[35] Full details of the administrative costs of these renewals are detailed below.

What is the policy measure and what is the rationale for its introduction?

31. This measure removes the requirement to renew ICOs /ISOs after eight weeks and then every four weeks. Interim Care Orders (ICOs) and Interim Supervision Orders (ISOs) are used to place the child temporarily under the care or supervision of the local authority during care proceedings. Both have to be renewed initially after eight weeks and subsequently every four weeks.

32. The FJR found that the renewal process is rarely challenged by the parties and the process itself can lead to the removal of resources from courts and local authorities to deal with the application. It was therefore felt that we could remove the need for this process, thereby increasing efficiency, while still ensuring that the parties are able to appeal against an ICO being made.

What are the impacts of the measure and which groups of people does it affect?

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[34] 3rd quarter (July to Sept) 2012[34] http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-quarterly

[35] These figures are an average of all types of ICO renewal including those that require a hearing. These figures are taken from internal research.

33. Under this measure, courts will be able to set ICOs or ISOs orders which are in line with the timetable for the case (but are no longer than the time limit). Thus they would be renewed once in the 26 weeks and then (if extended) every two months, instead of every four weeks. This should release resources that could help reduce delay in public law cases. Even if the average time from application to order remains unchanged at just over a year this would imply that an ICO/ISO would be renewed four times on average.

Children and Families

34. We assume that this measure will contribute to the overall improvement of outcomes for children and families, yet it is difficult to monetise this benefit. Removing this requirement may reduce the workload in each case for judges and court staff. This time could be used to help progress cases quicker. If cases could be completed quicker it may reduce uncertainties for the families and children involved.

HMCTS

35. The proposals to reduce the requirement to renew ICOs/ISOs should reduce the workload required per case in court. HMCTS does not intend to reduce staffing levels as a result of these proposals so there would be no financial savings. Resource savings would be used to improve the processing of, and reduce delays in these and other cases.

36. We estimate that the discounted resource releasing savings to HMCTS from reducing the number of ICO/ ISO renewals to lie between £5.1m and £28.2m over the ten years of the policy. This is derived by multiplying the reduction in the number of ICOs/ISOs renewals [a] (between 132,000 and 24,000) [36] x working hours (10 minutes of judicial time to renew an ICO/ISO and 45 minutes of administrative court time) [b] x staff costs [c] (combined staff cost per ICO are estimated at £24.81)[37].

[36] a) approx. 12,000 cases per year are subject to renewals. Our scenario analysis is that ICOs/ ICOs are currently renewed between 6 and 12 times, so between 144,000 to 72,000 renewals per year. This should be reduced to 4 per annum under the new measure.

[37] Uplifted salaries of a court administrator are £16.70 per hours (£27,810 / 1,665 hours). The hourly cost of a court judge is £73.70 (£149,235 / 2025 hours). The administrator's time is valued at £12.53 (£16.70 x 45/60mins) and the 10mins working time for a court judge is valued at £12.28 (£73.70 x 10/60mins). Thus the combined staff cost per ICO are estimated at £24.81.

37. These calculations add up to non-discounted resource releasing savings of between £0.60m to £3.27 a year with a central case scenario of £1.94m, which is the mid-point between the lower and higher case estimates.

38. The equivalent discounted value of benefits over the ten year policy are £5.1m in the lower case, £28.2m in the higher case and £16.7m in the central case. These are not financial savings but instead take the form of resource savings. In particular, we do not expect staff numbers to be reduced as a result of this policy; instead we expect that court capacity would be used to reduce delays in these and other cases.

Cafcass, CAFCASS Cymru and Local Authorities

39. As a consequence of introducing the proposed measure there should be fewer or shorter hearings in a case meaning each case would require less resource. As we do not have any evidence to suggest that these stakeholders would reduce staff numbers as a result of this policy, we expect these resources to be used to enhance inputs to other cases.

Legal Aid Fund

40. There is no separate legal aid payment associated with ICO/ ISO renewals; however, it is possible that lawyers working on these cases spend some time working on ICO/ISO renewals as part of their work preparing for hearings. Therefore there may be some minor savings associated with reduced charges from solicitors if they were previously paid for work concerning ICO/ISO renewals.

Were any other measures considered and why were they not pursued?

41. See Page 2- Summary sheet

Are there any key assumptions or risks?

42. We have assumed that ICO/ ISO renewals are not challenged. Were they, in future, to be more regularly challenged then this policy would not contribute towards reducing the delay in cases. However, the parties' rights to ask for new evidence to be considered or for the renewal to be reviewed at any time would remain.

43. It has been assumed that court case outcomes will remain the same as before as will:

- the level of reassurance and certainty that these are the right outcomes ;and
- the level of fairness or justice which applies to the court processes themselves.

Appraisal of – 3. Focusing the court, in its scrutiny of the care plan, onto those issues which are essential to its decision on whether an order should be made

What are the problems that the measure addresses?

44. This measure addresses delays in care and supervision cases that are caused by unnecessary scrutiny of the care plans.

What is the policy measure and what is the rationale for its introduction?

45. The measure focuses the court, in its scrutiny of the care plan, onto those issues which are essential to its decision on whether an order should be made. Evidence offered to the FJR, including during its own consultations, indicated that the courts are spending increasing amounts of time scrutinising the detail of the care plans put forward by local authorities, and requiring local authorities to provide increasing amounts of information to justify the plans. The FJR suggested that the courts are, in effect, increasingly looking not just to satisfy themselves on who should parent the child but on how that parenting should be conducted. This is partly driven by the courts' legitimate concern to get things right for the child but also partly by doubts about the quality of the care planning undertaken by local authorities.

46. Specific data is not collected on how much court time and resource is spent scrutinising care plans. However, the FJR found that, while it remains important that the courts take account of the essential elements

in care plans in reaching their decisions, the current level of scrutiny goes beyond what was envisaged at the time of the Children Act 1989. Care plans are not fixed in stone. Once children are placed into the care of the local authority, the plans inevitably evolve in response to the children's changing needs and circumstances. The FJR argued, and the Government agrees, that it may not be beneficial for the court to over-scrutinise care plans, especially if that adds to case duration, causes unnecessary duplication of work and does not deliver benefits for children which are intended.

What are the impacts of the measure and which groups of people does it affect?

Children and Families

47. This measure means that the court is not required to scrutinise the care plan in the way it has previously, ensuring that cases are resolved more quickly, leading to a permanent solution being reached for the benefit of the child and their family more swiftly.

HMCTS, Cafcass, CAFCASS Cymru and Local Authorities

48. Refocusing the court's scrutiny of the care plan should improve efficiency and help further reduce delay. This should help reduce the amount of resources required in each case from all the agencies involved and minimise the additional resources that will be required to implement the time limit. The reduced scrutiny of the care plan should lead to a decrease in workloads in the family justice system, thus potentially releasing staffing resource which can be deployed elsewhere and, in the case of local authorities, could be used to strengthen the quality of social care input into cases which may therefore contribute to reducing case duration. However, as scrutiny of the care plan will be at the discretion of the court it is difficult to monetise this benefit.

49. It is possible that at least initially there may be more appeals against case management decisions due to the reduction of the courts role in the scrutiny of the care plan which may lead to additional work. However, it is difficult to monetise this additional cost as we have no evidence to suggest what the number of additional appeals could be.

Legal Services Commission

50. There may be savings associated with reduced charges from solicitors if there were fewer or shorter hearings. However there is not sufficient information on legal aid costs to be able to quantify this.

Were any other measures considered and why were they not pursued?

51. See Page 2- summary sheet

Are there any key assumptions or risks?

52. We have assumed that the local authority's process in developing the care plan will not change as a result of this proposal; as such there will be no increase in work for the local authority since they will already need to prepare a care plan to go before the court. However, the Government has committed separately to continue working with local authorities to ensure effective embedding of the recently enhanced role of the Independent Reviewing Officers (IROs). IROs have the on-going responsibility within local authorities for monitoring the implementation and quality of children's care plans.

53. We have also assumed the details of the care plan will not change as a result of this proposal. However, if care plans were to be different it could lead to worse outcomes for the families and children involved which makes it important that the court provides an effective scrutiny of these plans.

54. It is possible that refocusing the court's scrutiny of the care plan on the long term plan for the upbringing of the child may result in more parents contesting the threshold criteria if they consider the court had insufficient information on which to base their decision. Were this to occur, this might reduce the benefits of the proposal to reduce delay in these cases.

55. The clause does not prevent the court from scrutinising the detail of the care plan if it feels that it is in the best interests of the child for it to do so, and we have assumed that the court will continue to scrutinise these elements which are essential to make the care order decision.

Appraisal of – 4. Ensuring that when making decisions regarding the timetable for the case, decisions are child focused and made with explicit reference to the child's needs and timescales.

What are the problems that the measure addresses?

56. As part of the package of public law reforms, this measure seeks to ensure that care and supervision cases are dealt with more swiftly, thus improving outcomes for children and families.

What is the policy measure and what is the rationale for its introduction?

57. This measure ensures that when making decisions regarding the timetable for the case, decisions are child focused and made with explicit reference to the child's needs and timescales.

58. Research that the Family Justice Review highlighted found that only 6% of cases had a timetable for the child submitted at the beginning of the proceedings and only 25% of cases had a timetable at the Case Management Conference stage.[38] Active case management (as set out in the Public Law Outline) is meant to support the paramountcy principle and ensure that the court takes into account dates of the significant steps in the life of the child and is appropriate for that particular child. However it is likely that if there is not a greater emphasis on the timetable it will continue to not be used as a regular case management tool therefore increasing the likelihood that the interests of the child are not taken into account at every stage of the case.

[38] Jessiman, P., Keogh, P. and Brophy, J. (2009) '*An early process evaluation of the Public Law Outline in family courts'* Ministry of Justice Research Series 09/10, London, MOJ.

What are the impacts of the measure and which groups of people does it affect?

Children and Families

59. The requirement for the court to ensure that timetabling and case management decisions must be child focused and made with specific reference to the child's needs and timescales will ensure that the child remains at the centre of the courts consideration, ensuring that the family retains confidence in the system and potentially ensure that cases are dealt with more speedily. However, it is not possible to monetise this benefit.

HMCTS, Cafcass, CAFCASS Cymru and Local Authorities

60. For these stakeholders the corresponding fall in hearings and preparation work needed may in turn lead to fewer inputs from legal professionals which could lead to fewer hearings. However, it is difficult to value this saving as we have no evidence to date on the reduction of hearings and associated reduction in input from the legal profession.

Were any other measures considered and why were they not pursued?

61. See page 2- summary sheet

Are there any key assumptions or risks?

The timetabling measure

62. We have also assumed that timetabling decisions that are made in the interests of the child will not often result in an increase in the duration of the case beyond 26 weeks due to the interests of the child in ensuring that the case is dealt with in a timely manner. However it is possible that for some cases, the court determines that it is in the child's interests that the case will last longer than 26 weeks. However it is impossible to quantify how many cases will be affected by this.

Review

A review of the Government's interventions to reduce unnecessary delay in care and supervision cases and reducing the uncertainty for the children and families in these cases will take place five years after implementation of the policy .The objective will be a proportionate check that the actions taken are operating as expected.

Public Law- Equalities Impact Statement

The public law measures are intended to address delay in the family courts. They are designed to reduce the duration of care and supervision cases and ensure that resources are used more efficiently, improving outcomes for children and families. Full

equalities impact assessments were completed as part of the Family Justice Review and in preparation for pre-legislative scrutiny by the Justice Select Committee.

Having had due regard to the potential differential impacts of these measures, the government is satisfied that it is right to put forward the legislation. The measures will play a significant role in helping make the family justice system work more effectively for the benefit of those children and families that come into contact with it. The proposals apply equally to all cases and do not treat people less favourably because of a protected characteristic. There is therefore no direct discrimination within the meaning of the Equality Act 2010.

Indirect discrimination

Although the proposals will apply equally to all cases, people who share certain protected characteristics are more likely to be involved in public law proceedings. As a result there may be slightly differential impacts dependent on age, pregnancy and maternity, race, religion or belief and sex. However as these proposals aim to improve outcomes for those involved in care and supervision cases it is likely that there will not be any indirect discrimination based on these characteristics and will not lead to different impacts among children and families in such cases.

Disability

The one area where care must be taken to ensure that there is no disadvantage is disability. We are content that for the 26 week time limit and expert evidence measures, the policy is proportionate and can be justified and that it would not be reasonable to make an adjustment for disabled persons so that they are out of scope for the proposals, as that would deny them opportunity of the intended benefits. For example, some parents with disabilities may find shorter cases with potentially fewer hearings less burdensome.

However, we must ensure as far as possible that parents and children with mental health issues, learning difficulties, those lacking capacity and other types of disability (including fluctuating ones) that impact on their communications are not put at a disadvantage due to measures taken to reduce delay. Research has shown that they may need longer to come to terms with proceedings and to understand their role.

In addition, in relation to the expert's evidence measure, disabled persons may particularly benefit from an expert opinion relating to the disability of a parent or child as the disability may have implications for the care of the child.

For both measures we expect that judicial discretion will ensure that any risk of disadvantage is minimised. In the case of the 26 week time limit, judges will be able to extend cases beyond the time limit where necessary to resolve the proceedings justly. This ensures that processes allow for more time where this is essential, for example where a party's disability necessitates more time for communication with appropriate professionals before a judge can make a final determination in a case.

Judges will also have discretion to authorise expert reports where the court is of the opinion that this is necessary to resolve the case justly.

In addition to this flexibility, we will also take other steps such as the ensuring the availability of guidance booklets to help those people who may find it difficult to understand the care proceedings process.

Private Law

Policy Area of Bill	*Family Justice: MIAMs*
Departments or agencies	Ministry of Justice, HM Courts and Tribunals Service, Legal Services Commission

Summary of the measures in the policy area

What are the problems that the measures address?

- The Government wishes to encourage more couples to mediation because it can be cheaper, quicker and more amicable. To do so, the Government wishes to raise awareness by directing people to learn about mediation through a Mediation Information and Assessment Meeting (MIAM).

- The Government wants to increase awareness among separating parents of family mediation, which can be used to settle a children or finance dispute instead of court proceedings. Parents need to make informed choices about using these services where it is appropriate and safe to do so.

- In order for separating parents to find out about and consider mediation they must first attend a Mediation Information and Assessment Meeting (a MIAM). Getting separating parents in particular to go to a MIAM is a key challenge.

- Parental awareness about the availability of family mediation in resolving private law disputes about children and finance following family breakdown remains low. There is also a degree of misconception about what it is, for

example that it is therapy or about reconciliation. Around 100,000 applications are made to the courts each year[39] for an order about a child. Around 80% of these applications concern where a child should live (residence) and who they should see (contact).

- These disputes require a significant amount of judicial resource – yet the issues are rarely legal ones. Disputes often centre on the day-to-day care of the child and the degree of involvement by the parent who no longer lives with the child.

- In seeking a court order too many parents focus on what they might "win" or "lose" rather than what is best for their child. A court order is usually inflexible and any breach of it by either parent can quickly become the focus for conflict.

Mediation can be quicker and less costly. It avoids the stress and conflict associated with court proceedings and parents retain control over what they agree[40]. The process of reaching a compromise, with the assistance of a trained family mediator, can support ongoing parenting through improved communication skills.

[39] This is an estimated full-year volume calculated using latest volume data published by HMCTS for Q4 2011/12 and data for Q1 to Q3 2012/13.

[40] Any agreement reached voluntarily is only enforceable if the agreement has been endorsed and ordered by a court. The court retains the right to impose different arrangements for children if it thinks that this is necessary to meet the welfare needs of the child.

What are the measures and what is the rationale for their introduction?

- The Government is undertaking a programme of work designed to improve information, advice and signposting to separating parents which includes the benefits of family mediation as an alternative to court and how access to mediation requires as a first step attendance at a MIAM. This Assessment of Impact is limited to the proposed statutory measure to require a person who wishes to start court proceedings of a particular kind to first attend a MIAM.

- The measure we have introduced in the Bill will, in family proceedings of a specified type, place a statutory requirement on a person who wishes to start proceedings (a "prospective applicant") to first attend a family mediation information and assessment meeting (a 'MIAM') to receive information about mediation and other types of dispute resolution and to consider whether it would be an appropriate means to settle the dispute.

- If having attended the MIAM the applicant still wishes to start proceedings they (or their legal advisor) will have to produce to the court officer a form which is either signed by the mediator who conducted the MIAM or alternatively states the reasons(s) why the applicant is exempt from the requirement to attend one.

- The types of proceedings to be specified are children and financial matters. Exemptions from the requirement to attend a MIAM will apply in specified circumstances, such as evidence of domestic violence, cases of urgency (where delay would risk significant harm to a child or to the life or physical safety of the applicant or his or her family etc.) or where no mediator is available to conduct the MIAM within 15 miles of the applicant's home and within 15 working days.

- Rules of court introduced in April 2010 already place a general duty on the court to consider at all stages of a family case whether the use of dispute services such as family mediation could be an appropriate way to settle the dispute. The court can, if the parties agree, suspend the proceedings for this purpose.

- Additional requirements were introduced in April 2011 through a Pre-Application Protocol (PAP) to the rules directed at both of the parties in a children or financial matter. This makes clear the expectation that the person who wishes to start proceedings (the "prospective applicant") will first attend a MIAM in order to consider using mediation as an alternative to court. It is expected that the other person in the dispute who would become a party to any proceedings ("the prospective respondent") will also attend a MIAM if asked to do so.

- The measure introduced in the Bill is intended to reinforce efforts to raise awareness of alternatives to court, at the point of separation; to effect a culture change from resorting to the court in the first instance, thereby encouraging more separated parents to consider using mediation to settle disputes arising out of family breakdown. Introducing a legislative requirement to consider mediation and evidence this or an exemption at the point of application to the court, will further reinforce the message that mediation is often the most appropriate way of resolving disputes and the courts will be looking to the parties to have considered an alternative resolution.

What are the impacts of the measures and which groups of people do they affect?

- The primary impact of this measure is on a separated parent or other family member who is in dispute with another person (most often the other parent) about arrangements for children or a financial matter and wishes to apply to the family courts for an order to settle the dispute.

- The applicant will not be able to issue proceedings unless they are able to show that they have either attended a MIAM to receive information about mediation and to consider using it as an alternative to court proceedings, or that they are exempt.

- This legislative measure is not intended to address the position of the other person in the dispute who, if proceedings start, would become the respondent.

- Measures to encourage prospective respondents to attend a MIAM (separately or together with the prospective applicant) are part of a wider programme of work which is beyond the scope of this impact assessment. However, a respondent is expected to attend a MIAM if asked to do so by the applicant. Therefore, this measure may have a secondary impact on respondents who would in future be more likely to be asked to attend a MIAM as a result of compulsory attendance by the applicant.

- As provided for in the exemptions section on Form FM1, attendance at a MIAM will not be compulsory where there is evidence of domestic abuse or, in urgent cases, where there is a risk to the life or physical safety of the applicant or there are child protection issues. Mediators are trained to screen and recognise risk when determining suitability for mediation and will usually see clients separately unless a joint meeting is expressly asked for.

- Family mediators will have responsibility for conducting MIAMs and they will therefore experience an increase in demand for their services. There is capacity within the profession to meet any upturn in demand for MIAMs and any subsequent mediation and revenues will increase to support the sustainability and viability of mediation practices as a consequence. Where clients are able to resolve their disputes through mediation it will

reduce pressure on the courts as there will be less contested cases which will require judicial intervention, freeing up court resources so that they can more appropriately be focussed on cases requiring judicial oversight and case management.

Were any other measures considered and why were they not pursued?

- The option of "do nothing" was considered and rejected. A key part of the Government's policy of promoting settlement of family disputes away from court, where appropriate and safe to do so, requires separated parents in particular to find out about and consider family mediation at an early stage when a dispute arises.

- In bringing forward a clause to make attendance at a MIAM a prerequisite for a person who wishes to start specified types of court proceedings the Government considered, and rejected, the option of extending this requirement to the respondent to the proceedings.

- The Government identified no effective levers that could be used to compel a respondent to attend a MIAM at the point where proceedings have yet to be issued. Once proceedings are issued the court can make use of its general case management powers to consider its duty to promote alternative dispute resolution, including adjourning the case for mediation to be attempted by the parties if they wish to do so. The court can also, in proceedings for a contact order, make a contact activity direction requiring a respondent who has not attend a MIAM to do so.

- The Government believes it is right that the clause should address only the position of the person who wishes to initiate proceedings. Other measures are available to address the position of the respondent.

Are there any key assumptions or risks?

Key assumptions

- We assume that placing a statutory requirement on a person who wishes to start proceedings of a specified kind to first attend a MIAM will not impact on their Article 6 rights (access to justice) as the requirement is simply an additional procedural one and ultimately does not restrict the applicant's ability to apply for an order in the specified proceedings, subject to complying with the MIAM requirement.

- We assume that if required to do so an applicant will attend a MIAM and that the court officer will be able to decide not to issue proceedings where the MIAM requirement is not met. We also assume that a mechanism will be needed to ensure that any dispute about compliance can be referred to a judge.

- We propose that there should be an exemption from the requirement for an applicant in specified proceedings to attend a compulsory MIAM and that the exemption criteria should broadly follow the existing criteria under the pre-application protocol introduced in April 2011. However, we assume that there will be no exemption on the ground of affordability.

- We assume that sufficient family mediation capacity exists to meet the increase in MIAMs as a result of the change to require all applicants in specified family proceedings to first attend a MIAM. There are currently around 110,000 applications each year for a private law Children Act order which we expect will represent the majority of cases that will be within the scope of our measure.

- We assume that no additional court officers will be required to enforce the statutory requirement and that this role will be undertaken as part of their existing functions in relation to ensuring that proceedings are only issued when the relevant court form or forms have been completed and filed and the necessary fee paid.

- We assume that evidence of attendance at the MIAM (or that the applicant is exempt from the requirement to attend a MIAM) will be through the filing of the FM1 form which is currently part of the process under the pre-application protocol.

Key risks

- There are a range of factors which make it difficult to predict the effect of this proposal in terms of whether it increases the use of mediation as an alternative to court proceedings.

- There is a risk that even if the measure achieves high compliance and leads to additional MIAMs, either party could still fail to engage

meaningfully with the process and so increased attendance at MIAMs may not be converted into increased numbers of mediations.

- There is a risk that applicants will falsely claim one of the various exemptions, resulting in many applications being filed with an FM1 giving the perception of high compliance. This would significantly undermine the effect of the measure which is to ensure proper consideration of mediation.

- There is a risk that falsely stated exemptions will not be tested in the first hearing and no judicial check is made as to whether or not FM1 has been filed or the exemption is appropriate.

- There is a risk that applicants who do not qualify for legal aid for mediation will have to pay the cost of attending the MIAM in addition to paying the court of making the application to court.

Further Discussion and Evidence for Specific Measures within Policy Area	
Policy Area	*Family Justice*
Specific Measures within Policy Area Appraised	*Family Mediation Information and Assessment Meetings (MIAMs).*

Appraisal of Family Mediation Information and Assessment Meetings (MIAMs)

What are the problems that the measure addresses?

1. Court proceedings should always be a last resort unless safety or welfare issues require judicial scrutiny and possible intervention. Once proceedings have started it can be difficult for parents to stand back and be objective about what is best for their child. Too often parents who come to court become focused on "winning" or "losing" and lose sight of their child's needs.

2. The concept of family mediation, its potential benefits and the process are often misunderstood. Mediation is sometimes confused with therapeutic interventions, such as relationship counselling, and as a process it may be perceived to be inferior to litigation.

3. Mediation is a dispute resolution process and family mediation is a highly skilled form of mediation. Family mediators possess additional skills and training to help them handle the difficult emotional aspects of family breakdown. They understand the risks that may be present and can help parents to focus on the needs their child.

4. Family mediation can offer considerable benefits over court proceedings. It can be quicker, less costly and less stressful than the process of obtaining a court order. But too few people are aware of family mediation with the result that many fail to give it proper consideration it deserves.

5. Ideally, parties with a family dispute should attend a MIAM at an early stage to consider their options before positions become entrenched. We hope over time to effect a culture change so that many more separating parents view attendance at a MIAM as the first step in resolving their dispute. We cannot compel parents with a dispute to attend a MIAM at this early stage – but we are taking steps to encourage them strongly to do so.

6. The Government is putting other measures in place to raise awareness of all forms of dispute resolution including mediation and encourage separating parents in particular to attend a MIAM through information on the *Sorting Out Separation* web app. However, the fact remains that many cases still come to court for resolution when they could be settled through mediation.

7. Since 1997 parties who are eligible to receive public funding for legal advice and representation (legal aid) have been required, as a condition of receiving funding, to attend an information and assessment meeting to consider mediation. This requirement does not extend to privately funded parties. However, mediation cannot take place unless both parties are willing to engage in the process. In order to incentivise a privately funded party to consider mediation the Legal Services Commission will fund the cost of their attendance at the information and assessment meeting where the other party is legally aided.

8. Despite this, evidence provided to the Family Justice Review suggests that awareness and use of non-court services to resolve private law[41] family disputes remains low. Disputed arrangements for children following parental separation currently result in around 100,000 applications being made to the family courts every year for an order to settle the dispute and which involve around 110,000 children. Around 40,000 of these applications relate specifically to contact[42] disputes.

9. New rules of court introduced in April 2010 place an obligation on the court to consider at all stages of a case whether the use of services such as family mediation could be appropriate. The courts have a general power to suspend proceedings in order for the parties to attempt an out-of-court resolution. However, this is only available to the court once proceedings have begun.

10. A pre-application protocol introduced in April 2011 introduced additional requirements in disputes about the arrangements for children or financial matters. The protocol places an expectation on the parties that they will have attended a mediation, information and assessment meeting (a MIAM) to find out about and consider mediation before court proceedings are started.

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[41] Private law disputes involve disagreements between family members (mostly parents) and proceedings are initiated by one of the parties involved. This contrasts with public law proceedings where a local authority acts to protect a vulnerable child.

[42] A child will often spend most of their time living with one parent after family breakdown. Contact disputes usually involve the other parent who no longer lives with the child but can relate to other family members such as grandparents and siblings.

11. The protocol was an innovative attempt to encourage more parties to attend a MIAM at the point just prior to proceedings in the hope of avoiding litigation. However, feedback from Resolution[43] and data from the Legal Services Commission suggest only a limited impact has been achieved in terms of driving up MIAM attendance for these parties. Publicly funded MIAM volumes increased initially driven by compliance with the protocol in some areas, but recently a reduction in volume has been observed.

12. The Justice Select Committee noted that the existing pre-application protocol has not been judged a success by a number of witnesses, in particular Resolution whose members reported inconsistency in the application of the protocol in over 100 courts in England and Wales.

13. The protocol is in the form of judicial guidance. It was made in support of the court's general case management powers in Part 3 of the Family Procedure Rules to promote mediation and other forms of dispute resolution service. In reality, the court's powers apply only once proceedings have started. The wording of the protocol is rather subtle but reflects the limitation on the court's ability to control what happens prior to proceedings starting. An applicant is "expected" to attend a MIAM rather than being "required" because there is currently no means to enforce this prior to the point at which proceedings begin.

14. A fundamental weakness of the protocol is that the court cannot enforce it by declining to issue proceedings where the applicant - as instigator of proceedings - has failed to attend a MIAM with no good reason. An applicant who is determined to start proceedings can do so in contravention of the protocol.

What is the policy measure and what is the rationale for its introduction?

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[43] See written evidence submitted to the Justice Select Committee (CFB09, CFB10 AND CFB21)

15. The clause will for the first time make attendance at a MIAM a prerequisite for an applicant who is asking the court to issue proceedings. The intention is not to force anyone to undertake mediation but to require attendance at a MIAM to give all available alternatives to court careful consideration. Parents who nevertheless decide to litigate in future will at least be doing so on a better informed basis.

16. Around half of contact proceedings also involve alleged serious welfare concerns[44] which require scrutiny by the court, but many other cases do not. These still require a significant amount of judicial time and expertise – yet the core of the dispute is not a legal problem but a disagreement between parents about how they each meet the needs of their child on an ongoing basis.

17. There is also a fundamental misconception on the part of many parents about how the court will decide arrangements for children if asked to do so. The current legal framework requires the court to make the welfare of the child – not the wishes of the parents – its primary consideration. Parents may find that the court orders arrangements that neither parent had anticipated, or desired. These arrangements are also inflexible. This can result in one or both parents struggling to make the arrangements work. Mediation can therefore provide a much better alternative and an arrangement that both parties 'own'.

18. We think that a person who wishes to start proceedings should be required to attend a MIAM so that there is a final opportunity to avoid proceedings which cannot simply be ignored. We think that the attendance at a MIAM by the applicant – as the instigator of proceedings – should be a mandatory part of the process for starting proceedings.

What are the impacts of the measure and which groups of people does it affect?

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[44] See Joan Hunt, outcomes of applications for contact orders, Ministry of Justice, 2008

Separating and divorcing parents and their children

19. The primary impact of this measure is on a separated parent or other family member who is in dispute with another person (most often the other parent) about arrangements for children or a financial matter and wishes to apply to the family courts for an order to settle the dispute.

20. It is intended to ensure that the person who wishes to start court proceedings attends a MIAM to receive information about mediation and to consider using it as an alternative to court proceedings.

21. This legislative measure is not intended to address the position of the other person in the dispute who, if proceedings start, would become the respondent. Measure to encourage prospective respondents to attend a MIAM (separately or together with the prospective applicant) are part of a wider programme of work which is beyond the scope of this impact assessment. However, a respondent is expected to attend a MIAM is asked to do so by the applicant. Therefore, this measure may have a secondary impact on respondents who would in future be more likely to be asked to attend a MIAM as a result of compulsory attendance by the applicant.

22. This change would not impact those clients who are or are at risk of domestic violence as these clients would be exempt from the need to consider mediation. Even if a client attended a MIAM in these circumstances they would usually be seen separately at a MIAM, unless they specifically requested to be seen together, so they would not be put at risk and mediators are trained to undertake detailed domestic violence screening when determining suitability of the dispute to mediation.

The courts

23. The introduction of the statutory MIAM for applicants in children and financial disputes who wish to start court proceedings is intended to reduce the volume of such cases being litigated through the family courts by encouraging more separated parents to settle disagreements through non-court dispute resolution services such as family mediation, where this is appropriate and safe.

24. Private law proceedings relating to disputes about the arrangements for children are high volume (around 100,000 applications per year involving around 110 children). The Government wants judicial expertise to be focused on the most complex family cases. These are public law cases involving legal proceedings by the State to remove a child from their family, or to place them under the supervision of the local authority, because the child is judged to be at risk of significant harm.

25. Public law cases are currently taking on average over [47.7] weeks to conclude. During this time the child is subject to ongoing uncertainty about the arrangements for their future care and this uncertainty can damage their potential and later life outcomes. The Government's priority is to focus judicial expertise on public law cases and reduce the time taken to reach final decisions about the future arrangements for these children. The Government is introducing a separate measure in the Children and Families Bill to place a statutory limit of 26 weeks on the duration of public law cases, with many cases settled sooner than this. Achieving this will be dependent on ensuring that the courts resources are primarily focussed on those cases that need to appear before court. Where mediation is successful in resolving disputes and reaching agreement it can reduce the number of cases that require judicial intervention.

26. It should be noted that while the Government is keen to promote alternative dispute resolution methods and avoid unnecessary court actions, the door to mediation is never closed. The courts can adjourn proceedings in order for parties to attempt mediation and some courts have on site mediators.

Legal professionals

27. Introducing a statutory requirement on the applicant to attend a MIAM as a prerequisite to starting court proceedings in children and financial disputes following family breakdown will require legal professionals to familiarise themselves with the requirement and be able to apply it in relevant cases – as with any other legislative change. Familiarisation with legislative changes and developments through case law is a key element of a practising legal professional's role.

28. This change and the detailed procedural requirements are to be set out in rules of court. Legal practitioners would need to explain the significance of this change to clients and may need to rethink their approach to a case depending on its complexity and the presence of factors which might

determine whether or not exemption from the requirement to attend a MIAM would apply.

Family Mediators

29. Family Mediators would need to explain the significance of the change in legislation to clients who indicate they are considering court proceedings. This represents more of a reinforcement of the importance of considering mediation rather than any difference in operational approach. However, mediators will need to undertake greater numbers of MIAMs as this change would place an obligation on clients to give proper and appropriate consideration to mediation as a way of resolving their family dispute, where this may not have historically been the case.

Were any other measures considered and why were they not pursued?

30. The option of "Do Nothing" was considered and rejected.

31. The Government is committed to promote family mediation as the dispute resolution service of choice in disputes about children and financial matters, where it can provide an appropriate and safe alternative to court proceedings. The Government already invests £15 million annually through public funding for family mediation in a range of children and financial matters and expects to invest a further £10 million in 2013/14.

32. It is clear from data available from the Legal Services Commission that the introduction of the Pre-Application Protocol in April 2011 did result in an increase in the volume of MIAM meetings in which one or both parties received public funding. The challenge is how to increase the volume of MIAMs with both parties attending. Mediation is only viable where both parties are willing to give it consideration and then agree to engage in the process of mediation.

33. We believe that there is a fundamental lack of awareness about family mediation across the general population and, in particular, by parents and couples who may be at risk of future family breakdown. Where people are aware of mediation they are often unclear about its scope (what it can and cannot address), how it works as a process and the benefits that it can deliver compared to a court-based resolution to a children or financial dispute.

Are there any key assumptions or risks?

Key assumptions

34. We assume that placing a statutory requirement on a person who wishes to start proceedings of a specified kind to first attend a MIAM will not impact on their Article 6 rights (access to justice) as the requirement is simply an additional procedural one and ultimately does not restrict the applicant's ability to apply for an order in the specified proceedings, subject to complying with the MIAM requirement.

35. We assume that if required to do so an applicant will attend a MIAM and that the court officer will be able to decide not to issue proceedings where the MIAM requirement is not met. We also assume that a mechanism will be needed to ensure that any dispute about compliance can be referred to a judge.

36. We propose that there should be an exemption from the requirement for an applicant in specified proceedings to attend a compulsory MIAM and that the exemption criteria should broadly follow the existing criteria under the pre-application protocol introduced in April 2011. However, we assume that there will be no exemption on the ground of affordability.

37. We assume that sufficient family mediation capacity exists to meet the increase in MIAMs as a result of the change to require all applicants in specified family proceedings to first attend a MIAM. There are currently around 110,000 applications each year for a private law Children Act order which we expect will represent the majority of cases that will be within the scope of our measure.

38. We assume that no additional court officers will be required to enforce the statutory requirement and that this role will be undertaken as part of their existing functions in relation to ensuring that proceedings are only issued when the relevant court form or forms have been completed and filed and the necessary fee paid.

39. We assume that evidence of attendance at the MIAM (or that the applicant is exempt from the requirement to attend a MIAM) will be through the filing of the FM1 form which is currently part of the process under the pre-application protocol.

Key risks

- There are a range of factors which make it difficult to predict the effect of this proposal in terms of whether it increases the use of mediation as an alternative to court proceedings.

- There is a risk that even if the measure achieves high compliance and leads to additional MIAMs, either party could still fail to engage meaningfully with the process and so increased attendance at MIAMs may not be converted into increased numbers of mediations.

- There is a risk that applicants will falsely claim one of the various exemptions, resulting in many applications being filed with an FM1 giving the perception of high compliance. This would significantly undermine the effect of the measure which is to ensure proper consideration of mediation.

- There is a risk that falsely stated exemptions will not be tested in the first hearing and no judicial check is made as to whether or not FM1 has been filed or the exemption is appropriate.

- There is a risk that applicants who do not qualify for legal aid for mediation will have to pay the cost of attending the MIAM in addition to paying the court of making the application to court.

Policy Area of Bill	*Family Justice: Enforcement*
Departments or agencies	Ministry of Justice, Department for Education, HM Courts and Tribunals Service, Cafcass, Legal Services Commission

Summary of the measures in the policy area

What are the problems that the measures address?

- Each year around 40,000 children are involved in contact applications made to the courts. The courts make around 100,000 contact orders each year. Parents can find it difficult to make contact work. Breach occurs most often in relation to a particular aspect or aspects of the arrangements when circumstances change or the child's needs change as they grow

older.

- Many cases of breach do not in fact result in enforcement proceedings (although the courts do have specific powers to enforce contact orders if asked to do so). Where parents do take action this is more likely to take the form of an application to court to vary the original order. Parents themselves seem reluctant to take enforcement action, suggesting that the most difficult and intractable cases drive enforcement proceedings.

- Around 1,300 applications to the courts are made each year for an enforcement order or financial compensation order. If the court is satisfied that the breach occurred and the parent concerned had no reasonable excuse it may require that to undertake unpaid work and/or award financial compensation (for example for the cost of a booked holiday).

- Only around 30 orders are made each year. The courts are reluctant to use punitive powers to 'punish' parents as this is likely to entrench parental conflict. The response of the courts is more often to diagnose the problem and try to make contact work.

- The courts already have the power to direct a party to undertake an activity designed to promote and facilitate contact. We think that these powers should be available to the court when faced with an enforcement application as they could help to address underlying issues that are standing in the way of contact working.

What are the measures and what is the rationale for their introduction?

- We propose to make one legislative change involving minor amendments to section 11 of the Children Act 1989 to enable the courts to make use of the existing 'contact activity direction' power when considering whether a person has breached a previously made contact order.

- The courts may currently use this power when considering whether to make, vary or discharge a contact order. In these circumstances the court may direct a party to the proceedings to undertake a form of 'contact activity' designed to facilitate and promote contact with the child concerned.

- Contact activities currently include: a Separated Parent Information Programme (SPIP) to learn about the damaging impact of conflict on children and parenting strategies for managing post separation parenting; a Mediation Information and Assessment Meeting (MIAM) to find out about and consider mediation; and a Domestic Violence Perpetrator Programme to address violent behaviour.

- Cafcass currently responds to around 19,000 contact activity directions made by the courts each year. Most of these are for SPIPs which are delivered at a cost to the DfE of around £150 per person, with some regional variation. As part of our proposal we intend to develop and test a form of SPIP focused on behaviours that feature within enforcement cases.

- In a breach situation it would be useful for the courts to be able to direct the party in breach to undertake a form of contact activity to address behavioural or parenting issues which may underlie the breach of the contact order. We think this policy response is necessary to support the courts in identifying and tackling underlying problems that prevent contact arrangements made for the benefit of the child from working.

- The amendments we propose will also enable the court to make an activity

direction in a situation where the court decides that the contact order as it stands fully meets the welfare needs of the child and does not need to be varied in any way. In such a situation the court could not currently make use of the activity direction power because the court is neither making, varying or discharging the order. We have identified this as a gap.

What are the impacts of the measures and which groups of people do they affect?

Children

- This measure should have a positive impact on children who are the subject of a contact order which is being breached by one or both parents. Conflict is damaging for children and this measure should help to tackle issues which drive non-compliance and fuel parental conflict.

- Parents who are directed by the court to undertake an activity may acquire information and skills to help them to make contact work in the future, thus reducing further parental conflict with its damaging impact on the child.

Separated parents

- Separated parents who are the subject of an application for an enforcement order for unpaid work or a financial compensation order which the court is considering making may benefit from this measure if they are having genuine difficulty adapting to their parenting role post separation. A very small number of parents who would have been subject to punitive sanctions could, under this measure, be directed first to attend an activity which might then avoid the need for a punitive measure to be imposed.

The courts

- The courts will have a more flexible range of powers at their disposal with which to address parental behaviour and conflict which is driving non-compliance. We believe that the judiciary will welcome this measure as it provides practical tools that can be used to avoid the need to impose punitive sanctions on parents who are having genuine difficulty complying

with court-ordered arrangements for their child.

Cafcass

- Cafcass already commissions the delivery of around 19,000 contact activities each year which are the direct result of activity directions made by the courts. This measure will bring within scope the 1,300 cases each year in which a party to a previously made contact order seeks enforcement action.

- We are working with Cafcass to model the potential impact on workload from an additional number of activity directions and the potential cost implications of this measure. There are various statutory considerations which restrict the use of the activity direction power by the courts in practice (discussed later in this Assessment of Impact). We expect the number of additional activity directions to represent a relatively modest proportion of the 1,300 enforcement cases currently brought before the courts each year.

Legal Services Commission

- There could be a small impact on the LSC if the courts decided to make more use of the activity direction power to require a parent in breach to attend a mediation information and assessment meeting (a MIAM) and that parent was eligible to receive legal aid to fund the cost of attendance. In practice we think any impact would be small in the context of the £15 million spent annually by the LSC on family mediation.

Legal professionals

- We have not identified any direct impact on legal professionals.

Were any other measures considered and why were they not pursued?

- As part of its wider policy development on enforcement the Government consulted on whether to legislate to provide the courts with additional punitive sanctions to address non-compliance with court-ordered contact arrangements. The Government response rejected that approach.

Are there any key assumptions or risks?

Key assumptions

- We assume that the volume of applications to the courts each year for an enforcement order will remain broadly the same or will decrease due to other measures in the Bill to:

  (i) Divert more cases into mediation instead of court proceedings to decide child arrangements.

  (ii) amend the Children Act 1989 to make it clearer that the courts will expect both parents to be involved in a child's life after separation, where this is safe.

  (iii) the change of focus of court orders from "contact" and "residence" to a more neutral form of Child Arrangements Order.

- We assume there will be some training requirement for the judiciary but none for court staff.

- We assume that the cost of delivering an enforcement focused activity (based around the existing Separating Parenting Information Programme) will be around £150 per person, which is the cost to DfE of delivering the existing SPIP.

- Extending the use of the activity direction power to enforcement cases will in theory increase the potential volume of such directions by up to 1,300 per annum if directed at the party in breach - or up to 2,600 if the courts were to make directions in every enforcement case in respect of both parties.

- However, statutory requirements for making activity directions (i.e. prior consideration by the court of the party's suitability, the programme's

availability and assessment of impact on the party of attendance) is likely to mean that the actual increase in volumes is likely to be relatively modest.

- SPIPs and any tailored enforcement type SPIP will continue, as far as volumes permit, at least in part, to be delivered as group meeting (which gives the benefit of parental perspectives from other parents and keeps costs down). However, in developing the detail of our measure we might decide that in an enforcement context a one-to-one meeting would be more appropriate. That would increase the cost of delivering the meeting and would need to be assessed through testing to see if the additional cost delivered a better outcome.

Key risks

- Enforcement cases could increase. That could in turn increase the number of activity directions made by the courts. However, this scenario would seem unlikely given the Government's wider programme of measures in the Bill to encourage more separating parents to resolve their dispute away from court where appropriate and safe to do so.

- The cost to DfE of delivering activities (and any new enforcement focused SPIP that might be implemented) could rise. However, this seems unlikely as Cafcass, working on behalf of the DfE, has progressively reduced the unit cost of delivering activities through its tendering arrangements.

- If one-to-one SPIPs and enforcement focused SPIPs need to be delivered on a one-to-one rather than a group basis this would increase the cost of delivering these activities in enforcement cases.

Further Discussion and Evidence for Specific Measures within Policy Area	
Specific Measures within Policy Area Appraised	Extending the use of the existing activity direction power when the court is considering an alleged breach of a Children Arrangements Order provision.

Appraisal of extending the use of the existing activity direction power when the court is considering an alleged breach of a Child Arrangements Order provision.

What are the problems that the measure addresses?

1. Evidence provided to the Family Justice Review suggested that swift enforcement is important where court orders for contact are breached to help prevent an arrangement that has been determined to be in the child's best interests from being ignored and a less beneficial alternative becoming the norm. Speedy return of breach cases to court would also enable adjustments to be made where necessary. Where a court order is breached the case should quickly return to court, to the same judge, to enforce the child's right to have a relationship with both their parents where this is safe.

2. Around 40,000 applications each year are made to the courts for a contact order. The courts make around 100,000 contact orders each year. Parents can find it difficult to make contact work. Breach occurs most often in relation to a particular aspect or aspects of the arrangements when circumstances change or the child's needs change as they grow older.

3. Many cases of breach do not in fact result in enforcement proceedings (although the courts do have specific powers to enforce contact orders if asked to do so). Where parents do take action this is more likely to be an application to court to vary the original order. Parents themselves seem reluctant to take enforcement action, suggesting that the most difficult and intractable cases drive enforcement proceedings.

4. Around 1,300 applications to the courts are made each year for an enforcement order or financial compensation order. If the court is satisfied that the breach occurred and the parent concerned had no reasonable excuse it may require that to undertake unpaid work and/or award financial compensation (for example for the cost of a booked holiday).

5. Only around 30 orders are made each year. The courts are reluctant to use punitive powers to 'punish' parents as this is likely to entrench parental conflict. The response of the courts is more often to diagnose the problem and try to make contact work.

6. The courts already a power to direct a party to undertake an activity designed to promote and facilitate contact. We think that these powers should be available to the court when faced with an enforcement application as they could help to address underlying issues that are standing in the way of contact working.

7. The Government has published proposals for returning enforcement cases to court more quickly. Where a case does return the Government wants the courts to have the full range of powers available to facilitate contact - as well as the more punitive powers such as unpaid work.

What is the policy measure and what is the rationale for its introduction?

8. The Government has published a range of proposals to improve the effectiveness of the court system in enforcing court-ordered contact arrangements. With the one exception below these proposals are non-legislative and are outside the scope of this Assessment of Impact.

9. However, we do propose to make minor amendments to section 11 of the Children Act 1989 to enable the courts to make use of the existing 'contact activity direction' power when considering whether a person has breached a previously made contact order.

10. The courts may currently use this power when considering whether to make, vary or discharge a contact order. In these circumstances the court may direct a party to the proceedings to undertake a form of 'contact activity' designed to facilitate and promote contact with the child concerned.

11. Contact activities currently include: as a Separated Parent Information Programme (SPIP) to learn about the damaging impact of conflict on children and parenting strategies for managing post separation parenting; a Mediation Information and Assessment Meeting (MIAM) to find out about and consider mediation; and a Domestic Violence Perpetrator Programme to address violent behaviour.

12. Cafcass, working on behalf of the DfE, contracts with providers for SPIPs and DV perpetrator programmes, which the DfE funds so that they are free at the point of use. MIAMs are delivered through family mediation services that are contracted by the Legal Services Commission for this purpose and must meet required standards. A parent who is eligible for legal aid will have their MIAM funded[45].

13. Programme providers commissioned by Cafcass currently respond to around 19,000 contact activity directions made by the courts each year. Most of these are for SPIPs which are delivered at a cost to the DfE of around £150 per person with some regional variation. As part of our proposal we intend to develop and test a form of SPIP focused on behaviours that appear to feature within enforcement cases.

14. In a breach situation it would be useful for the courts to be able to direct the party in breach to undertake a form of contact activity to address behavioural or parenting issues which may underlie the breach of the contact order. We think this policy response is necessary to support the

[45] The Legal Services Commission will also fund the cost of the MIAM for the other party if directed through an activity direction to attend a MIAM, as long as at least one of the parties is eligible for legal aid. This approach is designed to encourage attendance at the MIAM by both parties so that mediation can be given proper consideration.

courts in identifying and tackling underlying problems that prevent contact arrangements made for the benefit of the child from working.

15. The amendments we propose will also enable the court to make an activity direction in a situation where the court decides that the contact order as it stands fully meets the welfare needs of the child and does not need to be varied in any way. In such a situation the court could not currently make use of the activity direction power because the court is neither making, varying or discharging the order. We have identified this as a gap that needs to be addressed.

What are the impacts of the measure and which groups of people does it affect?

16. The scope of this measure is the 1,300 applications for an enforcement order or financial compensation order made to the courts each year. These cases represent a small proportion of all contact orders made but are likely to be very difficult cases involving significant parental conflict. Our proposal to extend to enforcement cases the existing contact activity direction power is part of a wider range of proposals (non-legislative) to improve the enforcement of contact orders. The impact of this measure therefore needs to be considered in that context.

<u>Children</u>

17. Children are entitled to maintain a relationship with both parents where this is appropriate and safe. It is unacceptable for one parent intentionally to obstruct contact arrangements which have been ordered by the court after careful consideration to meet the welfare needs of the child.

18. This measure will help the courts to address behavioural or parenting issues which are driving non-compliance with court-ordered contact arrangements. The approach of the courts is not to punish parents but to try to make contact work for the child. This measure should have a positive impact on children who are the subject of a contact order which is being breached by one parent. Conflict is damaging for children and this

measure should help to tackle issues which drive non-compliance and fuel parental conflict.

Separated parents

19. Separated parents who are the subject of an application for an enforcement order for unpaid work or a financial compensation order which the court is considering making may benefit from this measure if they are having genuine difficulty adapting to their parenting role post separation. Parents who undertake an activity may acquire information and skills that help them to make contact work in the future, thus reducing the scope for further parental conflict with the damaging impact that may have on their child.

The courts

20. The courts will in future have the option of making an activity direction as an alternative to imposing a punitive sanction (although it will retain the power to impose such a sanction if this subsequently becomes necessary). Parents who undertake an activity may acquire information and skills that help them to make contact work in the future, thus reducing the scope for further parental conflict with the damaging impact that may have on their child.

21. Having a more flexible range of powers at their disposal should help the courts to address parental behaviour and conflict which is driving non-compliance. We believe that the judiciary will welcome this measure as it provides practical tools that can be used to avoid the need to impose punitive sanctions on parents who are having genuine difficulty complying with court-ordered arrangements for their child.

Cafcass

22. Cafcass already commissions the delivery of around 19,000 contact activities each year which are the direct result of activity directions made by the courts. This measure will bring within scope the 1,300 cases each year in which a party to a previously made contact order seeks enforcement action.

23. We are working with Cafcass to model the potential impact on workload from an additional number of activity directions and the potential cost implications of this measure. There are various statutory considerations which restrict the use of the activity direction power by the courts in practice (discussed later in this Assessment of Impact). We expect the number of additional activity directions to represent a relatively modest proportion of the 1,300 enforcement cases currently before the courts.

24. The average cost to the DfE of a SPIP is £150 per person. We think it is reasonable to assume that the cost of delivering an enforcement focused SPIP would be similar.

25. We are working with Cafcass to model the potential impact on activity direction volumes and delivery costs. Extending the use of the activity direction power to enforcement cases will in theory increase the potential volume of such directions by up to 1,300 per annum if directed at the party in breach - or up to 2,600 if the courts were to make directions in every enforcement case in respect of both parties.

26. However, statutory requirements for making activity directions (suitability, availability and assessment of impact) is likely to mean that the actual increase in volumes is likely to be relatively modest. Modelling work will ascertain the likely range of volume impact from extending the activity direction power to enforcement cases.

27. The statutory requirements for making an activity direction are contained in section 11E of the Children Act 1989 are:

(1) Before making a contact activity direction (or imposing a contact activity condition by means of a contact order), the court must satisfy itself as to the matters falling within subsections (2) to (4).

(2) The first matter is that the activity proposed to be specified is appropriate in the circumstances of the case.

(3) The second matter is that the person proposed to be specified as the provider of the activity is suitable to provide the activity.

(4) The third matter is that the activity proposed to be specified is provided in a place to which the individual who would be subject to the direction (or the condition) can reasonably be expected to travel.

(5) Before making such a direction (or such an order), the court must obtain and consider information about the individual who would be subject to the direction (or the condition) and the likely effect of the direction (or the condition) on him.

(6) Information about the likely effect of the direction (or the condition) may, in particular, include information as to any conflict with the individual's religious beliefs; or any interference with the times (if any) at which he normally works or attends an educational establishment.

(7) *The court may ask an officer of the Service or a Welsh family proceedings officer to provide the court with information as to the matters in subsections (2) to (5); and it shall be the duty of the officer of the Service or Welsh family proceedings officer to comply with any such request.*

Legal professionals

28. We have not identified any impact on legal professionals.

Were any other measures considered and why were they not pursued?

29. The option of “Do Nothing” was considered and rejected. The Family Justice Review identified the need to improve the system so that enforcement cases return to court more speedily in order to address the reason for the breach.

30. In June 2012 the Government consulted on proposals to improve the timeliness and effectiveness of the current system. This included possible options for legislation to provide the courts with additional punitive sanctions to address non-compliance with court-ordered contact arrangements. The Government response[46] rejected that approach but did commit the Government to make changes to the existing contact activity powers in the Children Act 1989 to extend their use to enforcement cases.

Are there any key assumptions or risks?

Children

31. We assume that children will benefit from the measure we propose if it succeeds in helping the courts to help parents in enforcement proceedings to make contact work for children. We have not identified any risks to children.

Separated parents

32. The impacts are sensitive to the impact of other measures in the Bill to encourage co-operative parenting and to encourage more separated parents to resolve disagreements about their children away from court where this is appropriate and safe.

The courts and Cafcass

33. We assume that the volume of applications to the courts each year for an enforcement order will remain broadly the same or will decrease due to other measures in the Bill to:

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46 http://www.education.gov.uk/aboutdfe/departmentalinformation/childrenandfamiliesbill/a00216607/family-justice-reform-cooperative-parenting

(i) Divert more cases into mediation instead of court proceedings to decide child arrangements.

(ii) Amend the Children Act 1989 to make it clearer that the courts will expect both parents to be involved in a child's life after separation, where this is safe.

(iii) Change the focus of court orders from "contact" and "residence" as something parents "win" or "lose" to a more neutral form of Child Arrangements Order.

34. We assume there will be some training requirement for the judiciary but none for court staff.

35. We assume that the cost of delivering an enforcement focused activity (based around the existing Separating Parenting Information Programme) will be around £150, which is the cost to DfE of commissioning the delivery of the existing SPIP.

36. We assume that SPIPs and any tailored enforcement type SPIP will continue, at least in part, to be delivered as group meeting (which gives the benefit of parental perspectives from other parents and keeps costs down). However, in developing the detail of this our measure we might decide that in an enforcement context a one-to-one meeting would be more appropriate. That would increase the cost of delivering the meeting and would need to be assessed through testing to see if the additional cost delivered a better outcome.

37. There is a risk that enforcement cases could increase. That could in turn increase the number of activity directions made by the courts. However, this scenario would seem unlikely given the Government's wider programme of measures in the Bill to encourage more separating parents

to resolve their dispute away from court where appropriate and safe to do so.

38. There is a risk that the cost to the DfE of commissioning the delivery of activities (and any new enforcement focused SPIP that might be implemented) could rise. However, this seems unlikely as Cafcass has progressively reduced the unit cost of delivering activities through its tendering arrangements.

39. There is a risk that if one-to-one SPIPs and enforcement focused SPIPs need to be delivered on a one-to-one rather than a group basis this would increase the cost of delivering these activities in enforcement cases. The most effective method of delivery in terms of desired impact on influencing parental behaviour needs to be tested and assessed prior to implementation.

Legal Services Commission

40. We have identified the risk of a small impact on the LSC if the courts decided to make more use of the activity direction power to require a parent in breach to attend a mediation information and assessment meeting (a MIAM) and that parent was eligible to receive legal aid to fund the cost of attendance. In practice we think any impact would be small in the context of the £15 million spent annually by the LSC on family mediation.

Policy Area of Bill	*Family Justice: Parental involvement and Child Arrangements Orders*
Departments or agencies	Department for Education; Ministry of Justice
Contact for enquiries	*Family Law team, DfE*
Summary of the measures in the policy area	
What are the problems that the measures address? • Family court proceedings can be emotionally and financially draining for family members, and can be particularly damaging for children. • Cafcass figures show that there were 37,258 new contact and residence cases in 2011-12, involving a total of 56,294 children.	

- Despite the pro-contact stance in both government policy and case law it is clear that a substantial number of children lose touch with their non-resident parent, which can have a lasting impact on the child's life.
- Though there is no evidence of it in practice, there is a widely-held perception that there is an entrenched bias against fathers (usually the non-resident parent) in the family courts.
- There are labels attached to the legal terms of contact and residence which carry connotations of parents being 'winners' and 'losers', which can fuel conflict and lead cases to being even more adversarial.

What are the measures and what is the rationale for their introduction?

- Both of the proposed provisions will amend the Children Act 1989.
- The parental involvement amendment will place an explicit requirement on the courts to consider the benefits to the child of having a continuing relationship with both parents, alongside the other factors which affect their welfare.
- The Child Arrangements Order amendment will replace the existing orders for contact and residence. The order will focus parents' attention on practical care arrangements that suit a child's needs, rather than on their 'rights' in respect of a child– this is a recommendation resulting from the Family Justice Review.
- The proposed changes complement each other and the Government's wider reforms to the family justice system and are based on equity – the overarching intention is to reinforce the expectation that children should have a relationship with both of their parents, and to send a clear signal that both parents remain jointly responsible for their children following family separation. These reforms also aim to encourage parents to resolve disputes outside of the courts and place greater emphasis on the needs of their children following separation - rather than on their own perceived 'rights'.

What are the impacts of the measures and which groups of people do they affect?

- The measures will impact on children of separated families; separated parents; the legal profession; and the state (in terms of court and Cafcass costs).
- It is not possible to reliably quantify the impacts of the measures on these groups because it largely depends on a behavioural response on the part of parents; other issues which will affect the impacts are changes to the eligibility for legal aid, and the wider measures and

reforms to the family justice system. The anticipated changes are discussed in the longer assessment, below.

- There is no universally recognised framework to measure 'well-being' but evidence (see page 7) indicates that children benefit from a relationship with both parents following family separation, where there are no safeguarding issues.
- There could be an initial increase in court applications arising from the amendments, potentially increasing costs in the short-term to, for example, the courts, Cafcass, and individuals; while the changes to the system are established.
- However, it is the Government's intention that there will be a potential longer-term increase in the use of mediation and other support to resolve disputes without the need for court intervention.

Were any other measures considered and why were they not pursued?

- The Government recently consulted on four different options with regard to the parental involvement clause; respondents indicated a preference for a presumption of parental involvement. The proposed legislation to replace contact and residence orders with a new Child Arrangements Order is in line with a recommendation of the Family Justice Review. There are no alternative approaches to achieve this recommendation without primary legislation.

- The proposed amendments are just two strands of reform to the family justice system. A comprehensive package of support, including mediation, parenting programmes and parenting agreements is currently being developed to encourage and enable parents to resolve disputes about their children outside of the courts. It is intended that only the most complex of cases and those with safeguarding issues should reach the courts for resolution.

- For other cases, the Government wishes to send a clear signal that children benefit from a continuing relationship with both parents following family separation and arrangements for this are most successful when they are made by parents who work together and focus on the needs of their children.

Are there any key assumptions or risks?

- There is limited evidence available on parents' likely behavioural responses to the proposed changes but there is a potential risk that there may be an initial increase in applications and repeat applications

to the courts from non-resident parents who believe that the new provisions offer 'rights' to contact and/or an equal share of the child's time. In particular there is a risk that some parents may seek to revisit existing cases.

Further Discussion and Evidence for Specific Measures within Policy Area	
Policy Area	*Family Justice*
Specific Measures within Policy Area Appraised	*6. Parental involvement* *7. Child Arrangements Order*

1. Appraisal of Parental involvement

What are the problems that the measure addresses?

Children and their families

1. Despite the pro-contact stance in both government policy and case law, it is clear that a substantial number of children lose touch with their non-resident parent[47] following separation.

2. Cafcass (Children and Family Court Advisory and Support Service) figures show that there were 37,258 new contact and residence cases in 2011-12, involving a total of 56,294 children. Although most separated parents make their own arrangements for their children, a 2003[48] survey suggests that over one in ten children (13%) whose non-resident parent

[47] Joan Hunt & Alison Macleod (2008) *Outcomes of applications to court for contact orders after parental separation or divorce*,

[48] Blackwell and Dawe (2003), "Non-resident parental contact", Department for Constitutional Affairs

was the respondent and just under one-in-ten children (9%) whose resident parent responded, had their contact arrangements ordered by the courts.

Frequency of child contact

3. In one survey, resident parents reported that, among children who do not live with both parents, between one quarter and one third rarely, if ever, see their non-resident parent[49].

4. The Understanding Society (2009) survey showed levels of contact from the perspective of non-resident fathers. This indicated that 14% did not have any contact post-separation and a further 28% had contact less than once a week. The comparative figures for non-resident mothers are 10% and 29%[50].

5. 1 in 4 non-resident parents said their time with their child had been affected because the other parent had been reluctant to allow it[51].

6. There is a general consensus that it is good for most children to maintain continuing and frequent contact with both parents when parents cooperate and communicate and there are low levels of conflict between them.

Outcomes for parents – lower levels of satisfaction and emotional health

7. A US study[52] looked at the connection between role satisfaction of parents and "institutional role clarity". The authors found that fathers' low involvement with their children was related to on-going conflict with the mother, to greater geographic distance from children, and to a lack of clarity about how they should behave in their parenting role.

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[49] Peacey and Hunt (2008) *Problematic contact after separation and divorce: a national survey of parents.*

[50] Fehlberg et al (2011)

[51] Peacey and Hunt (2008)

[52] Leite et al (2002) "Aspects of father status and post-divorce father involvement with children", Journal of Family Issues, 23(5), 601-623

8. For both the group above and the group of parents who go to court to resolve disputes, a 1993[53] study and another in 1995[54] point to disengagement from families being bad for fathers' emotional health.

Perception of bias in the family courts

9. There is a widely-held perception that family courts are biased in favour of one parent, usually the child's mother. However, the family justice review panel found no evidence of this (perceived) bias in practice. This supports the findings of a small scale study of court files[55] which showed that 79% of the completed cases ended with a court order for face to face contact between the applicant and the child in question. Where face to face contact was to take place, over three-quarters of those who sought overnight stays were granted them (78%). Where there was to be only visiting contact, almost all applications for contact on an unsupervised basis succeeded (94%).

10. However, the *perception* of bias is clearly an issue for a number of parents in family proceedings, particularly fathers. Responses to the Government's recent consultation on the parental involvement proposals showed that one of the most common reasons by those indicating support for the amendment was that it would address 'bias' within the family courts.

What is the policy measure and what is the rationale for its introduction?

11. The *Welfare of the Child: Parental Involvement* clause places a duty on the courts in private law cases to presume that the involvement of both

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[53] Kruk (1993), "Divorce and Disengagement: patterns of fatherhood within and beyond marriage", Fernwood Publication

[54] Greif (1995), "When divorced fathers want no contact with their children: a preliminary analysis", Journal of Divorce and Remarriage 23 (1/2) 75-84

[55] Hunt and Macleod (2008), University of Oxford "Outcomes of applications to court for contact orders after parental separation or divorce", Ministry of Justice

parents in the child's life will further the child's welfare. The clause will amend the Children Act 1989.

12. The clause is intended to emphasise the importance of children having a continuing relationship with both of their parents following family separation, where it is safe and in the child's best interests. However, it will not entitle parents to a prescribed, or equal share of the child's time; it will not offer parents a 'right' to have contact with the child.

13. This clause is also intended to send a clear message to parents that court decisions relating to children will take account of the principle that both parents remain jointly responsible for their children following separation.
14. It is also intended help to dispel the widely-held perception that there is an entrenched bias against fathers within the family courts, and encourage a more co-operative approach to resolving disputes outside of the courts.

15. The Government believes that intervention is justified on equity grounds. The Children Act 1989 is the legal framework which governs children's family law. The proposed amendment will place an explicit requirement on courts to consider the benefits of a child having a continuing relationship with both parents alongside the other factors affecting the child's welfare. The child's welfare will remain the court's paramount consideration in the decision-making process.

16. Evidence suggests that many children of separated families are not experiencing a relationship with their non-resident parent; there is also clear evidence that children benefit from a continuing relationship with both parents following family separation, where there are no safeguarding concerns. As the law currently stands, there is no reference to the importance of joint parenting when families separate. Amending the legislation to include a reference to parental involvement could help to improve outcomes for children by strengthening the expectation, and affecting a cultural shift, that children should maintain a continuing relationship with both parents after separation (where it is safe and in the child's best interests).

<u>Parental involvement and enforcement consultation</u>

17. A public consultation took place on the parental involvement clause between June and September 2012. This was a joint consultation of the Department for Education and the Ministry of Justice. The consultation received 214 responses; more than half of respondents indicated that

they support the Government's plans to legislate. The Government published its response to the consultation findings in November 2012, alongside the draft parental involvement clause and related documents as part of the pre-legislative scrutiny process (evidence from the consultation regarding parental involvement has been included in this impact assessment).

18. It is the Government's intention that, in the longer-term, the proposed amendment will encourage more parents to reach agreement about the care of their children without the need for court intervention, thereby reducing the number of court applications. The Government believes that intervention is justified on efficiency grounds. The potential reduction in families resolving disputes through the courts would mean that resources could be reallocated to public law cases to help reduce delay; and would enable courts to focus on the most complex private law cases. However, the volumes involved (and therefore potential opportunities to reallocate resources to public law cases) are uncertain and analysis does not take account of the impact of changes to legal aid which could see more self-represented parties in cases where a dispute does reach court. The Government has committed to monitoring applications and reviewing evidence around implementation, and how this impacts on the courts.

19. The proposed amendment is consistent with wider reforms and measures that the Government is making with the aim of reinforcing the message that both parents have a role to play in their child's life and that they will need to work cooperatively to make agreements that are in the best interests of their children. The Government is currently developing a package of support to encourage and enable separated parents to resolve disputes outside of the courts.

What are the impacts of the measure and which groups of people does it affect?

Separated parents

20. Views were divided among those who responded to the Government's parental involvement consultation on whether the proposed change in legislation would encourage parents to resolve disputes out of court: 43% indicated that they believed it would achieve this objective and 38% stated they did not believe that it would (a further 19% were not sure). A number

felt that the change would provide an incentive to parents to agree a parenting plan, particularly over time as perceptions and expectations evolved. Some respondents suggested that mediation and other support may, over time, become viewed as 'the norm' when resolving disputes rather than using the courts. However, it was acknowledged that court action would always remain the right option for some families.

21. These responses suggest that there may be some longer-term cultural shift in attitudes if the parental involvement legislation is implemented, which could lead to an increase in parents attending mediation or other support, such as a parenting programme, instead of turning to the courts.

22. Parents' behaviour will be affected by a number of wider reforms – in particular, the removal of legal aid for legal advice and representation in private law cases where there is no evidence of domestic violence; and a proposed requirement for parents to have first attended a MIAM before applying to the courts for a resolution to their dispute.

23. We do not hold information about the costs to parents who privately fund attendance at a MIAM and mediation. However, the costs for clients in receipt of legal aid are a useful guide; the Family Mediation Council has advised its members to use legal aid rates as a benchmark so that there is a reasonable and consistent understanding of the costs clients can expect to pay. The average cost of mediation to the LSC (Legal Services Commission) is in the region of £520 per legally aided client. This includes the costs of a MIAM and mediation sessions. For a MIAM only, the LSC pays two fixed fees; £87 (excluding VAT) for a meeting with one client, or £130 (excluding VAT) where two clients attend the meeting together[56].

24. In summary, we cannot reliably quantify the full impacts of the proposed amendment. However, we anticipate that the proposed legislative change will provide an incentive to parents to negotiate co-operative agreements for their children outside of the courts, and envisage an overall reduction in court proceedings concerning contact and residence disputes, in the longer-term.

25. The Government acknowledges that there is a possible risk of an initial increase in court and repeat applications following the introduction of the

[56] Courtesy of the Legal Services Commission (2013)

proposed legislative change, from non-resident parents (primarily fathers) who believe the court may be more likely to rule in their favour under the new provisions. However, the costs of this potential increase are difficult to quantify for several reasons. These include the difficulty in predicting parents' behavioural response in terms of their approach to resolving disputes, particularly in view of changes to eligibility for legal aid from April 2013; and the potential impacts of increased support for resolving disputes outside of the courts.

Children

26. A number of studies show that children adjust better to parental separation if they have flexible, frequent and supported time with both parents. A 2004 study[57] shows that higher levels of contact with both parents are associated with low levels of conflict. Moreover, more contact with a less-seen parent is associated with happier children, so joint parenting arrangements are likely to be better for children than sole-parenting ones. Similarly, a 1999 study[58] indicates that where fathers not only have contact but engage actively in post-separation parenting, there are significant benefits for children.

27. All of these improvements are, however, difficult to quantify – especially 'wellbeing' with regard to children (a universally recognised framework to measure this does not currently exist).

28. When asked if a legislative amendment would change the way courts made decisions; 57% of those who responded to that question believed it would. Of the respondents who believed that the legislation would lead to positive changes in decision making, some stated that the presumption approach would allow the courts to recognise formally that a child's best interests were met by both parents being actively involved in a child's life where it was safe to do so.

Costs

[57] Smyth et al (2004), "Father-child contact after separation: profiling five different patterns of care", Family Matters No 67

[58] Amato (1999), "Nonresidential fathers and children's well-being: a meta-analysis", Journal of Marriage and the Family 61 557-573

29. Costs to individuals may include court fees and legal advice and representation.

30. Private law cases present a cost to the state in terms of the services provided by Her Majesty's Courts and Tribunal Service (HMCTS); and the involvement of Cafcass - which is funded by the Department for Education. Where individuals qualify for legal aid, some or all of their costs will be met by the state. Even if an individual does not qualify for legal aid, he or she may be eligible for fee-remission, depending on income.

The courts

31. According to the HMCTS annual report 2011-12, the total cost to HMCTS of family cases was £240m in 2011-12; with £105m coming from fee income (this includes public and private law). As an indicative estimate, the administrative cost of a private law children case in a County Court is around 6.5 staff hours (equivalent to approximately £100 based on an average salary for court administrative staff). In addition, there will be judicial involvement in these cases; non-staff costs would also apply. A recent review of court files found that, on average, a private law case involved 5.5 hearings. As the processes are the same, we would expect the administrative cost in a Family Proceedings Court to be similar to that of a County Court.

32. We do not expect any financial savings to the state in the short/medium term. One of the intended aims of the proposed legislation is to deter parents from applying to the courts to resolve disputes about their children's care following family separation. We cannot reliably predict to what extent a fall in applications may occur in the long-term.

33. If there is a fall in applications over time, the main benefit may be in terms of reallocating HMCTS and Cafcass resource to other cases, for example, to reduce delay and case duration. This may include the complex cases and public law cases (which currently take a considerable length of time to complete).

34. The analysis in this assessment assumes that the current balance between fees and court costs for family cases remains the same as today – with the cost of family cases to HMCTS outweighing the income recovered through fees which across family cases averages at around

50% (in 2011)[59]. This is calculated by looking at total fee income as a percentage of total costs.

Cafcass

35. In 2012-13, *average* costs to Cafcass of private law cases varied from £240 for short cases (those which required no further work beyond the first court hearing), to £1,441 for the more complicated cases. Based on these averages, the total cost to Cafcass of these cases during this period can be estimated in the region of £44m (though in practice it is likely to be more than this). This includes applications for specific issues and prohibited steps orders, but the majority of these cases were for contact and residence orders. This cost represents around 35% of Cafcass's baseline funding allocation of £126.2 million in 2012-13[60]. This cost to Cafcass is likely to be reduced (in the longer-term) if there is an increase in the use of mediation and other support by families to resolve their disputes, rather than turning to the courts.

The legal profession

36. Legal practitioners will need to understand the change and be able to apply it in relevant cases, as with any other legislative change. Familiarisation with legislative changes and updates is a key element of a legal practitioner's role. Familiarisation with the proposed parental involvement provision should not prove burdensome as legal practitioners will be aware of the existence of parental involvement principles from case law (which is less accessible to parents). There is little evidence in the parental involvement consultation analysis that the legislation will impose a burden on legal professionals.

37. Familiarisation costs are usually a one off transitional cost and tend to be absorbed in general training costs.

38. The proposed amendment may require legal professionals to explain the significance of the change to their clients and to rethink their approach to a case, depending on the details of each case and its complexity.

39. Given that we do not intend to issue any new guidance, the actual impact of this legislative provision in terms of additional working hours is difficult

[59] Family Justice Review Final Report, November 2011

[60] Courtesy of Cafcass, February 2013

to monetise as it will depend on the approach chosen by the individual private family law practice. Parents' behaviour is also a factor in this – separated parents involved in disputes about their children may also need to rethink approaches to solving their dispute. As previously mentioned, there is little evidence on what the take-up of dispute resolution processes might be outside of the court system, and how many cases may actually reach the courts, once the reforms have been implemented.

40. There are around 2,400 private family law practices in England and Wales[61]. Legal professionals' hourly staff costs can range between £27.60 and £37.60[62], including 27 per cent uplift for non-wage costs.

41. In addition to one-off familiarisation costs there may be a change in on-going levels of business. This could depend upon whether there is an overall change in the number of court cases and whether there is a change in the work required in each case, including the nature and extent of discussions and exchanges involved in reaching a conclusion.

Mediators and experts

42. Mediators may also be affected in a similar way to legal services providers. They may incur familiarisation costs and also a change in their overall levels of business. This may arise if, for example, there is increased use of mediation instead of court-based resolution in the future. There may also be changes in the use of experts depending upon how the reforms affect the nature and extent of discussions and exchanges involved in reaching a conclusion.

Wider society

43. Society may place a positive value on the removal of any perception of bias within the court system - including any increase in the perceived fairness of court processes as well as in case outcomes.

Were any other measures considered and why were they not pursued?

[61] Source: Law Society (2010), http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=429572

[62] Source: Office for National Statistics (2010), "Annual Survey of Hours and Earnings (ASHE)", http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-235202

Parental involvement and enforcement consultation

44. Respondents to the parental involvement public consultation were asked questions in relation to four different legislative options.

45. The other options consulted on were:

- The Principle approach

  This option would place a duty on the court to have regard to the general principle that, irrespective of the amount of contact a child may have with any parent, the child's welfare is likely to be furthered by the fullest possible involvement of each parent of the child in the child's life.

- The 'Starting Point' approach

  This option would mean that the court's starting point would be that the welfare of the child is likely to be furthered if each parent of the child is involved in the child's upbringing.

- 'Welfare Checklist' approach

  This option would include an additional factor in the welfare checklist to have regard to enabling the child to have the best relationship possible with each parent.

46. Analysis of the consultation responses shows a clear desire among the respondents for legislative change to reinforce the expectation that both parents should continue to have a relationship with their children following family separation, believing that the 'presumption' approach would best achieve this. Over half of respondents to the consultation supported the Government's view that this option is the most appropriate legislative approach.

47. The draft clause was amended slightly to strengthen the safeguards within the provision following comments from some of the consultation respondents on this aspect of the amendment.

Wider Family Justice Reforms

48. Since the Children Act 1989 sets out the basis on which court decisions about child contact and residence are made, and the Government wishes to clarify this further, no other specific measures were considered to tackle the problems detailed in the first section of this assessment. However, the parental involvement clause is part of wider changes to the family justice system, which are largely intended to encourage and enable separated parents to resolve disputes about their children's care outside of the courts. The proposed parental involvement clause is part of a package – it complements and supports the non-legislative measures currently being developed, and the proposed legislation for Child Arrangements Orders and compulsory attendance at a Mediation Information and Assessment Meeting (MIAM). Taken together, the Government is confident that this package will encourage and enable many parents to focus on the needs of their children and resolve disputes in a less adversarial manner.

49. The non-legislative measures include improved information and guidance about dispute resolution processes and a web service to help parents develop skills in reducing conflict and reach amicable agreements. Other support includes mediation, parenting programmes, and the creation of a parenting agreement.

50. Parents' attendance at a MIAM will be compulsory before cases relating to children's care arrangements proceed through the courts, although there will be exemptions in some cases (such as those where there is evidence of domestic violence). This is the subject of a separate impact assessment.

Are there any risks or assumptions?

51. There is a risk that the legislation may increase the number of new applications to court initially, or lead to an increase in applications to vary an existing order from parents who believe the new provision may result in a different outcome.

52. Of those who answered the question in the parental involvement consultation about the potential impact on applications following the introduction of parental involvement legislation, 40% thought that there would be an increase (11 of those respondents were fathers; 5 were

mothers); in comparison with 29% who believed there would a decrease (of these respondents, 29 were fathers; 4 were mothers).

The Australian experience of shared parenting legislation

53. Evidence from the Australian experience following the introduction of shared parenting provisions in the Shared Parental Responsibility Act 2006 suggests that an increase in the number of child contact applications is not necessarily inevitable. A report by the Australian Institute for Family Studies indicates that nationally, from July 2005-June 2006, there were 18,752 applications filed involving children (p.306). In 2006-07, the year after introduction of the amended legislation on July 1 2006, there were 18,880 applications. The same study also found that the overall number of applications for final orders in children's matters (including cases where there were also property issues being litigated) declined by 22% from 18,752 in 2005-06 to 14,549 in 2008-09. Rates of litigation have fallen further since that time. In 2010 - 2011, the total number of applications for final orders in children's matters (including cases where there were also property issues), was 12,815[63].

54. However, it is important to note that the Australian legislative framework and dispute resolution services are different from that of the UK so we are wary of making direct comparisons and assumptions about the impact in the UK of the proposed parental involvement amendment. Additionally, caution should be exercised when considering the impact of the Australian legislation as it was part of wider reform, including the introduction of easily accessible family law centres.

55. It is also difficult to attribute impact on behaviour change to the legislation alone in this assessment due to other reforms, including the changes to eligibility for legal aid.

Safety and wellbeing

56. A number of respondents to the consultation commented on the need to ensure that strong safeguards are in place to protect children. A particular concern was that the use of the word ‘safety’ in the drafting of option 1 in the consultation document was too narrow a term to cover the range of harm that a child may be suffering, or at risk of suffering. Some respondents felt it could be misinterpreted as an expectation to focus on

[63] *Meaningful Reform of the Children Act 1989: learning from the Australian experience*, Patrick Parkinson (2012)

the child's physical safety. Those making this point suggested that referring to harm or the risk of harm would fit better with the existing terminology of the Children Act 1989.

57. The Government considered this point carefully and has redrafted the provisions to take account of this concern. The Government is confident that the proposed legislative amendment is drafted in a manner which makes clear to the courts (and parents) that it should not be interpreted as giving parents a 'right' of contact, or equal amounts of time or prescribed levels of contact with children.

58. The existing safeguards within the system, for example; the Welfare Checklist and the duty on Cafcass officers to conduct a risk assessment where they suspect a child is at risk of harm, will still apply to all private law cases when the new provision is implemented. The child's welfare and interests will remain the court's paramount consideration when making decisions in all cases.

59. Ensuring that clear information, advice and guidance is available for separated parents, and robust dispute resolution processes are in place, will help to minimise the risk of parents making applications on the basis of misinterpreting the provision. Indeed, the Government's planned package of support for separated parents is intended to act as a buffer to this.

60. If the change to the law meets one of its key policy objectives and deters people from applying to the courts, there is a risk that some parents may feel forced to accept care arrangements that place a child or a parent at risk. A high proportion of private law cases which currently reach the courts involve factors that put a child or adult at risk of harm. Robust measures for detecting these cases are needed in pre-court dispute resolution processes to ensure cases of this nature still get to court – the Government is currently working with a range of partners to ensure that appropriate screening processes are in place throughout the dispute resolution process.

2. Appraisal of Child Arrangements Order (CAO)

What are the problems that the measure addresses?

61. There are two perceived problems with the private law system that the introduction of CAOs will play a part in addressing. The first is the adversarial nature of the court system. Although there are processes designed to reduce conflict between parents who bring a case to the courts, the Family Justice Review highlighted that many actively seek 'their day in court', and view the outcome as one of 'winning' or 'losing'. The current system of child contact and residence orders can reinforce this perception. Although the majority of parents have genuine reasons for seeking a residence order, anecdotal evidence[64] suggests that some parents will apply for a residence order even when they are content with the arrangements for the child; they simply wish to have the official recognition of being the 'resident parent.' Some applications for contact and residence orders arise less as a result of concerns about a child's care, but more because one or both parents is seeking a court ruling about their own 'rights' in respect of the child.

62. The second problem is that, despite the pro-contact stance in both government policy and case law, there is a widely-held perception that courts tend to be biased in favour of one parent, usually the child's mother. This in turn has led to a perception that the private family law system views mothers as being more important than fathers in children's lives and therefore more likely to be granted residence of the child when such cases reach the courts. The terminology associated with contact and residence orders are often perceived as establishing a hierarchy - with the resident parent (usually the mother) seen as being more important than the non-resident parent.

<u>Perception of bias in the family courts</u>

63. Although the Family Justice Review panel found no evidence of bias in practice, it identified a number of sources for this perception. The proportion of children living with their father after divorce or separation is low. A 2008[65] study found that 'resident parents were almost always female' – only 9% of their sample of resident parents was male.

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[64] Peacey and Hunt (2008) *Problematic contact after separation and divorce: a national survey of parents.*

64. The Family Justice Review panel recognised that the slowness of the court system meant that by the time cases are heard, the living arrangements for children in the interim (usually with the mother) were upheld by the courts. In their interim report (2011), the Family Justice Review panel noted that advice given by solicitors to non-resident parents is often based on court 'norms'. This can perpetuate a view of system bias, and deter fathers from seeking the level of contact with their child that they feel is needed.

65. The Review also noted a continuing problem with the enforcement of court orders – the perception that resident parents are able to flout contact orders with impunity further reinforces the perception that the system favours one parent over the other.

Winners and losers

66. The terms 'residence order' and 'contact order' are associated with the perceived power imbalance between resident and non-resident parents, reinforced by the current description of a contact order that requires the resident parent to 'allow' the non-resident parent to see his/her child.

67. The benefit of continuing involvement with both parents (where it is safe) is already a consideration in court decision making, but it is not explicitly stated in the legal framework which governs the process (the Children Act 1989). This has further contributed to a perception that the law does not fully recognise the important role that both parents can play in a child's life.

68. The Family Justice Review highlighted the problems of an adversarial system and the perception of bias as just two of a wide range of issues that drive the need for private law reform.

69. There is a general consensus that it is good for most children to maintain continuing and frequent contact with both parents when they cooperate and communicate and have low levels of conflict. The Child Arrangements Order aims to place a firm focus on the child's practical care needs, rather than on labels arising from the court orders.

What is the policy measure and what is the rationale for its introduction?

70. The Child Arrangements Order clause will amend the Children Act 1989, replacing the existing provisions for contact and residence orders. The new CAO will focus on the child's wider needs and not just where they will live and when they will spend time with their other parent.

71. Court proceedings are often confrontational. Parents can place too much emphasis on 'winning' their case rather than focusing on their children's needs. The terminology associated with contact and residence orders contributes to this adversarial stance. An intention of this measure is to help to remove the perception of winners and losers, and focus attention on the practical care arrangements that best suit the needs of the child.

Family Justice Review panel recommendation

72. The FJR panel recommended in its final report that the Government should develop a 'Child Arrangements Order', to set out the arrangements for the upbringing of the child when parents seek a court resolution to disputes about their children's care (the amendment will seek to repeal the existing provisions for contact and residence orders). The panel recommended this on the grounds that it would aim to move discussion away from loaded terms such as residence and contact to focus on the practical issues of the day to day care of the child; enabling more flexible, child focused arrangements. The Government accepted this recommendation because it sees the value in changing the emphasis of court orders to focus on the practical arrangements for caring for the child; and of removing the current emphasis on the labels 'contact' and 'residence' which have become synonymous with the notions of 'winning' and 'losing.' 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.

73. In this case we believe that intervention is justified primarily on equity grounds. The measure will help to mitigate a perceived bias towards one parent, signalled through the use of two separate orders, and thereby improve the perception of equity amongst parents. The measure will also help parents to understand that court proceedings take place to consider their children's needs, rather than as a means of asserting their 'rights' in respect of a child.

What are the impacts of the measure and which groups of people does it affect?

Improved parental perceptions and better outcomes for parents and children

74. The use of a single Child Arrangement Order will put a greater emphasis on children's needs rather than parents' 'rights'. It is intended to send a clear signal to parents that neither should feel differently treated in court; it will also help to dispel the perception that there is an in-built legal bias against one parent (usually the father).

75. There is no robust evidence on its impact on parents in terms of wellbeing or emotional health. Responses to the Family Justice Review suggest that interested parties are broadly in favour with this proposal alongside other measures to encourage parents to focus on their children's needs:

    "On balance, however, we consider that removing the current emphasis on the different labels of residence and contact, implying a winner and a loser, would be helpful as part of a wider and sustained effort to change attitudes and culture. Both residence and contact are in fact about parenting time. Our members report advising clients to forget the labels and that matters are often easier to resolve if discussions are about co-operative parenting and parenting time in the interests of the child. Otherwise, some cases have been known to fight around the label when there is in fact agreement on parenting time."(Resolution, consultation response quoted in the Family Justice Review (2011)66).

76. There are a wide range of possible types of impact from replacing current court orders with a new form of court order.
    These include:
    a. Changes in the overall volume of court orders because arrangements might need to be varied more, or less often in future.

    b. Changes in the overall volume of court orders because they might lead to more or less demand for mediation or for other forms of resolution instead of court-based resolution.

[66] Family Justice Review Final Report (2011):
http://www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf

c. Changes in the overall volume of court orders if a single order in future can cover the issues which previously required more than one order to resolve.

d. Changes in the costs of making an order. These could include court costs, which could be partially met by court fees, as well as legal costs. These might stem from the extent and nature of discussions and exchanges involved in making an order, including the extent of information required. This in turn may include information provided by experts.

e. A different on-going overall level of resource required in relation to the activity of making court orders would have resource implications for HMCTS, for parents, for legal services providers, for mediators and other service providers, and for the legal aid fund where legal aid is applicable.

Familiarisation costs

77. Legal practitioners will need to understand the change and be able to apply it in relevant cases, as with any other legislative change. Familiarisation with legislative changes and updates is a key element of a legal practitioner's role. Familiarisation with the new order should not prove burdensome - the concept it represents is very straightforward. There has been no feedback on the published clause, or evidence provided to the Justice Committee's pre-legislative scrutiny, that suggests this change will not impose a burden on legal professionals. Familiarisation costs are usually a one off transitional cost and tend to be absorbed in general training costs (as mentioned in greater detail in the parental involvement assessment, above).

78. In addition to legal services providers familiarisation costs would be incurred by all other parties involved in the activity of making court orders as identified above (and similarly outlined in the parental involvement section of this assessment).

Were any other measures considered and why were they not pursued?

79. No other measures were considered to tackle the specific issue of negative perceptions caused by the terminology of contact and residence

orders. This issue was explored in detail by the Family Justice Review, and the Government accepted the Panel's recommendation to introduce the new single order.

Wider Family Justice Reforms

80. The Child Arrangements Order clause is part of wider changes to the family justice system, which are largely intended to encourage and enable separated parents to resolve disputes about their children's care outside of the courts.

81. The non-legislative measures include improved information and guidance about dispute resolution processes and a web service to help parents develop skills in reducing conflict and reach amicable agreements wherever possible. Other support includes mediation, parenting programmes, and the creation of a parenting agreement.

82. Parents' attendance at a MIAM (Mediation Information and Assessment Meeting) will be compulsory before cases relating to children's care arrangements proceed through the courts, although there will be exemptions in some cases (such as those where there is evidence of domestic violence).

Are there any key assumptions or risks?

83. Three main risks have been identified for the introduction of CAOs. These were raised in the consultation responses to the Family Justice Review, in the feedback to DfE from interested parties when the CAO clause was published, and in the pre-legislative scrutiny report published by the Justice Committee in December 2012. The first is that the new order will make no difference to how parents approach resolving disputes or reduce conflict during cases, resulting in wasted administrative resource. The FJR panel accepted that whether to replace contact and residence orders is a judgement call as the change is likely to have little impact on changing attitudes to parental roles on its own – however, it is part of a much wider package of measures that aim to promote the involvement of both parents in a child's life, both in intact and separated families. It is not the expectation that the new order can remove the perception of winners and losers in all cases. The change is consistent, however, with other

measures to help separated parents focus on their children's needs – and in some cases it will help to take the focus off the labels of residence and contact.

84. Cases will also be affected by the changes to the availability of legal aid. It will therefore be very difficult to assess in isolation what impact the introduction of this new order will have on promoting less adversarial resolutions to cases and the equity of both parents.

85. The second risk (flagged up by representatives of the legal professions) is that the new legislation has the potential to create confusion, particularly for the expected larger number of litigants in person arising from reductions in legal aid. The combination of different elements of contact and residence orders has resulted in a longer definition than currently exists in section 8 of the Children Act 1989. The concept of the child arrangements order is, however, straightforward – it is a single order that sets out the care arrangements for a child. To mitigate any risk of confusion, the Government is currently developing a package of support for separated parents, including improved advice and guidance about the system which will also help parents understand the nature of the new provisions. The online information hub will also explain the change.

86. The third risk, also raised by representatives of the legal professions, is that the change in terminology may cause confusion in cross-jurisdictional cases. The introduction of CAOs does not change how international law relating to children operates. A central concept in the relevant Hague (1980 Child Abduction and 1996 Protection of Children Convention and Council of Europe Conventions (1980 Custody Convention) and EU legislation (Council Regulation (EC) No 2201/2003 Brussels IIa) is that of 'rights of custody'. In England and Wales, the concept of parental responsibility includes the right to determine where a child lives. The CAO will not change the nature of parental responsibility and how it operates. Where a court order is in place that sets out what the living arrangements should be, it is expected that the content of the order will be specific enough to establish who has "rights of custody" from an international perspective. In situations where a father does not have parental responsibility, but is named in a CAO as a person the child will live with, he will automatically be awarded PR. The Government believes that the introduction of the CAO and the repeal of the contact order and residence order will not alter the way in which the main instruments in the field of international private family law operate in relation to England and Wales.

87. The perceived risk, however, arises from the possibility that the change in terms (i.e. away from contact and residence) may be hard to interpret in other jurisdictions. To be enforceable under 1980 Hague Article 5a, 1996 Hague Article 3b or Brussels IIa Article 2(9), orders need to show clearly which parents have the right to decide on a child's place of residence. Although the position regarding the operation of PR will be clearly established through the making of CAOs, the interpretation of the terms used is a matter for the courts and authorities with jurisdiction in Hague Contracting States and EU Member States. The Government will consider how best to raise awareness of this change among states that are party to the relevant international treaties and avoid any misunderstanding that the concept of 'rights of custody' has been affected by the introduction of the new order.

88. The introduction of CAOs will not change the number of forms used for the court application process. As now, one form will be used for applications that cover private law issues that could result in a CAO, Prohibited Steps Order (PSO) and Specific Issues Order (SIO).

Parental behaviour in submitting applications

89. It is the Government's policy objective that only the most complex and conflicted cases, and those with safeguarding issues will reach court when the full set of private law reforms are introduced. It seems unlikely that the introduction of CAOs will affect the number or timing of applications made by separated parents. Parents will still want to put their case forward separately - it seems very unlikely that either a) one parent will be happy to let the other submit an application in the expectation that the court will consider the child's needs in the round, or b) that parents would submit joint applications. However, as no modelling work has been done on the impact of introducing CAOs on the timing/frequency of submitting applications, it is impossible to predict this with complete certainty.

Policy Area of Bill	*Family Justice: Divorce*
Departments or agencies	Ministry of Justice, HM Courts and Tribunals Service

Summary of the measures in the policy area

What are the problems that the measures address?

These measures will:

- (a) dispose of the need for parties who wish to end a marriage or civil partnership to file a statement of arrangements for children.

- Where there are any children the parties must submit a statement setting out the proposed arrangements for maintenance and contact – or must say that these are yet to be settled. The submission of a statement of arrangements for children in proceedings for a decree nisi, judicial separation order or nullity order does not in itself prompt judicial scrutiny of these arrangements.

- This statement is not binding and settlement of the children arrangements is not a procedural requirement for obtaining a divorce or dissolution of a civil partnership. While these issues may be subject to judicial scrutiny as part of these proceedings this is rare in practice.

- It is unnecessary to require parties in these proceedings to make a statement of arrangements for children. Such disputes may be settled in separate proceedings at any time under the Children Act 1989.

- In 2011 there were approximately 125,000 applications to the courts for a *decrees nisi*, judicial separation order or for an order to annul a marriage with almost all being for a decree nisi to dissolve a marriage.

- Judicial involvement **[DN: scrutiny of child arrangements and judicial involvement in the case generally are two different things]** in these cases is not an effective use of judicial time since 98% of the applications were uncontested by the parties. Where both parties agree that the marriage or civil partnership has irretrievably broken down there is no clear need for judicial involvement.

and

- (b) repeal separate and un-commenced provisions for an entirely new divorce process which have not been implemented and should also now be repealed.

What are the measures and what is the rationale for their introduction?

(a) To streamline the process for litigants / lawyers, removing the unnecessary preparation of a statement and to improve the allocation of resources to cases that require judicial involvement
(b)To meet a longstanding commitment to repeal Part 2, FLA.

- **The first change** removes the requirement on the parties to make a statement of arrangements for children for scrutiny by the court when applying for a decree nisi in divorce proceedings[67], a judicial separation order, or a nullity order.

[67] And for a Conditional Order which is the equivalent provision for civil partnerships.

- This will simplify the process for all applicants. Judicial scrutiny of arrangements for children in these proceedings is rare and can provide only a snapshot in time of children's needs and arrangements to meet these.

- The Children Act 1989 provides specific orders for resolving a dispute about children at any time. The continuing availability of these separate orders provides the key safeguard for children at any point during and after a divorce.

- Removing the statement requirement will also facilitate, in uncontested divorce cases, the proposed exercise of residual judicial functions by appropriately trained justices' clerks and their assistants[68], freeing up judicial time for more complex cases. This will involve a substantial reduction of judicial involvement in uncontested divorce proceedings. This proposal for delegated powers is being considered as part of the development of the single family court in the Crime and Courts Bill.

- Experienced judges will still be able to advise on uncontested cases where necessary and judges will continue to deal with contested divorce.

- **The second measure** addresses a long-standing commitment to Parliament[69] to repeal unimplemented provisions in legislation for a new divorce procedure. The Bill provides a rare opportunity to fulfil this commitment.

What are the impacts of the measures and which groups of people do they affect?

<u>Repeal of restrictions on divorce etc. where there are children</u>

Children

- There should be no impact on children as the requirement to make a statement on arrangements for children and possible judicial scrutiny of that statement are considered to have no material impact in practice. Evidence supporting this view and risks applying to it are examined in this

[68] Justices' clerks and their assistants are legally qualified staff employed by Her Majesty's Courts and Tribunals Service (HMCTS) to support the work of the court.

[69] See Lords Hansard, Written Answers, 16 January 2001, column WA126.

Assessment of Impact.

Divorcing couples and parents and their legal advisers

- Parties, and their legal advisers if they have them, will no longer have to provide to the court information about maintenance and contact arrangements for children in proceedings for a decree nisi (divorce), judicial separation or nullity. We have no data on how much time this takes on average or how it contributes to the overall cost of employing a solicitor, including for example whether reduced legal costs at the divorce stage as a result of not producing the statement might be associated with higher legal costs later on if the same maintenance and contact issue are addressed later.

The courts

- In uncontested cases District Judges will be freed from the requirement to consider the statement of arrangements for children in order to decide whether to exercise the court's powers in relation to them. This will facilitate the delegation of remaining judicial functions in divorce cases to qualified and suitably trained justices' clerks and their assistants.

- We estimate that around 10,000 judicial hours per annum will be freed up for more complex family cases (equivalent to £0.9 million but this will not yield a financial saving as this time will be used for other work).

- We estimate that around 10,000 hours of justices' clerk / assistant time would be needed to take on uncontested divorce work from District Judges (equivalent to cost of £0.3 million per annum). This cost will be met by diverting resources from other activities and will not generate a net financial cost to HMCTS.

- Justices' clerks and their assistants will require initial training to take on this new role. It is intended that this change will be part of a wider package of reforms to the family courts. It is not possible at this stage to disaggregate training costs.

<u>Repeal of unimplemented provisions for a new process of divorce</u>

- There should be no impacts as these measures remain unimplemented

and are simply being repealed.

Were any other measures considered and why were they not pursued?

Repeal of restrictions on divorce etc. where there are children

- The option of "Do Nothing" was considered and rejected for the reasons set out below.

- Parties or their legal representatives are currently required to prepare a statement - about the arrangements made or planned for their children – which is neither binding nor a procedural requirement to obtaining divorce. Any dispute about such arrangement can be settled in separate proceedings at any time.

- Research[70] has shown that the requirement to make a statement of arrangements for children in proceedings for a decree nisi, judicial separation order or nullity order does not result in effective judicial scrutiny of these arrangements.

- Submissions to the Justice Select Committee have confirmed this view.

Repeal of unimplemented provisions for a new process of divorce

[70] See Murch, M, Douglas, G, Scanlan, L, Perry, A, Lisles, C, Bader, K. and Borkowski. M (1998) *Safeguarding children's welfare in uncontentious divorce: A study of s.41 of the Matrimonial Causes Act*. Report to the Lord Chancellor's Department. Cardiff University.

- Consideration of whether to implement the new procedure and ground for divorce in Part 2 of the Family Law Act 1996 was the subject of extensive research[71].

- The findings of that research were clear: the twin aims of saving saveable marriages and bringing to an end those that had irretrievably broken with the minimum of conflict were unlikely to be served by implementing Part 2.

- The Government has no plans to amend Part 2 (as advocated by some family law practitioners). This is a complex piece of legislation and would require significant parliamentary time to amend.

- The Government believes that its wider reforms to the family justice system as a whole have a greater potential to impact positively on children and families.

Are there any key assumptions or risks?

Repeal of restrictions on divorce etc. where there are children

Key assumptions

- A District Judge takes on average five minutes to process an uncontested divorce application.

- A suitably trained justices' clerk or their assistant (having acquired the necessary experience and confidence) would take the same time.

- Continued judicial support for this change will aid the development of detailed proposals to ensure the smooth transition to the new process for handling uncontested divorce.

[71] *Information Meetings & Associated Provisions within the Family Law Act 1996: Final Evaluation of Research Studies Undertaken by Newcastle Centre for Family Studies, University of Newcastle,* September 2000.

- The number of uncontested divorces will remain broadly at the 2011 level.

- There is no change to the split of divorces being 2% contested (requiring judicial consideration) and 98% uncontested (to be dealt with by justices' clerks and their assistants).

- Where an uncontested divorce gives rise to the need for a hearing this will take place in a local court before a judge so as to preserve access to justice.

- The structure of court fees remains broadly the same.

- The consideration of contact and maintenance arrangements required to produce the statement is assumed to provide no benefits and to duplicate other separate considerations which take place for example at separate court hearings. As such the current requirement is assumed just to generate additional costs. This includes no benefits arising from the earlier consideration of these issues at divorce stage rather than their later consideration at other stages.

Key risks

- The need for effective training for justices' clerks and their assistants in order to ensure that uncontested divorce cases are not referred to judges unnecessarily.

- The lack of any evidence about the potential behavioural responses of divorcing couples to the proposed changes in terms of whether they may be more likely in future to contest a divorce in order to ensure access to a judge.

- If either risk materialises it would reduce the efficiency savings we hope to realise by freeing up judges to undertake more complex family cases.

- The statement of contact and maintenance arrangements might in some

cases add value and might not completely duplicate considerations which would otherwise already take place at other stages.

Repeal of unimplemented provisions for a new process of divorce

Key assumptions

- Part 2 will remain unimplemented until repealed.

- Other initiatives to reform family justice will replace elements of Part 2 in terms of information giving and will have greater impact as the focus will be on all separating parents and couples regardless of their marital status.

Key risks

- Failure to repeal Part 2 would maintain the current legal uncertainty about the extent to which other family justice reforms can replicate elements of Part 2 and would disadvantage children and families who could otherwise benefit from these reforms.

Further Discussion and Evidence for Specific Measures within Policy Area	
Policy Area	*Family Justice: Divorce*
Specific Measures within Policy Area Appraised	8. *Repealing a restriction in primary legislation that requires the court to consider whether to exercise statutory powers in respect of children when considering an application for a divorce or dissolution of a civil partnership.* 9. *Repealing provisions in primary legislation for a new divorce process which have never been implemented.*

Appraisal of 1. Repeal of restrictions on divorce and dissolution etc. where there are children

What are the problems that the measure addresses?

41. In 2011 there were approximately 125,000 applications to the courts for a *decrees nisi*[72], judicial separation order[73] or for an order to annul a marriage[74] with almost all being for a decree nisi to dissolve a marriage. These cases were all scrutinised by a judge - yet 98% of applications for a decree nisi were uncontested by the parties concerned.

42. An uncontested divorce is one where both parties accept that the marriage itself has irretrievably broken and both wish to divorce. Disputes about other matters such as financial provision or arrangements for children may

[72] A *decree nisi* is a provisional order granted when the court is satisfied that the person applying for a divorce has proved their entitlement to obtain one.

[73] A decree of judicial separation is an alternative to a divorce. It does not dissolve the marriage but removes the obligation on the parties to live together.

[74] Nullity orders have the effect of making a marriage void, as if it had never taken place. A marriage may be void (not allowed by law) or may be voidable (the marriage was valid but there are circumstances that mean it can be treated as if it never took place).

still arise during or after the divorce but the need to dissolve the marriage is not in dispute. In practice disputes about financial provision or children are often dealt with in separate linked proceedings. In relation to children, the statement of arrangements, if scrutinised by the court as part of the divorce application, may duplicate substantive consideration of these issues in other proceedings.

43. Where both parties agree that their marriage has irretrievably broken down there is no clear need for judicial scrutiny of an application for a decree nisi or judicial separation order. It is an inefficient use of resource for valuable judicial expertise to be directed at proceedings which rarely result in the need for a court hearing to enable a decree nisi or judicial separation order to be granted. These proceedings are high volume and the judicial time invested in these cases could have greater positive impact in other types of more complex and demanding family proceedings.

44. Where there are any children of the marriage the parties must currently also submit a statement to the court setting out the proposed arrangements for maintenance and contact – or must say that these are yet to be settled. This statement is not binding and settlement of these matters is not a procedural requirement for obtaining a divorce. While these issues may be subject to judicial scrutiny as part of the divorce process this is rare in practice.

45. In proceedings for a divorce (a decree nisi in effect) or an alternative judicial separation order it is unnecessary to require parties in every divorce case to make a statement of arrangements for children given the evidence that this is not routinely scrutinised by the courts, despite the court having a statutory duty to consider whether to exercise its powers in relation to children[75]. The current requirement to make a statement of arrangements involves additional work for the parties and their legal advisers if they have them.

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[75] See submissions to the Justice Select Committee by Resolution, The Law Society and the Association of District Judges as part of pre-legislative scrutiny of the Children and Families Bill (papers CFB09, CFB10 and CFB21).

46. Where there is no dispute about the arrangements for children there is no need for any judicial scrutiny of these arrangements as part of divorce proceedings. Where a dispute about children does arise, either during the divorce or subsequently, separate proceedings will remain available under the Children Act 1989 to resolve the matter if the parties cannot do so by themselves (or through alternative means such as family mediation). Disputes about children may be settled through these separate proceedings at any time.

47. The Family Justice Review recommended that an uncontested divorce or dissolution of a civil partnership should be handled administratively (that is, not by a judge but by a qualified legal adviser, suitably trained, whose role is to support the family court). This is considered in the next section.

48. The Review also recommended that the process of divorce should begin through an on-line hub. That proposal is outside the scope of this Assessment of Impact which is limited to the effect of clauses in the Children and Families Bill.

49. The broader context for this measure is that it will support the Government's commitment to reduce significantly the time it takes the family courts to complete a public law Children Act case (one in which the State has placed a vulnerable child under a care or supervision order and needs to settle the long-term arrangements for that child). Those proceedings are on average taking more than a year to complete. The Government wants most of those proceedings to be completed in no longer than 26 weeks.

What is the policy measure and what is the rationale for its introduction?

50. We propose to remove the requirement in section 41 of the Matrimonial Causes Act 1973 which requires the parties proceedings for a decree nisi, judicial separation order or nullity order to file a statement of arrangements for children with the court (and will repeal section 63 of the Civil Partnership Act 2004 which makes similar provision in respect of civil partnerships). This will streamline the process for all of these proceedings

and will benefit parties by reducing the information they must submit to the court for scrutiny. This measure will not make it any easier to satisfy the court that the marriage or civil partnership has irretrievably broken down. Those requirements will remain the same.

51. In uncontested cases for a divorce, dissolution of a civil partnership or judicial separation order this measure will also facilitate the proposal to exercise remaining judicial functions by appropriately trained justices' clerks and their assistants working in the family court and employed by Her Majesty's Courts and Tribunal Service. Judges would continue to deal with contested applications for divorce or dissolution of a civil partnership and will also be able to advise justices' clerks and their assistance on more complex uncontested cases where needed – for example, those involving international law considerations.

52. The rationale for this measure is to simplify the process for all applicants in these proceedings by removing the requirement to provide the court with a statement setting out details about the arrangements for children. Judicial scrutiny of these arrangements at the point of divorce or dissolution of a civil partnership in uncontested cases is rare[76] and in any event can only provide a snapshot in time of children's needs and how these will be met. The Children Act 1989, on the other hand, provides a means to seek a court resolution of a dispute about children at any time. The availability of these specific orders will continue to provide an important safeguard for any children involved in family breakdown beyond the point at which a marriage or civil partnership comes to an end.

53. A further justification for this measure is that it will free up judicial time for more complex family cases by facilitating the exercise of the remaining judicial functions in uncontested divorce cases by appropriately trained justices' clerks and their assistants, employed by Her Majesty's Courts and Tribunals Service (HMCTS) to support the work of the family court.

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[76] See Murch, M, Douglas, G, Scanlan, L, Perry, A, Lisles, C, Bader, K. and Borkowski. M (1998) *Safeguarding children's welfare in uncontentious divorce: A study of s.41 of the Matrimonial Causes Act*. Report to the Lord Chancellor's Department. Cardiff University.

54. Experienced judges will still be able to advise on uncontested cases where necessary, for example where a marriage involves international law considerations. Judges will continue to deal with contested divorce cases and will also be able to advise on more complex uncontested cases where needed, for example those involving matters of international law.

55. Proceedings for nullity involve a decision to make a marriage void as if it had never existed – with all the potential implications that could have for the legal status of children and property. Nullity proceedings, which are small in volume, will also therefore continue to be dealt with by an experienced judge.

56. Matters relating to children require particular judicial expertise. This is why we propose that these will continue to be dealt with by a court through separate Children Act proceedings rather than by justices' clerks or their assistants as part of proceedings for divorce or judicial separation.

What are the impacts of the measure and which groups of people does it affect?

Separating and divorcing parents and their children

57. The measure will simplify the process for a decree nisi, judicial separation order or nullity order and for obtaining an equivalent conditional order, judicial separation order or nullity order in respect of a civil partnership. There were about 125,000 decrees nisi, conditional orders and decrees for judicial separation issued in 2011. Almost all of these were decrees nisi for dissolution of marriage. There were only around 150 decrees of judicial separation granted, and around 650 dissolutions of civil partnerships.[77]

[77] Sources: Judicial and Court Statistics 2011 (available at http://www.justice.gov.uk/statistics/courts-and-sentencing/judicial-annual-2011) and Civil Partnership Statistics, United Kingdom, 2010 (available at http://www.ons.gov.uk/ons/rel/vsob2/civil-partnership-statistics--united-kingdom/2011/sb-civil-partnerships-in-the-uk--2011.html#tab-Number-of-dissolutionshtml). Statistics on civil partnerships for 2011 are provisional.

58. No adverse impacts on maintenance and contact arrangements for children are expected as a result of these not being explained to the court and potentially scrutinised.

59. Under the current procedure:

    (a) the spouse applying for a divorce completes an application know as a "petition" with personal details and the facts that support the irretrievable breakdown of the marriage. That spouse also completes a form detailing plans for maintenance and contact arrangements for any children under 16 (or under 18 and in education or training) and submits this to the local court with the fee. Court staff then send a copy of the petition to the other party with a response form (notifying the original petitioner of this).

    (c) If the other party does not contest that the marriage has irretrievably broken down and the fact establishing this, the next stage is for the petitioner to apply for a decree nisi which involves the petitioner swearing an affidavit before a solicitor or member of court staff. At this point, all the forms received by the court are passed to a judge – including the statement of arrangements for children.

    (d) The judge reviews the paperwork including proposed arrangements for any children. If the judge is satisfied on the evidence that irretrievable breakdown of marriage has been established and that the applicant is entitled to a decree nisi, the judge must certify that he is so satisfied and direct that the application be listed before a District Judge for the making of the decree nisi at the next available date. Save for any pre-warned issue of costs the hearing at which the decree nisi is made is a block hearing. The district judge reads out a list and decrees are made en bloc by the court. The court staff inform the parties.

    (e) If on considering the paperwork the judge is not satisfied that the applicant is entitled to a decree nisi, then he may either direct that any party to the proceedings provides such further information or takes such other steps as the court may specify or direct that the case be listed for a case management hearing.

60. There is no central record relating to how often the judge is not satisfied that a decree nisi can be made. We believe it happens very rarely, based on informal discussions with the family judiciary and HMCTS. Separate court proceedings may be used to settle disputes relating to residence, contact and maintenance for children. Final financial arrangements and

residence and contact arrangements for children do not need to be settled before a divorce is granted, and the arrangements submitted with the divorce petition are not binding.

(f) The petitioner then has to wait for 6 weeks before applying for the decree nisi to be made absolute, legally ending the marriage. (If the original petitioner does not do this, the other spouse has to wait a further three months before they can apply). The issuing of the decree absolute is handled by court staff not a judge and staff have to check that the applicant is entitled to have the decree nisi made absolute.

(f) However, the court does have power to delay making the decree absolute in certain circumstances. For example, if as a result of considering the arrangements or proposed arrangements for the children of the family the court considers that it may need to exercise its powers under the Children Act 1989 and exceptional circumstances make such action desirable, the court can stay the grant of a decree absolute of divorce.

61. Based on informal discussions with the judiciary, and in the light of submissions by judges and family practitioners to the Justice Select Committee during pre-legislative scrutiny of this measure, we believe that in practice this power to delay the decree absolute following consideration of children's arrangements is rarely used, and that consideration of arrangements for children does not in practice lead to a delay in the making of the decree absolute of divorce. If there are disputes these will normally be taken forward in separate proceedings under the Children Act 1989 or, in relation to a financial or property matter, by way of ancillary relief proceedings, which will continue after the decree nisi has been issued.

62. By removing consideration of the arrangements for children from steps (a) to (f) our proposals will simply the process and the information required by the court but will not adversely impact on decisions about any children concerned or a financial remedy that may be sought by the other spouse. The revised process will involve consideration only of whether the divorce is contested or uncontested, whether the applicant is entitled to a decree nisi and whether there is any outstanding financial dispute in relation to the other spouse which, exceptionally, requires a stay in the making of the decree absolute.

<u>The courts</u>

63. **HM Courts and Tribunals Service (HMCTS):** We estimate that that 10,000 judicial hours will be saved annually (an equivalent saving of £0.9 million) although this will not be a financial saving as the judicial time freed up by this measure will be used to progress more complex family cases and reduce delay.

64. Justices' clerks and their assistants will need to spend a proportion of their time processing uncontested divorces – we estimate that around 10,000 hours per year will be required (equivalent to approx. £0.3 million per annum). This will be met by diverting resources from other activities and will not generate a net financial cost. Under the proposals Justices' clerks and their assistants will require some initial training and guidance in order to deal with uncontested divorce cases under the new process. It is not possible at this stage to identify the costs of this as we expect it to form part of wider changes to processes in the family courts – and in particular the establishment of the single family court.

Legal professionals

65. Legal professionals: The simplification of the process may mean those who are not contesting their divorce and who have children may have no need to seek legal advice about children when applying for divorce/nullity/dissolution and less legal advice might be required per case.

66. It is assumed however those in contested divorces with more assets at stake and/or in dispute about the children arrangements are more likely to still have legal representation for the divorce and/or for a separate Children Act application.

67. It is also possible that the current 'statement' part of the divorce application does not constitute any great part of the overall fee, particularly where there is a fixed fee package for the entire divorce process.

Were any other measures considered and why were they not pursued?

68. The option of "Do Nothing" was considered and rejected.

69. Research[78] has shown that the requirement to make a statement of arrangements for children in proceedings for a divorce does not result in effective judicial scrutiny of these arrangements.

70. In its submission to the Justice Select Committee, Resolution[79] (which represents a large number of family law solicitors) described the current process as a "*tick box exercise*".

71. The Law Society said[80] it "does not believe that the suggested provisions remove an important safeguard for children. Neither section 41 nor the Statement of Arrangements form provide additional or more effective protection for children."

72. The Association of District Judges[81] commented "we support the repeal of s.41 matrimonial Causes Act 1973, and its equivalent under the Civil Partnership Act 2004. In our experience, they are rarely, if ever, invoked and we are satisfied that the more appropriate course in any event is to make an application under the Children Act 1989." Most divorce applications are dealt with by District Judges.

Are there any key assumptions or risks?

Separating and divorcing parents and their children

73. The impacts are sensitive to whether the requirement to provide a judge with details of maintenance and contact arrangements for children affects the speed and nature of settlements reached during the divorce process and to the effect on demand for legal assistance in completing an application for divorce.

74. Those applying for a divorce would benefit from no longer be required to provide details of maintenance and contact arrangements for children as part of their application. This would save the applicant time and may also save legal costs for the applicant and respondent to the divorce as there is

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[78] See previous references to Murch and Douglas.

[79] See paper CFB10 submitted to the Justice Select Committee for pre-legislative scrutiny of the Children and Families Bill

[80] Ditto - see paper CFB09.

[81] Ditto – see paper CFB21.

no longer a need for most people to take legal advice on the statement of arrangements for children made for the purpose of the divorce. The scale of this benefit would depend on how long it currently takes to complete these details and how many people take legal advice because of the need to provide a statement.

75. We assume that this measure will have no impact on arrangements for child maintenance and contact as scrutiny of these as part of the divorce process is rare and when it does take place it may duplicate the consideration of these issues in other proceedings.

76. There is a risk that legal work undertaken as part of producing the statement is not a complete duplicate of legal work undertaken at later stages to resolve contact and maintenance arrangements. If not a complete duplicate then the savings to parents from reduced legal costs would be lower.

77. There is a risk that in some cases production of the statement and/or judicial scrutiny of the statement may lead to the earlier resolution of contact and maintenance arrangements or might otherwise be associated with improved outcomes. If so then the costs to children and parents would be higher.

<u>The courts</u>

78. We assume that the number of uncontested divorces remains at the 2010/11 level, there is no change to the split of contested uncontested divorces, that uncontested divorces would be processed in local courts by HMCTS legal advisers and that there are no changes to court fees.

79. We have assumed that most uncontested divorce cases will in future be processed by justices' clerks or their assistants who will be able to refer cases to a judge if appropriate. If this happened in a large number of cases, the efficiency savings of the proposal would be diminished.

80. **Time required for a District judge to process an uncontested divorce:** The estimate of approximately 5 minutes per uncontested divorce is based on analysis of how long it takes judges on average to conduct one piece of box work (of any type) and this is estimated to be 4.7 minutes based on over 16,000 observations made during a one-off internal study of 43 courts in the South East over three months in 2006/2007. We do not have observations of the time taken to do an uncontested divorce specifically. However, an internal survey undertaken by HMCTS suggests that an

uncontested divorce is simpler than average box work, so it is possible the time taken to complete an uncontested divorce is overestimated.

81. Informal consultation with the Association of District Judges also suggests that 5 minutes is a reasonable estimate for the time required. If the time required for a District Judge to process an uncontested divorce was higher, the net benefit of the proposal would be higher.

82. **Time required for a HMCTS legal adviser to process an uncontested divorce:** We assume that it would take an HMCTS legal advisor the same amount of time as a District Judge to process an uncontested divorce i.e. 5 minutes. There would also be less material to review as details of proposed arrangements for children would no longer be part of the divorce process. This suggests that it might take justices' clerks and their assistants less time than it currently takes a District Judge. On the other hand, there are differences between the skills and experience levels of a District Judge and justices' clerks and their assistants. In light of this we do not attempt to make adjustments to the time taken. Instead we assume that the time taken would be the same.

83. It is possible that the time required for a justices' clerk to process an uncontested divorce, and therefore the level of efficiency savings in judicial time, might be higher or lower. If it takes longer for a justices' clerk to process an uncontested divorce the net benefit of the proposal would be lower.

84. **Number of uncontested divorces:** The total number of decrees nisi between 2006 and 2011 has ranged between 135,233 (2006) and 119,260 (2009). In 2010 and 2011 it was approximately 125,000. It is not possible to predict the exact number however for the purposes of estimation; we assume approximately 125,000 divorces per year. It is also possible that the proportion of divorces that are uncontested might change from the current 98%. If the number of uncontested divorces were to decrease, the net benefit of the proposal would reduce. We assume that the volume of divorces is unchanged by these proposals as is the split between contested and uncontested divorces.

85. **HMCTS operational processes:** We have assumed that the only changes to the current process would be the exercise of reduced judicial functions in uncontested divorce cases by suitably trained justices' clerks and their assistants. Impacts on HMCTS would be different if, as a result of these reforms, HMCTS later introduced further changes to operational procedures supporting the administration of these cases.

Legal practitioners

86. Any impact on legal professionals would depend on how many people currently take legal advice to complete their divorce petition with reference to the statement of arrangements for children. Some clients may no longer do so if there is no requirement to provide details of maintenance and contact arrangements for children to the court.

87. However, written submissions to the Justice Select Committee by The Law Society and Resolution did not raise any concerns about the impact of this measure on the legal profession. In practice, any dispute concerning the arrangements for children arising from divorce are likely to be the subject of separate Children Act proceedings. Where legal advice is provided about the arrangements for children we believe that it is more likely to be in the context of separate proceedings. The impact on the legal profession of repealing the statement of arrangements requirement should therefore have a minimal impact on family solicitors.

88. As above there is a risk that production of the statement is not a complete duplication of other legal consideration of contact and maintenance arrangements. If this risk materialises then the costs to legal practitioners of the reforms would be lower.

Appraisal of 2. Repeal of unimplemented provisions for divorce (Part 2 Family Law Act 1996)

What are the problems that the measure addresses?

89. The Bill also contains a second measure to fulfil a long-standing commitment to Parliament to repeal un-commenced provisions for no-fault divorce contained in Part 2 of the Family Law Act 1996.

90. These provisions were aimed at saving saveable marriages and reducing distress and conflict for those that needed to end. Part 2 retained the ground for divorce as the irretrievable breakdown of the marriage but would have removed the requirement to evidence this through the citing or one or more 'facts':

- Adultery

- Unreasonable behaviour
- Desertion
- Have lived apart for more than 2 years and both agree to the divorce
- Have lived apart for more than 5 years (usually sufficient even if one of the parties to the marriage objects to a divorce).

91. Adultery, unreasonable behaviour and desertion involve the making, in effect, of an accusation of 'fault'. Proponents of no-fault divorce believe that removing these from the process of divorce could help to reduce conflict and acrimony.

92. Repeal of these provisions is as long-standing commitment to Parliament following extensive academic research which showed that the policy objectives of this legislation saving saveable marriages and, where marriages break down, bringing them to an end with the minimum distress to the parties and children affected were unlikely to be fulfilled by the provisions in Part 2

93. Repeal of Part 2 has not been possible to date because of the lack of a suitable legislative vehicle. The wider family justice scope of the Children and Families Bill now provides an opportunity to give effect to the commitment to repeal Part 2

94. The Government has introduced separate measures in the Bill which would make it compulsory for an applicant in specified types of family proceedings to first attend a family Mediation Information and Assessment Meeting (MIAM) meeting to receive information about mediation and to consider whether it could be an appropriate means to settle a family dispute. That provision has some similarities with the information meeting provision for divorce in Part 2.

95. The Government's MIAM clause will apply to all parties with a financial or children dispute regardless of marital status. The Government believes that this broader focus is the right one. Repeal of Part 2 will remove legal uncertainty and facilitate the development of other initiatives to help separating and divorcing parents regardless of marital status.

What is the policy measure and what is the rationale for its introduction?

96. Following enactment of the Family Law Act 1996 the Government commissioned Newcastle University to evaluate the provisions in Part 2[82]. Part 2 would also have introduced some key new procedural requirements to the process for obtaining a divorce which would have included mandatory attendance at an information meeting, as a prerequisite to making a statement that the marriage has irretrievably broken. A period of 3 months would have to elapse before such a statement could be made and filed with the court. Following the making of the statement a period for reflection and reconciliation would then follow (9 months with the possibility of an extension in certain circumstances). The effect of these procedural changes would have been to lengthen the time for obtaining a divorce in every case to a minimum of 12 months.

97. The information meeting requirement was key to the new process. Six models of information meeting were tested over a two-year period. None of these was considered to be effective enough for implementation of Part 2 on a national basis.

98. The research showed that, for most people, the meetings came too late to save marriages and tended to incline those who were uncertain about their marriages towards divorce. Whilst people valued the provision of information, the meetings were too inflexible, providing general information about both marriage saving and the divorce process. People wanted information tailored to their individual circumstances and needs. In addition, in the great majority of cases, only the person petitioning for divorce attended the meeting, but marriage counselling, conciliatory divorce and mediation depend for success on the willing involvement of both parties.

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[82] *Information Meetings & Associated Provisions within the Family Law Act 1996: Final Evaluation of Research Studies Undertaken by Newcastle Centre for Family Studies, University of Newcastle,* September 2000.

99. The report suggested testing a further model designed to address the majority of the shortcomings identified in the pilots. However, this new kind of meeting would not have solved the underlying problems associated with compulsory information meetings, in particular the timing of the meetings in the divorce process and their inability to engage both parties. The then Government's view was that the problems with Part 2 were not limited to the provisions on information meetings. The new procedures would be complex and likely to lead to significant delay and uncertainty which would not be in the best interests of the divorcing couple or their children. There were concerns that its provisions would ultimately prove unworkable in practice.

What are the impacts of the measure and which groups of people does it affect?

100. There should be no impacts as the provisions are not in force and it has been clear for some time that the intention is to repeal these provisions.

Were any other measures considered and why were they not pursued?

101. No other measures were considered.

102. Whether to implement Part 2 was informed by extensive academic research. The decision not to implement the provisions (and to repeal them) was taken over 10 years ago and was based on that rigorous academic evidence. It would open to the Government to seek to amend the provisions of Part 2 but we have no plans to do so.

103. Part 2 is a highly complex piece of legislation. It also extends only to divorcing couples and parents. The Government's current reform agenda is aimed at all children and families regardless of marital status.

Are there any key assumptions or risks?

104. The Government believes that repeal of Part 2 remains necessary. We have put forward a separate proposal to make attendance at a Mediation Information and Assessment Meeting (MIAM) compulsory for a person who wishes to start proceedings for a children matter or financial remedy. The purpose of the MIAM is to provide information about mediation and to consider with the parties whether might be suitable as a means to settle

the dispute. This requirement is similar to the Information Meeting requirement in Part 2 but applies irrespective of marital status.

105. Some respondents to the Family Justice Review and pre-legislative scrutiny consultation by the Justice Select Committee have argued that rather than repeal Part 2 the Government should implement it in order to bring in 'no-fault' divorce and thus reduce acrimony and conflict in the divorce process. The provisions in Part 2 are complex and cannot easily be unpicked. Retaining some parts while repealing others is not a viable option. The information meeting provision in Part 2 was key to the new process of divorce yet independent evaluation of the six information meeting pilots found this provision to be fundamentally flawed.

106.

Private Law – equality impact statement

The private law reforms are aimed at supporting separated parents to make their own child-focused care arrangements without resorting to the courts. Where cases do come to court, the process should be as fast and straightforward as possible. The potential equalities impacts have been considered in the course of the Government's consideration of the Family Justice Review's recommendations, its response to the Panel's final report, and during the development of specific legislative proposals.

The Government's assessment is that the overall impact of these reforms is likely to be positive for children and parents, and that is appropriate to implement these measures to make the system more effective for the families that use it. The proposals apply equally to all cases and do not treat people less favourably because of a protected characteristic. There is therefore no direct discrimination within the meaning of the Equality Act 2010.

Indirect discrimination

No adverse impacts are expected on the protected characteristics as a result of the introduction of the child arrangements order. Courts will continue to make decisions with the child's welfare as the primary consideration, and based on the individual circumstances of each case.

The Government is introducing a presumption in law that a child's welfare is furthered by the involvement of both parents, where it is safe and in the child's best interests.

One of the aims of this measure is to address the perception that the family courts are biased on gender lines, and do not fully recognise the importance of fathers to their children's welfare. The legislation will strengthen confidence in the fairness of the system, and reinforce the expectation that both parents are responsible for their children's upbringing.

We have, however, identified the risk of a negative unintended consequence for separated parents arising from this parental involvement legislation. If the legislation works as intended and encourages more separated parents to settle their disputes out of court, it is possible that vulnerable parents will be coerced into agreeing care arrangements. The vulnerable parent in these situations is more likely to be the mother.

We will mitigate this risk in several ways. The Sorting out Separation web app will provide advice on how safety concerns should be raised and handled in the dispute resolution process. Mediators involved in Mediation, Information and Assessment Meetings (MIAMs) are already skilled at identifying and assessing for safety issues. The Ministry of Justice with work with the Family Mediation Council and other interested parties to make this process as robust as possible. For domestic violence cases, the current set of exemptions from the requirement to attend a MIAM will be extended in line with the criteria in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the extended list of evidence of domestic violence therein.

Conclusion

The private law reforms do not treat people less favourably on the basis of any of the protected characteristics. Action to mitigate the risks for vulnerable parents is underway, but overall we expect positive impacts on separated mothers and fathers. These include the potential to reduce tensions between parents and encourage a less adversarial approach, and increased confidence in a system that recognises the important role that both parents can play in a child's life.

Any enquiries regarding this publication should be sent to us at www.education.gov.uk/contactus.