



Championing Children and Young People in England

**A Child Rights Impact Assessment
Of Parts 1-3 of the
Children and Families Bill (HC Bill 131)
27 February 2013**

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Abbreviations

CRC	United Nations Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
EHC plan	Education, Health and Care Plan
MIAM	Mediation Information and Assessment Meeting
OCC	Office of the Children's Commissioner
SEN	Special Educational Needs
UNCRC	United Nations Convention on the Rights of the Child

Executive summary

This assessment looks at the provisions of the Children and Families Bill on adoption, family justice and the reform of provision for Special Educational Needs. It considers the likely impact of these changes on children's enjoyment of the rights set out in the UN Convention on the Rights of the Child and the other rights that children have in domestic and international law.

Adoption

Every child deserves stability and the opportunity to develop secure attachments through a permanence plan that is right for them. Children have a right to have their views taken into account, but this is not reflected in the adoption clauses.

Measures to recruit and support adoptive parents are very welcome. We have concerns about the consequences for children if adopter recruitment functions are removed from local authorities rapidly and on a large scale.

Achieving continuity by minimising delay and disruption for children placed for adoption is in children's best interests. However, provisions on early permanence risk being perceived as pre-empting the court process, and potentially undermining efforts to reunite children with their birth parents, or wider family, where this is in children's best interests.

UNCRC Article 20 (3) requires that due regard is paid to 'the child's ethnic, religious, cultural and linguistic background' when a child is deprived of their family environment. The repeal of the requirement to give due consideration to ethnicity would remove a comparable obligation from domestic law. In our view, the evidence does not support the need for such a change.

Opening the Adoption and Children Act Register to approved adopters poses significant privacy and safeguarding challenges. The inclusion of children pre-adoption would fall foul of the requirement in UNCRC Article 21 that adoption must follow due process and be based on legal certainties.

Current legislation on contact for children in state care and children post-adoption is in line with requirements of the UNCRC and ECHR. We are not convinced the changes would significantly advance children's interests.

Family Justice

Children's best interests will be served by less undue delay in family law proceedings, and if separating parents focus on their needs. In every case, the best interests of the individual child must remain paramount, and consideration given to the child's views.

Reducing litigation between separating parents will often serve children's best interests. However, a more robust focus is required on children's best interests and their views and

wishes in MIAMs and mediation. Narrow exemption criteria risk cases being inappropriately referred to mediation, placing children at risk or harm.

The introduction of a presumption that a child's welfare will be furthered by the involvement of both parents in their life risks undermining the principle that courts must make decisions that are in the individual child's best interests.

On balance, the introduction of time limits for public family law proceedings should support children's best interests. Every child will need support and time to participate in proceedings in a way which works for them. There remains a possibility of disruptive recurrent late extensions of proceedings.

Proposals on judicial scrutiny of care plans do allow judges welcome discretion. However, the narrow definition of 'permanence' risks reduced scrutiny leading to low quality care plans with insufficient detail and support.

Reform of Special Educational Needs provision

It is vital that decisions about provision are driven by what is best for children. However, there is no explicit requirement on the face of the Bill for children's best interests to be a primary consideration in decisions about provision.

The duty on local authorities to have regard to children's views and wishes is very welcome, but needs to be embedded in specific measures of the Bill.

We recognise the importance of joint commissioning and inter-agency working. Nevertheless, provisions for Education, Health and Care Plans offer no new rights to high quality health care or social care. Plans will not be available to disabled children who do not have SEN, or children who cease to have SEN. The reforms stop short of a fully integrated system which puts vulnerable children and their needs at the centre of decision-making.

Provisions enabling children to appeal to the tribunal are welcome. Children who appeal need to have appropriate support.

The extension of obligations to academies and further education institutions is an important change which will ensure all duty-bearers meet their obligations to children with SEN. The exceptions under which a school can decline a request from a child with an EHC plan are too broad.

The 'local offer' has potential to make a real difference to children and young people. However, this potential is limited by the lack of minimum standards for local offers, or mechanisms to ensure implementation.

Children's rights to education are not reduced when a child is deprived of their liberty. The exclusion of children in detention from the provisions of the Bill is in breach of the requirements of the UNCRC.

The Office of the Children's Commissioner

The Office of the Children's Commissioner is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The United Nations Convention on the Rights of the Child (UNCRC) underpins and frames all of our work.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. She also has a duty to speak on behalf of all children in the UK on non-devolved issues which include immigration, for the whole of the UK, and youth justice, for England and Wales. One of the Children's Commissioner's key functions is encouraging organisations that provide services for children always to operate from the child's perspective.

Under the Children Act 2004 the Children's Commissioner is required both to publish what she finds from talking and listening to children and young people, and to draw national policymakers' and agencies' attention to the particular circumstances of a child or small group of children which should inform both policy and practice.

The Office of the Children's Commissioner (OCC) has a statutory duty to highlight where we believe vulnerable children are not being treated appropriately in accordance with duties established under international and domestic legislation.

Our Vision

A society where children and young people's rights are realised, where their views shape decisions made about their lives and they respect the rights of others.

Our Mission

We will promote and protect the rights of children in England. We will do this by involving children and young people in our work and ensuring their voices are heard. We will use our statutory powers to undertake inquiries, and our position to engage, advise and influence those making decisions that affect children and young people.

The United Nations Convention on the Rights of the Child

The UK Government ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1991. This is the most widely ratified international human rights treaty, setting out what all children and young people need to be happy and healthy. While the Convention is not incorporated into national law, it still has the status of a binding international treaty. By agreeing to the UNCRC the Government has committed itself to promoting and protecting children's rights by all means available to it.

The legislation governing the operation of the Office of the Children's Commissioner requires us to have regard to the Convention in all our activities. Following an independent review of our office in 2010 we are working to promote and protect children's rights in the spirit of the recommendations made in the Dunford report and accepted by the Secretary of State.

Introduction

This paper presents the Office of the Children's Commissioner's child rights impact assessment of the Children and Families Bill. The purpose of such an assessment is to identify the likely impact of the Bill's provisions on the promotion and realisation of children's rights. We assess the Bill against the rights set out in the United Nations Convention on the Rights of the Child (UNCRC); the Human Rights Act 1998, which incorporates provisions of the European Convention on Human Rights (ECHR) into domestic law; and other international human rights obligations.

The UNCRC was ratified by the UK on 16 December 1991. Although it has not been incorporated into domestic law it has important consequences for the rights of children. There are two particular ways in which the UNCRC affects the rights owed to children in England. Firstly "all domestic legislation has to be construed as far as possible to comply with international obligations"¹. Secondly, the UNCRC informs the content of article 8 ECHR², and as such impacts upon domestic law by virtue of the obligation placed on public bodies by section 6 of the Human Rights Act 1998 not to act incompatibly with rights found in the European Convention on Human Rights³.

We also have regard to the interpretative comments of the UN Committee on the Rights of the Child (CRC), and case-law and comments of domestic and international courts and treaty bodies.

The UK is a state party to the UNCRC and in December 2010 the then Children's Minister Sarah Teather committed that the Government would give 'due regard' to the UNCRC when making new policy and legislation and, in so doing, will always consider the recommendations of the CRC.

The OCC's Children's Rights Assessments aim to draw on the views and experiences of children who are likely to be affected by the measures under consideration. In this assessment, we draw largely on previous consultations and research by our own office and others. In February 2013, the OCC team discussed key elements of the new Bill with members of Amplify – the OCC's young people's advisory group. Their comments are reported in section 4. We also discussed SEN provision with the young people who are members of Brighton and Hove's AHA! (Aiming High Advisory Group), and their thoughts are reported in section 7.

Our assessment considers the impact of the Bill's provisions on children's rights in law. However, it also considers how far the measures in the Bill are likely to have a wider impact on children's well-being and their enjoyment of their rights.

¹ *Smith v Secretary of State for Work and Pensions* [2006] UKHL 37; [2006] 1 WLR 2024 at [78] per Lady Hale referring to the UNCRC

² See for example *Neulinger v Switzerland* (2012) 54 EHRR 31 at [131] – [135]

³ An important recent example of this is *ZH(Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166

Scope

The Children and Families Bill is a complex piece of legislation with important and far-reaching consequences for many different groups of children, including those who are known to face significant disadvantage; children who are separated from their parents, children with special educational needs and disabled children.

In order to consider the implications of each set of reforms, the assessment addresses key aspects of the Bill – adoption, family justice and reform of special educational needs provision – separately and in turn. It is important to remember that there will be many children affected by more than one of the Bill's provisions: for example, a high proportion of looked-after children also have special educational needs⁴.

In line with our proposed model for Child Rights Impact Assessments⁵, and with the draft provisions for reforming the OCC, our focus is on considering *'the effect on the rights of children of ... government proposals for legislation'*⁶. The assessment focuses on analysis of proposals as tabled and does not recommend amendments to the Bill.

Since the starting point for OCC's Child Rights Impact Assessments is the UNCRC, which applies to children and young people up to their eighteenth birthday, this assessment considers the rights of children⁷. We do not comment in detail on the Bill's impact on the rights of adults and young people over 18 years, including changes to Special Educational Needs provision focused on 19 to 25 year olds. However, the OCC's overall remit covers 18-21 year olds who are disabled or who have been in care: we are well aware of the challenges disabled young people face during transition to adulthood, and the importance and value of appropriate and integrated support and services.

Many of the provisions of the Bill – particularly relating to adoption and family justice – engage the rights of adults, including rights to family and private life (ECHR Article 8) and a fair trial (ECHR Article 6). These issues are not covered here.

This CRIA makes no detailed comment on the following provisions within the Bill:

(i) Flexible Parental Leave

These provisions – which will apply across Great Britain - are designed to enable working fathers to take on a more active role in caring for their children and working parents to share the care of their children. They also extend the leave entitlements of adoptive parents. These provisions and the other proposals set out in the Government's response to the 'Modern Workplaces' consultation⁸, are positive and will help enable both parents

⁴ Our of all children who had been looked after continuously during the 12 months leading up to March 2011, and who were attending educational institutions, 72.8% were classified as having special educational needs. Children with Special Educational Needs: An analysis – 2012, Department for Education, October 2012.

⁵ Office of the Children's Commissioner, Proposed Model for Child Rights Impact Assessments, May 2012

⁶ Reform of the Office of Children's Commissioner: draft legislation, July 2012

⁷ Provisions in domestic law which require local authorities – for example – to provide certain care leavers with transitional support up to the age of 21 years, do not serve to alter the definition of child in domestic law, see MacDonald, A. 'Rights of the Child: Law and Practice', 2011.

⁸ Government response to the 'Modern Workplaces' consultation, November 2012

to fulfil their common responsibilities for children's upbringing and development, as required by Article 18 of the UNCRC.

(ii) Flexible working

Working parents of children under 18 years, as well as those who care for adults, already have the right to request flexible working. The provisions will extend the right to request flexible working to other employees. It appears unlikely that this extension – which will apply in England, Wales and Scotland – will have a direct impact on children's rights.

(iii) Childcare

The provisions – which will apply in England – enable the creation of new registered childminder agencies, remove the duty on local authorities to assess sufficiency of childcare provision in their area, allow Ofsted to charge for early re-inspection at the request of a childcare provider, and remove duties on schools to consult before offering facilities or services to the community.

We do not comment in detail on the proposals, but note that they engage both the **rights of young children** to maximum development, to be treated as rights holders and to develop their personality and talents to the full (UNCRC Article 6, Article 29), as well as **the duty of States to provide support to parents**, particularly working parents (UNCRC Article 18). Article 18.3 sets out the State's duties to take all appropriate measures *“to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible”*. In recommendations to States Parties, the CRC has viewed high-quality day-care places as the responsibility of the State⁹. In whichever way services are provided to young children,

“States parties must ensure that the institutions, services and facilities responsible for early childhood conform to quality standards, particularly in the areas of health and safety, and that staff possess the appropriate psychosocial qualities and are suitable, sufficiently numerous and well-trained.”¹⁰

(iv) Reform of the Office of the Children's Commissioner for England

The Office of the Children's Commissioner for England broadly welcomes these reforms and believes they will contribute to the realisation of children's rights. However, it would not be appropriate to undertake a detailed assessment of the reforms since they relate directly to the remit and work of the OCC.

⁹ Hodgkin, R. and Newell, P. 'Implementation Handbook for the Convention on the Rights of the Child', UNICEF, 2007

¹⁰ Committee on the Rights of the Child, General Comment No. 7, Implementing Child Rights in Early Childhood, 2006

Amplify: the Office of the Children's Commissioner's Young People's Advisory group

Amplify are the Office of the Children's Commissioner's young people's advisory group. The group has 26 members from across England, aged between 12 and 18 years.

Back in summer 2012, Amplify were involved in selecting the Children and Families Bill as a priority for a Child Rights Impact Assessment. Amplify were consulted again in February 2013 about the proposals in the Bill and the issues they feel are important to them. Here are some of the key things they said:

Children – especially those whose voices are often not heard - should be **genuinely involved in all discussions** which are about them. This is children's right and the law should be clear about whose responsibility it is to make that happen in every different area covered in the Bill. Children should be able to complain, appeal, and talk to professionals – confidentially if necessary – about things that affect them. If a child has difficulties communicating, it is the adults' responsibility, not the child's, to make sure they have support to say what they need to say, through a translator, the use of sign language, pictures, letter boards or flash cards, and computer aided communication. They might need somebody else to speak for them, and that should be allowed too.

Amplify members said that the stability offered by adoption was very important, but it was also vital **for children going through the adoption process to be listened to**, even if support was needed to for this to happen. They needed to be able to share their feelings confidentially. Children grow up and change very quickly, and the opportunities for them to talk to professionals are too far apart. It is important that the process moves forward without delay, as long as this does not lead to poor decisions. People should not assume that only parents from the same ethnic background as a child are suitable adopters, but a child's culture, religion and ethnic background are still important factors to consider. Children's wider families and other friends and adults are really important: all should be involved.

Amplify felt there were lots of positive things about the **Family Justice** reforms. It was vital **that someone was looking after the child and supporting them** during the court process. They felt that mediation should always be publicly funded so that separating parents weren't deterred from trying mediation. Children should be involved in mediation if they wanted to share their views, but this should be done carefully so that children weren't put at risk or placed in an uncomfortable position. The wider family, including step-parents, are really important for many children, and they should be part of the picture.

If reform of SEN provision is to make a difference to children, it will need to begin with a better understanding by professionals, adults and children of how services can be improved to best meet the needs of each individual child. What is being asked for is that **every disabled child or child with SEN is treated as an individual**, with respect, and negative attitudes and bullying are prevented and addressed in school and outside school. Amplify described instances where this approach was absent especially in relation

to understanding and helping develop positive relationships and in social situations. They also gave really good examples where well-thought out provisions had made it possible for disabled children to express their views on their own care and where practical and continuous support, given in the right way at the right time by the right service or people, had made it possible for children to achieve their full potential. This must happen for all children, everywhere.

Adoption provisions ¹¹

Adoption provisions: key issues

1. The UNCRC states that, in adoption, the best interests of the child must be the paramount consideration at every stage of the adoption process (UNCRC Article 21). Our assessment considers how the provisions in the Bill are likely to impact on children's rights and interests, including the right of a child to know and be cared for by their parents (Article 7); the child's right not to be separated from their parents except where necessary for their best interests (Article 9); children's right to have their views taken into account (Article 12); the rights of children deprived of a family (Article 20); and the rights of children during adoption (Article 21).
2. Adoption has profound implications for children and their rights. Where adoptive placement is assessed by the care authority as most likely to meet the child's needs, timely progress in seeking court approval and placing the child appropriately is important. However, the child's best interests must remain paramount throughout the decision-making progress. Article 20 of the UNCRC requires the state to provide special protection and assistance to all children who cannot live with their families. Every child deserves stability and the opportunity to develop secure attachments and life-long relationships through a permanence plan that is right for them. All routes to permanence require skilled and well-trained professionals, good assessment planning and decision-making processes and good support post placement.
3. The measures taken by the government in this Bill and elsewhere to **recruit, inform and support adoptive parents** are very positive, and should contribute significantly to reducing delay for children. If the adopter recruitment/approval function was removed from local authorities, particularly if this was done rapidly and on a large scale, this could result in adverse consequences for children.
4. An adoption order constitutes radical interference in children's and parent's rights to family life. Article 21(a) of the UNCRC requires that such an order can only be made by 'competent authorities'. There is a risk that wider use of '**early permanence**' provisions will be perceived as pre-empting the court process, undermining efforts to reunite the child with their birth parents where this is in children's best interests. The provisions do not include any requirement to ascertain children's views as required by Article 12 UNCRC.

¹¹ The Children Act 1989 makes the child's welfare the court's paramount consideration. The Adoption and Children Act 2002 states that 'the paramount consideration ... must be the child's welfare throughout his life', Part 1, chapter 1, 1 (2)

5. UNCRC Article 20(3) requires that due regard is paid to 'the child's ethnic, religious, cultural and linguistic background'. The **repeal of the requirement to give due consideration to ethnicity** would remove from domestic law a comparable obligation on English authorities. In our view, the evidence does not support the need for such a legislative change. We have found no robust evidence that such a change would increase the likelihood of children of minority heritage and culture being placed successfully for adoption.

6. Opening the Adoption and Children Act Register to approved adopters would require **very careful safeguards** to ensure approved adopters were able to access only information which does not breach children's privacy rights (UNCRC Article 16, ECHR Article 8), as well as protecting children from abuse (UNCRC Articles 6, 19 and 34), and how to ensure that children were fully informed and engaged in deciding what information they wanted to make available to a much wider audience (UNCRC Article 12 and Article 16). **Extending the register to include details of children for whom the local authority is 'considering adoption'** would fall foul of the requirement in UNCRC Article 21 that adoption must follow due process and be based on legal certainties.

7. **Current legislation on contact for children in state care and children post-adoption is in line with requirements of the UNCRC and ECHR and allows consideration of the right contact arrangements for each child.** Although practice can vary, we are not convinced that additional regulations are required: instead the focus should be on sound assessment practice focused on children's best interests and taking full account of children's views, feelings and wishes about contact. We are also unclear about the justification for additional provisions around post-adoption contact.

Introduction

This section considers the proposed amendments to section 22C of the Children Act 1989 and section 1 of the Adoption and Children Act 2002 dealing with early permanence through 'fostering for adoption', the repeal of the requirement to give due consideration to ethnicity, changes to the recruitment, assessment and approval of prospective adopters, personal budgets for adoption support services, adoption support services' duty to provide information, changes to the Adoption and Children Act register, and contact arrangements for children in local authority care, and for children post-adoption.

The measures set out in the Bill relate to England, aside from those provisions on contact (clauses 7 and 8) which relate to family proceedings and therefore apply to England and Wales.

The most important of children's UNCRC rights engaged by these proposals are:

- Article 3: the best interests of the child must be a primary consideration
- Article 7: the child's right to know and be cared for by their parents
- Article 9: the right of a child not to be separated from their parents except where such separation is necessary for the best interests of the child
- Article 12: the right of children to express their view and have their views appropriately considered
- Article 19: the right of children to be protected from physical and mental violence
- Article 20: when considering solutions where a child is temporarily or permanently of its family environment 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'
- Article 21: the best interests of the child shall be paramount in the system of adoption

The UN Guidelines for the Alternative Care of Children (2009)¹² also provide important guidance in relation to children who are unable to live with their families.

Article 8 of ECHR provides for the rights of children, birth parents and (following adoption) adoptive parents to respect for their private and family life.

The UNCRC establishes that, in relation to adoption, the best interests of a child must be the paramount consideration. For the youngest children for whom an adoptive placement is likely to be the appropriate decision, the government's focus on reducing delay in securing a permanent placement is very positive and will help to enable the development

¹² These guidelines apply up to the point where a final adoption is made and the child has been placed with adoptive parents.

of attachment relationships without disruption. However, for older children over the age of around 18 months/2 years, the picture is more complicated. For children of all ages, sound assessment and decision making processes are needed to ensure that permanence provisions are focused on the best interests of each individual child.

Children affected

The government recognises that adoption will not be in the interests of all children who cannot live with their birth parents. It has not quantified how many children it expects to be affected by the different provisions, but intends to accelerate the whole adoption process so that more children benefit from adoption and more rapidly”¹³

In the year to March 2012, 3,450 looked after children in England were adopted, and 2,680 were placed for adoption¹⁴. Three quarters of children adopted were under 4 years old at the time of the adoption. 85 per cent of looked after children who were adopted were from a White background, compared to 78.1 per cent of all looked after children. There were 67,050 looked after children on March 31st 2012. The majority of children adopted from care have had significant experience of adversity in early childhood, and at least one experience of separation and rejection. Sibling groups, children with disabilities or special needs, older children, and children from ethnic minority backgrounds all tend to wait longer for adoptive placements. With regard to ethnicity, there are differences between ethnic groups. In particular, children of Caribbean heritage are less likely to be adopted and are over-represented in care. However, data shows that more of the children from this background who are in care at any one time entered care at an older age than was the case with children who were white and those from other groups, including children of mixed heritage.¹⁵

The complexities of decisions around permanence for looked-after children mean that it is difficult to say with confidence how many children will be affected by the specific measures set out in the Bill.

Children's views

There is limited relevant research which draws on the views of children with experience of the adoption process. Almost all the research is retrospective and few studies capture children's views of current practice.

A recent survey conducted by the Office of the Children's Rights Director with 429 children with experience of adoption shows overall support but a range of views about the potential opportunities and challenges stemming from Fostering for Adoption proposals¹⁶.

¹³ An Action Plan for Adoption: Tackling Delay', Department for Education, March 2012

¹⁴ Table E1, children Looked After by Local Authorities in England (including adoption and care leavers) - year ending 31 March 2012, Department for Education

¹⁵ Comment provided by Professor June Thoburn, University of East Anglia who is an expert on adoption research.

¹⁶ Office of the Children's Rights Director, 'Changing adoption - adopted children's views', 2013

In Dance and Rushton's 2005 research with young people placed with permanent families during middle childhood, children spoke about their experience of adoption and life afterwards¹⁷. Many highlighted the disruption they had experienced before adoption, and the ways in which the transition to adoption was made easier – through a warm welcome, and the knowledge that they would have access to opportunities and a place of their own. Children found it difficult to deal with uncertainty about not knowing what might happen or what was expected, as well as new schools, house rules, being in a new environment and having to make new friends.

Some children said they had settled in easily, others found it a slow and difficult process, and took a long time before they felt sure they would not have to move again. Although children whose placements had been disrupted were not interviewed, a small number of children remaining in placements wished they had not been adopted, prompting the researchers to consider whether other permanence options should have been explored in more depth. Similarly, Thoburn and colleagues found that most of those children they interviewed who had been adopted and most of those who had been permanently fostered thought this had been the right decision for them, but a small minority of the fostered children wished they had been adopted and a small minority of the adopted children wished they had remained in foster care.¹⁸ Many children wished that social workers had explained what was going in greater detail, and where social workers had been very supportive, this had really helped children manage the transition. Siblings placed together often had strikingly different experiences.

Recent research by Elsbeth Neil with adopted children in middle childhood found that almost all children felt fully integrated into their adoptive family, expressing positive feelings of love for and closeness to their adoptive parents¹⁹. Around half of the children had complicated emotions that often included feelings of loss, sadness or rejection in relation to their birth family. A quarter of children had not really begun to explore the meaning of adoption, and a quarter did not find these issues problematic. Over half of children reported experiencing uncomfortable questioning or teasing from other children about their adoption. The study suggests the importance of openness of information in adoption, the need to prepare and support adoptive parents to help children make sense of being adopted, and the need to help children manage their adoptive status in the peer group context.

Placement of looked after children with prospective adopters

The proposals

The intention of these proposals is “to reform the adoption system to remove barriers and reduce delay so that children for whom adoption is in their best interests can be placed

¹⁷Dance C. and Rushton, A. Joining a new family: The views and experiences of young people placed with permanent families during middle childhood, *Adoption & Fostering Journal*, Volume 29, Number 1, Spring 2005, pp. 18-28(11)

¹⁸ Thoburn, J., Norford, L. and Rashid, S. (2000) *Permanent Family Placement for Children of Minority Ethnic Origin*. London: Jessica Kingsley

¹⁹Neil, E., Making sense of adoption: Integration and differentiation from the perspective of adopted children in middle childhood, *Children and Youth Services Review*, Volume 34, Issue 2, February 2012, Pages 409–416

quickly with adoptive families”²⁰.

The first proposal is to amend section 22C of the Children Act 1989 to require local authorities who are considering placing a child for adoption to consider placing the child with a local authority foster parent who has been approved as a prospective adopter.

Impact of the Proposals

There has been no published assessment of the likely impact of these proposals. With respect to the proposed amendment to section 22C of the Children Act 1989, we recognise that **avoiding unnecessary delay in the adoption process and reducing disruption through changes of placement is likely to be in children’s best interests**. This is particularly pressing for very young children, given what we know about the importance for child development of responsive care from birth²¹. UNCRC Article 20(3) requires that due regard is given to ‘the desirability of continuity’ in the child’s upbringing. This is reflected in the UN Guidelines for the Alternative Care of Children:

*“Frequent changes in care setting are detrimental to the child’s development and ability to form attachments and should be avoided..... Permanency for the child should be secured without undue delay ...”*²²

However, adoption is a permanent measure and is **‘the most radical form of interference in family life’**²³. The UN Guidelines on Alternative Care for Children make clear that

*“The family being the fundamental group of society and the natural environment for the growth, well-being and protection of children, efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents, or when appropriate, other close family members”*²⁴.

Likewise, whilst Strasbourg case law recognises that adoption may be the only option in certain circumstances, it is only permissible under exceptional circumstances, in the child’s best interests²⁵.

Article 21(a) of the UNCRC requires states to *“ensure the adoption of a child is authorized only by competent authorities ... that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians.”*

Any separation of a child from their parents must be based on legal certainties: that is the decision-making process must be fair, and the parents and children, as appropriate, must

²⁰ Foreword to draft legislation dated November 2012 by Edward Timpson MP, Parliamentary Under Secretary of State for Children and Families.

²¹ Masson, J. ‘Adoption: Future legal issues’, *Adoption and Fostering*, Vol 34, no. 3, 2010

²² UN Guidelines for the Alternative Care of Children, 2009, para. 60

²³ Fortin, J. ‘Children’s Rights and the Developing Law’, 2009, Cambridge University Press, p. 539

²⁴ UN Guidelines for the Alternative Care of Children, 2009, para.3

²⁵ *ibid*, p. 608

have had an opportunity to be heard²⁶. Article 21(a) also requires that adoption only occurs on the basis of 'all pertinent and reliable information'. This means that 'an adoption must be conditional upon a proper investigation and assessment by qualified professionals independent of the authority considering the adoption application.'²⁷ Hodgkin and Newell argue that the paramountcy of children's best interest in adoption is *"in one sense circumscribed by the legal necessities of satisfying legal grounds and gaining necessary consents. If the procedures are not followed, then an adoption must not proceed, regardless of the child's best interests."*²⁸

The state bears *"a heavy responsibility to ensure the individual rights and interests of all the parties are properly articulated and considered before and adoption order can be justified."*²⁹ A full consideration of children's best interests in relation to adoption requires careful weighing and assessment of the child's needs, including their right to a relationship with their parents, and their need for stability and permanence with a family who can meet their needs, and their right to be protected from harm³⁰.

The government has acknowledged that placement of children with potential adopters 'can never pre-empt a court's decision that a child should be adopted'.³¹

The proposed requirement on local authorities 'to consider' placement with foster carers who are also approved as prospective adopters does not amount to a requirement that children *must* be placed in concurrent planning or fostering for adoption placements. The practical challenges of recruiting those who wish to adopt and are also able and willing to take on the role of foster carers are considerable. This is likely to mean that the measure has relatively minor impact. It could lead to the slightly earlier placement with adopters than is at present achieved of a small number of infants – in particular those whose parents request adoption. However, we believe that very welcome measures elsewhere in the Bill to tackle undue delay in family court proceedings (a key driver of delays in adoption³²) and to recruit more potential adoptive parents are likely to have a more significant impact on delay than these provisions.

There is also the issue of whether such carers, whose primary motivation is to adopt, would be prepared to continue as long term foster carers or Special Guardians if the court did not conclude that the child's welfare required the legal status of adoption and so dismissed a Placement Order application.. This would mean that the child might need to be moved again. Where a child has been placed with foster carers who make a commitment to him or her and, subsequent to a plan being made for adoption, decide to make application to adopt, this can provide continuity highly beneficial to the child but is quite different from a proposal to approve adopters as foster carers in order to move the child into adoptive placement before the court has given leave to place by making a

²⁶ *ibid*, p.523

²⁷ *Ibid*, p. 508

²⁸ Hodgkin, R, and Newell, P. 'Implementation Handbook for the UNCRC', 2007, p. 296

²⁹ Harris-Short, S. 'Making and Breaking Family life: Adoption, the State and Human Rights', *Journal of Law and Society*, Vol.35, No. 1, March 2008

³⁰ MacDonald, A. 'The Rights of the Child: Law and Practice', p.550

³¹ Department for Education, an Action Plan for Adoption: Tackling Delay, March 2012

³² Masson, J. 'Adoption: Future legal issues', *Adoption and Fostering*, Vol 34, no. 3, 2010

Placement Order. If this provision were to be used on a wide scale, we would be concerned that it risked effectively pre-empting – or be seen to pre-empt - the court's decision that a child's relationship with its birth parents must be legally and permanently severed. For a proportion of the youngest children, however, a model close to the concurrent planning approach, involving well supported and trained adopter/foster carers who are recruited on the basis that they are able and willing to work towards a child's potential reunification with birth parents and to adopt the child if this plan does not succeed, will continue to be appropriate. For older children with existing relationships with family, it will be essential to continue to recruit foster carers who will maintain important family links and work towards reunification but provide a permanent home through foster care, Special Guardianship or adoption where such reunification is found not to be in the child's best interests. These placements will continue to provide a major route to permanence for many looked after children.

The practical impact of the proposals will be affected by other reforms in the child protection and care planning system.

- There is now less scrutiny of the process through which the adoption decision is reached since adoption panels no longer have a role in the decision as to whether adoption is in the best interests of a child. That key decision now rests only with the local authority decision maker and it is not yet clear what expert advice, especially legal advice, will be routinely available and what planning processes will replace the adoption panel advisory process on whether a child should be placed for adoption so that such decisions can be well informed. Placing a child with potential adopters as soon as the local authority 'is considering' placing a child for adoption would risk undermining even further an appropriate level of scrutiny and would not ensure proper representation of the child's interests through due process.
- Planned improvements to the social work workforce are fundamental to this agenda, as it is intrinsically linked to that for child protection. If the reforms following the Munro Review are successful, they should help ensure consistently high quality, evidence based assessments which underpin timely planning for the child. These will be critical to ensuring there is a sound and full assessment of the birth parents' ability to change within the child's developmental timescale –and, in line with Article 9 of the UNCRC, any role they can continue to play in the child's life even if they are not able to resume full-time care. It is also important that if an early placement is likely to become permanent the views of the child are ascertained at the outset, as far as their age and capabilities allow and their interests to be subject to independent representation. However, there is no explicit requirement when placing a child with prospective adopters for the wishes and feeling of the child to be taken into account at this stage. Article 21(a) requires that *'the persons concerned have given their informed consent'*. The UN CRC urges *"all States parties to inform the child, if possible, about the effects of adoption ... and to ensure by legislation that the views of the child are heard"*.³³ This is a

³³ UN CRC General Comment no. 12, *The right of the child to be heard*, 2009

serious omission and one that **breaches article 12 of the Convention on the Rights of the Child**³⁴.

There are particular concerns about the position of very young parents, who are themselves, children. Special care will be needed to ensure that their rights as children – to support, protection and a voice - are considered alongside those of their own children.

In summary, the government's intention to reduce delay and disruption is very welcome, particularly for the youngest children. Early permanence provisions are likely to work in children's best interests if they are used to facilitate a concurrent planning model, with foster carers who are potential adopters but who are also prepared to work alongside local authorities to support a child's reunification with their birth parents. If, however, there is a significant growth in 'Fostering for Adoption', where prospective adopters are encouraged to foster the child they wish to adopt, this risks undermining children's right to have a relationship with their birth parents if possible, and could be perceived as pre-empting the court process. Insufficient attention is given to ensuring that children's ascertainable views and wishes are considered. The challenges in recruiting and supporting foster carers/potential adopters who are willing and able to support these early permanence arrangements mean that take-up is likely to be limited. Long-term foster family care with kin or non-kin families, with some carers making the decision to apply subsequently for a Special Guardianship or adoption order, is likely to remain the preferred permanence option for most children in care. It is therefore essential that the proposed legislation and guidance does not have unintended consequences with respect to the recruitment for and support of these other permanence options.

Repeal of requirement to give due consideration to ethnicity

The proposals

The Bill proposes to amend section 1 of the Adoption and Children Act 2002 to remove the requirement in England to give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background when placing a child for adoption (Section 1(5)). The current requirement to give such due consideration will be retained in Wales. There is no apparent justification for treating adoption in England differently than adoption in Wales.

Impact of the proposals

We are concerned about the proposed changes to section 1 of the Adoption and Children Act 2002.

The paramountcy principle is found in section 1(2) of the Adoption and Children Act 2002 and a requirement to have regard to the wishes and feelings of the child is found in

³⁴ Alistair MacDonald also notes that "it is submitted that Article 8 and Article 6 of the ECHR require that the child must be properly involved in the decision making process concerning adoption", 'The Rights of the Child: Law and Practice', 2011

section 1(4)(a) of that Act. These provisions accord with articles 12 and 21 of the Convention on the Rights of the Child.

The paramountcy principle is directly inspired by the 1986 UN Declaration³⁵ which establishes that 'in all matters relating to the placement of a child outside the care of the child's own parents, the best interests of the child, particularly his or her need for affection and right to security and continuing care, should be the paramount consideration'. These considerations are reflected in the government's focus on finding loving homes for children unable to live with their birth family.

However, the proposed amendment to section 1 (5) of the Adoption and Children Act 2002 **is contrary to article 20 of the UN Convention on the Rights of the Child** and as such in breach of the government's obligation to comply with the Convention. Although section 1(4) (d) of the 2002 Act requires the court or adoption agency to have regard to "the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant", it does not make the same requirement as does having specific regard to the child's "ethnic, religious, cultural and linguistic background" as required by article 20 of the UNCRC.

Research suggests **a child's ethnic, cultural and religious background does matter in a way which merits specific consideration**, although there is certainly no straightforward relationship between 'transracial' adoption and poor outcomes for adopted children. Thoburn and Moffat's 2001 study, the most comprehensive to date, concluded that some white families can successfully parent children of a different ethnic origin. However, they found that 'transracial' adoptive families faced challenges in supporting children to feel pride in their appearance, culture and heritage, and combating the adverse effects of racism, *alongside* dealing with the consequences for children of early adversity and rejection³⁶. These findings are echoed in the recently published British Chinese Adoption Study³⁷, focusing on the experiences and mid-life outcomes of women adopted from Hong Kong in the 1960's, which highlighted the difficulties that some women had experienced with coping with racism and being visibly different from their adoptive families.

The UNCRC's 'due regard' duty does not impose an absolute duty to base decisions solely on the child's background.³⁸ It has been established practice since the 1998 guidance 'Adoption – Achieving the Right Balance', that race, culture and religion are *'only some among a number of other significant factors and should not of themselves be regarded as the decisive ones'* in identifying adoptive placements.

³⁵ 1986 UN Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, Article 5

³⁶ Moffat, P. and Thoburn, J. 'Outcomes of permanent family placement for children of minority ethnic origin', *Child and Family Social Work* 2001, 6

³⁷ Summary of the British Chinese Adoption Study, British Association for Adoption and Fostering website, 2013

³⁸ Cantwell, N. and Holzscheiter, A. 'Article 20: Children Deprived of their Family Environment : A Commentary on the United Nations Convention on the Rights of the Child', Martinus Nijhoff Publishers, 2008

Neither the UNCRC or the requirement in the Adoption and Children Act 2002 that 'due consideration' is paid to a child's religious persuasion, racial origin and cultural and linguistic background impose a blanket requirement to match children with adoptive parents from the same background:

- Current statutory guidance is already clear that *"If the prospective adopter can meet most of the child's needs, the social worker must not delay placing a child with the prospective adopter because they are single, older than other adopters or does not share the child's racial or cultural background."*^{39 40}
- The UN Committee on the Rights of the Child recommended that the UK *"strengthen its efforts to facilitate that children, always in their best interests, are adopted as speedily as possible, taking in due account, inter alia, their cultural background"*⁴¹ reflecting the need to reduce unnecessary delay and to take account of a child's background, focusing, above all, on the child's best interests.

Reflecting on the evidence of many organisations and researchers with experience of the adoption system, the pre-legislative scrutiny report of the House of Lords Select Committee on Adoption noted that **the evidence before the committee did not suggest that the requirement for an appropriate ethnic match was "such a significant problem that legislative change is necessary"**⁴².

Recent research by Ofsted found that the court process was the most significant cause of delay in adoption, and that *"processes for matching children with adoptive placements were generally robust and, of the authorities surveyed, there was little evidence of delay caused by an unrealistic search for a 'perfect' ethnic match."*⁴³ The shortage of potential adopters from ethnic minority backgrounds, and the preference of many adopters for a child from a similar background are also significant factors: there is good evidence that the different BME communities will come forward to adopt, given recruitment practices and processes that are ethnically and culturally sensitive⁴⁴.

Work by Selwyn and others⁴⁵ highlights the complex range of factors which underlie the longer waiting time experienced by some groups of minority ethnic children: including age at referral to children's services, level of interest from prospective adopters, as well as social work practice, and how proactive agencies were in seeking matches beyond the local area. Whilst Farmer et al found that attempts to find an adoptive family with a similar ethnic backgrounds contributed to delay for 70 per cent of the BME children who experienced delay, the same study found that 29 per cent of BME children were placed

³⁹ Statutory Guidance on Adoption, 2011, Department for Education

⁴⁰ LAC(98)20 – Adoption – Achieving the Right Balance

⁴¹ UN Committee on the Rights of the Child, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, 2008, para 47

⁴² Adoption: Pre-Legislative Scrutiny Report, HL Paper 94, published 19 December 2012 at para [71]

⁴³ Ofsted 'Right on time: exploring delays in adoption', 2012

⁴⁴ Ridley, J, Wainwright, J. with Davda, P., 'Black' families for 'black' children?: An Evaluation of Action for Children's Practice in Ethnically Matching Black, Asian and Dual Heritage Children for Adoption, University of Central Lancashire and Action for Children, 2010

⁴⁵ Adoption Research Initiative 'Pathways to permanence for black, Asian and mixed ethnicity children', November 2010

with families whose ethnic background did not meet their own⁴⁶ suggesting a pragmatic approach focused on children's best interests.

In the many areas where social work practice is of a consistently high quality -taking into account and weighing up every element of children's background and needs in making decisions about adoption placements– little may change as a result of the removal of the 'due consideration' requirement. However, where such practice is not consistently sound there is a **risk that the change will result in less attention being paid to children's ethnic, religious and cultural backgrounds**, and this may lead to placements which do not meet their short or long-term needs. Quality assessment, as well as speed, is critical to successful adoption outcomes for children. Farmer et al explore the factors underlying disruptions, highlighting links between informal matching processes (rather than formal matching meetings) and suggesting that disruption is more likely where adoption panels express concern about a match⁴⁷.

In conclusion, the delay experienced by black and minority ethnic children awaiting adoption is an important issue which needs to be addressed. However, the reasons behind the longer waits by some black and minority ethnic children for whom there is an adoption decision are complex, as are the reasons for the over-representation in care of Caribbean and some groups of mixed heritage children though this is not the case for all those groups. There is little evidence to suggest that the current 'due consideration' requirement is to blame for delay or over-representation.

There is a risk that the change will lead to some children being placed with families who cannot meet their linguistic, cultural and identity needs, as the focus of practice and of efforts to recruit adopters from a wide range of backgrounds may be reduced. For some children from minority ethnic backgrounds, adoption placements may not be in their best interests, while permanent foster placement with families of similar heritage may meet their needs more fully. Given the complexities of ethnicity, culture, language and religion, and the number of children from dual heritage backgrounds, it is clearly essential that all adopters and foster carers are trained and supported so that they can respond well to the needs of children from different backgrounds. This can only be enhanced by the significance given in legislation to the meaning and importance of their heritage in their development of a sound sense of identity and self-worth, in line with the standards set out in the UNCRC.

Recruitment, assessment and approval of prospective adopters

The proposal

This measure would enable the Secretary of State to require local authorities to commission adopter recruitment services from one or more adoption agencies. Directions could be given to named local authorities, particular kinds of local authorities, or all local authorities.

⁴⁶ Farmer et al, An Investigation of family finding and matching in adoption – briefing paper, Department for Education, June 2010

⁴⁷ Farmer et al, *ibid*

Impact of the proposals

The measure is focused on recruitment of potential adopters. Any impact on children is likely to be indirect, and will depend on how far and fast the new power is used and the resulting impact on overall availability of placements for children.

Around 20% of children who have been adopted were placed with adopters recruited and approved by voluntary adoption agencies (VAAs)⁴⁸. If the new power was used without careful assessment of VAA's capacity to scale up recruitment, there would be a risk of an inadequate supply of placements. Adoption consortia currently include both statutory and voluntary adoption agencies in effective collaboration and these could be further developed if the concern is about the effectiveness of local authorities to recruit adequately.

Furthermore, the geographical arrangements for adoption agencies are important. Some children need to be placed near to their birth family and communities so that they can retain contact with relatives and friends.

Local authorities will still run other aspects of adoption and other permanent placement services, which benefit from the expertise of specialists in adoption placement, Adoption specialists tend to be among the most experienced social work professionals and assist in the assessment of the best interests of a wide group of children. It would not be beneficial to other children to have this expertise removed from the local authority.

Adoption support services: personal budgets

The proposal

This measure would place new duties on local authorities to consider requests for personal budgets and to give prospective adopters information about their entitlements to support.

Impact of the proposals

Again, these proposals are largely focused on support to adoptive parents, and we have no major comments.

Provisions on assessments for personal budgets do not refer to the need to ascertain the views and wishes of the child as required by UNCRC Article 12, nor to ensuring that the best interests of the adopted child (UNCRC Article 3) are at the centre of decisions are made about the use of personal budgets and provision/monitoring of direct payments. Adopted children have variable support needs which often emerge over time. They require flexible and responsive support services. The implications for personal budgets and the organisations managing them are significant, but there is no reference to piloting in the legislation.

⁴⁸ An Action Plan for Adoption: Tackling Delay , Department for Education, 2012

It will be important that Regulations allow for adopters to request assessment and services at a later date following an Adoption Order, rather than only at the time the Order is made. It is not always possible to foresee difficulties for the child which may emerge at a later date and which may require therapeutic or other specialist support for the child and family.

The Adoption and Children Act Register

The proposal

These proposals would make it possible a) for children *'for whom a local authority in England are considering adoption'* to be included in the Adoption Register. This appears to mean that the Adoption Register would contain information about children for whom the court has not made a Placement Order, including children for whom there has been no formal decision by the local authority, following due process, that adoption is in a child's best interests nor that they are to seek a Placement Order. The government's response to questions from the Select Committee on Adoption Legislation includes in this category children from the first week the child is in care, or unborn children⁴⁹.

b) for prospective adopters to access the register directly, subject to appropriate safeguards to be set out in regulations.

Impact of the proposals

As stated by the European Court of Human Rights, adoption means 'providing a child with a family, not a family with a child'. The state is responsible for making sure that adoptive parents are those who are able to offer the child the most suitable home⁵⁰, and as 'the competent authority' will retain the responsibility for ensuring that potential adopters are a suitable match for the child.

The Register contains highly sensitive information about children and their background and these proposals give rise to a number of concerns about possible breaches of children's rights.

In respect of the first proposal there are a number of potential impacts upon children. If placements a long way from home were made for such children as a result of their details being included on the register, and prior to the appropriate decision making process, this could undermine efforts to reunite children with their birth parents. Furthermore, there will be children whose parents have not requested adoption and are likely to contest such a placement. Above all, and as discussed above (under 'Placement of looked after children with prospective adopters'), ECHR Article 8 and UNCRC Article 21 require that adoption proceedings follow due process, and decisions are made by the courts based on legal certainties. **Placement of children on the adoption register where there has not been due process of decision making and where, with a child in care, the courts have not**

⁴⁹ From discussion of the trigger for 'fostering for adoption' proposals, Government response to select committee on Adoption Legislation, February 2013

⁵⁰ Vite S. *ibid*

agreed adoption as their care plan, falls short of these requirements.

Opening up the Adoption and Children Act register to prospective adopters would involve making information about children on the register open to members of the public. A number of **rights relating to privacy and protection from harm** are relevant.

- UNCRC 21 requires ‘pertinent and reliable information’ as a basis for decisions about adoption. This information must be gathered through a study *which is confidential*⁵¹.
- Article 16 UNCRC provides for the **child’s right to a private life**, and entitles them to protection by law from interference in their private life. Interference in a child’s private life can be arbitrary – even if lawful – if it is not in accordance with the aims, provisions and objective of the UNCRC⁵². The vulnerability of children in alternative care and their experience of stigma and prejudice mean that have a right to ‘special protection and assistance’.
- Under Article 16, **children must also be aware of the existence of information stored about them, know why it is stored, who controls it, who has access to it, and should be able to challenge it on this basis or have challenge made on their behalf**⁵³. This will apply also to children who have not yet been placed for adoption.
- Children’s images, as well as personal data concerning identity, time in care, medical history, and personal relationships all come within the ambit of ECHR Art 8 (1) right to respect for privacy⁵⁴.

The UN guidelines on Children in Alternative Care establish clear standards for records on children in care:

“110. The records on children in care should be complete, up to date, confidential and secure.

111. The above-mentioned records could be made available to the child, as well as to the parents or guardians, within the limits of the child’s right to privacy and confidentiality, as appropriate.”

In summary: the inclusion of children on the Register for whom there has not been due process in decision making and court approval for the plan for the child in care but for whom the local authority is ‘considering adoption’ does not meet the requirements of ECHR Article 8 and UNCRC Article 21. In order for the proposal to open the adoption register to prospective adopters to be compliant with the UNCRC, **very careful checks would be needed** to ensure approved adopters were able to access only information which did not breach children’s privacy rights (UNCRC Article 16, ECHR Article 8), and that children were fully and actively informed and engaged in deciding what information they wanted to be made available to a much wider audience and how they wanted to

⁵¹ Vite S. and Boechat, H. ‘Article 21: Adoption. A commentary on the UNCRC’, 2008

⁵² MacDonald, A. ‘The Rights of the Child: Law and Practice’ 2011, 9.7

⁵³ Ibid, para 9.18

⁵⁴ Ibid para 9.4

describe themselves (UNCRC Article 12 and Article 16). The most rigorous protections would also be required in order to ensure that people who want to harm or abuse children could not access the information on the register (UNCRC Articles 6, 19 and 34).

Contact

The proposal

Clauses 7 and 8 of the Bill propose changes in the law on contact for children in care of local authorities, and for children post-adoption.

For **children in the care of local authorities**, the Bill provisions are intended to make it clear that the local authority should not allow contact with parents, guardians and certain other people if contact with any of those persons would not safeguard and promote the welfare of the child. The provisions would dis-apply the current duty on local authorities to 'endeavour to promote contact' with the birth family and others in those cases where a local authority has been authorised to refuse contact, or is doing so on a temporary basis.

For **post-adoption contact**, the Bill allows for orders which deal with contact arrangements to be made at the adoption order stage and subsequently. It sets out the factors that the court must consider when deciding whether to grant permission. These include the possible harm that might be caused to the child by the proposed application, the applicant's connection to the child, and any representations that are made to them by the child, the person who has applied for the adoption order or the child's adoptive parents. The key change is the provision for the court to make pre-emptive 'no contact' orders. The Bill also amends existing legislation to create a more demanding 'permission filter', raising the bar for any birth parent to make an application for a contact order.

Children's views on contact:

There have been a number of recent consultations and research on the issue of contact for adopted children and for looked after children. It is very clear from these that children and young people feel very strongly about the issue of contact.

A small group of children with experience of adoption convened by the Office of the Children's Rights Director talked of how it was important for children to be asked for their views and given information about why important decisions had been made about adoption and contact⁵⁵. They said that contact might be particularly important for older children who had had a relationship with their birth parents, but also that contact could be important 'because we have something important in common'. Where adults had behaved violently or badly in the past, children had concerns about whether contact was a good idea.

A survey by the Who Cares? Trust collected the views of 133 looked after children and care leavers for a submission to the recent consultation on contact. There were different

⁵⁵ Office of the Children's Rights Director, Improving Adoption and permanent placements, January 2013

views about how happy children were with the contact they had with siblings and birth families, but a significant minority did not have good contact experiences. The Who Cares? Trust submission stated how important it is that looked after children are engaged in the decision making concerning contact: 'understanding what a child thinks, feels and hopes for their future is integral to identifying what actions are in their best interest.'⁵⁶ The submission also emphasised the need for support to improve the quality of contact and that, because contact is not always positive, it does not follow that contact should be prevented when children want it and it is in their best interests: 'Contact is important to young people (even though they themselves recognise it can be hard) and it should be highly valued, well planned and properly supported'. Children had different feelings about contact with different family members. Children had both contacted and been contacted by their birth families without permission, raising the prospect that if a young person does not agree with or understand the reasons for not having contact, they may seek contact without the support which could address any risks.

In respect of post adoption contact, the Who Cares? Report concluded that 'what is important is a considered assessment of need and sufficient support for all parties where contact is deemed to be beneficial'. They comment that young people are concerned about the contact they have with their siblings who have been adopted and refer to research which suggests that contact between siblings post-adoption is likely to be positive.

Impact of the proposals

A range of different children's rights are engaged in contact issues particularly the right of children to an identity (Article 8) and the right of children separated from their parents to maintain a relationship with their parents, except if it is contrary to their best interests (UNCRC Article 9), and children's rights to have their views, wishes and feelings taken into account (UNCRC Article 12), and children's rights to protection from harm (UNCRC Article 19).

UNCRC 9 (3) provides as follows in relation to contact

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

This operates to ensure contact with birth parents when children are looked-after, if this is not contrary to the child's interests. MacDonald (2011) notes 'The fact that a child's best interests requires his or her removal from parental care should not lead automatically to a conclusion that it is in the child's best interests not to have continuing contact with those parents'⁵⁷. State care is ideally temporary and high quality contact can play an important role in maintaining children's relationships with parents.

⁵⁶ Who Cares? Trust (2012) response to the Department for Education's call for views on contact arrangements for children.

⁵⁷ MacDonald, A. 'Rights of the Child: Law and Practice', 2011

Contact is an important part of the mutual enjoyment by children and parents of each other's company, and fundamental to a child's right to family life (ECHR Article 8), including contact between the child and other people with whom the child has family ties. As MacDonald (2011) notes, states are not allowed a wide margin of appreciation in relation to contact issues where children have been removed from their parents. Limiting or terminating contact for children in care must be justified by particularly strong reasons⁵⁸.

Under current legislation, local authorities already have a duty to promote reasonable contact between children in state care and parents. A local authority may also refuse contact on a temporary basis, and for a longer time in exceptional cases where sanctioned by the court. This is in line with requirements of the UNCRC and ECHR.

The changes which would disapply the duty to promote contact where a local authority is authorised to refuse contact appear to **simply clarify rather than change this current position**.

The changes which would enable regulations to set out whether contact is consistent with safeguarding and promoting the child's welfare, are intended to focus decisions about contact on the child. The impact on children's rights clearly depends on how regulations would change.

Under current law, the child's best interests are paramount in making decisions about contact, and the court must consider the welfare checklist under section 1 (3) of the Children Act 1989⁵⁹. These principles apply to all children, some of whom will go on to return to the care of their parents or wider family members, some of whom will go on to be adopted, and others for whom different permanence arrangements will be appropriate. Ending or reducing contact in order to make it easier to find a permanent placement for a child is not acceptable. We recognise the variable quality of contact support and supervision arrangements in practice. However, given that current law is focused on the best interests and welfare of each individual child, the justification for the change is unclear. **There should be no need for over-restrictive regulations on the issues to be considered: the key to ensuring decisions are in children's best interest is a sound assessment process, which is informed by children's voices.**

Neil et al (2012) argue that extensive research on **post-adoption contact** demonstrates that 'contact can be positive, neutral or negative, and the quality of contact is more important than the type'⁶⁰. Current legislation provides for individualised decision-making at the Placement Order stage and post-adoption, with contact neither promoted nor discouraged – and is therefore in line with UNCRC Article 9. It already allows courts to make appropriate decisions to end or limit contact, and there are already barriers to unhelpful applications for contact by birth parents post-adoption. There is scope for

⁵⁸ MacDonald, A. 'Rights of the Child: Law and Practice: paras 8.206 – 8.207.

⁵⁹ Ibid, para 258

⁶⁰ Neil, E. et al 'Contact arrangements for adopted children: what can be learned from research?', Centre for Research on the Child and Family, University of East Anglia, August 2012

improvements in practice to ensure that post-adoption contact arrangements work in children's best interests. However, it is not clear that legislative change is required.

It is also not clear why there may be provisions for the court to make pre-emptive 'no contact' orders but not also such orders *for* contact. This would add to 51A (6), a reference to (2) (a). The latter would provide for the child to make clear to the court that they wish to have contact with a person (perhaps for example with siblings) where no party has made such an application.

There is a risk that tightening provisions on post-adoption contact may signal to adoptive parents that such contact is not in children's best interests, undermining the openness with which adoptive parents approach the complexities and challenges of post-adoption contact. Neil et al argue that it is this openness which helps to ensure that contact works in children's best interests, supporting their rights to identity and their acceptance and understanding of their birth heritage⁶¹.

In line with Article 3 and Article 12 of the UNCRC, efforts should be made at any age to ascertain child's wishes, feelings and experience in developing and assessing a suitable plan for contact. Children's views should always be taken seriously and the extent to which the child's views are determining will vary according to their understanding and competence. For applications made after the adoption order, this will require a child's interests to be represented by an appropriate professional, such as a CAFCASS Guardian.

⁶¹ Neil et al, *ibid*

Family Justice Provisions

Family Justice Provisions: key issues

1. Our assessment considers how provisions on family justice will impact on children's best interests: including children's right to have a relationship with their parents (UNCRC Article 7 and 9; ECHR Article 8); their right to life and protection from abuse (UNCRC Article 6, Article 19; Article 34); and parents' shared responsibilities for bringing up their children (UNCRC Article 18).
2. The **overall focus on reducing undue delay in public family law proceedings** and on focusing the attention of separating parents on the interests and needs of their children is very welcome. In each and every case, the best interests of the individual child must remain paramount. An understanding of the child's best interests involves full consideration of the child's unique circumstances, and an understanding of their views and experiences.
3. Reducing litigation between separating parents will often serve children's best interests. However, mediation is an adult-oriented process. There is **no focus on children's best interests, views and wishes within the proposals for MIAMs – or subsequent mediation** - as required by Article 3 and Article 12 of the UNCRC. Children's rights to life and to protection from harm and abuse (UNCRC Article 6; Article 19; Article 34) may be undermined if exemption criteria are too narrowly drawn and cases are inappropriately referred to mediation.
4. UNCRC Article 9 says that children whose parents are separated have the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Nevertheless, the introduction of a **presumption that a child's welfare will be furthered by the involvement of each of the child's parents in his or her life** risks undermining the principle that courts must make decisions that are in the best interests of the individual child. It is hard to predict the wider impact of the change on the way that separating parents deal with disputes about children's upbringing.

5. Measures to **reduce unnecessary delay in public family law proceedings** are consistent with the UNCRC and with Council of Europe Guidelines, and will minimise the impact of prolonged disruption and uncertainty on children's well-being and development. Consistently good practice in pre-proceedings work will help ensure timely decision-making. Some cases will require a longer timeframe; but the focus on granting extensions only where there is specific justification is proportionate. Adequate information, support and time must be allowed for each child to participate in proceedings in a way which is appropriate for them.
6. Proposals on **Judicial Scrutiny of Care Plans** retain flexibility by allowing judges discretion to scrutinise the decision-making process leading to a care plan, and now incorporate a reference to section 34 (11) of the Children Act 1989 intended to make clear the link to the court's duty to consider the contact arrangements for the child. However, 'permanence' is widely understood to be a framework of emotional, physical and legal conditions that gives a child a sense of security, continuity, commitment and identity. There is a risk that the narrow definition of permanence in the Bill – which focuses on who looks after the child – could limit scrutiny of these vital aspects of permanence, leading to low quality care plans with a lack of appropriate detail and support, including for children who return to their parents. **This would fall short of the 'special care and assistance' required by UNCRC Article 20 for children deprived of their family environment.**

Introduction

The provisions in the Bill are part of a programme of wider reform of the Family Justice System following the Family Justice Review ('the Norgrove Report'). They are intended to bring about *"a family justice system in which delay is no longer acceptable and where the system has a much clearer focus on the child"*, and to support separating parents *"in developing flexible and co-operative agreements, which focus clearly on their children's needs."*⁶² Changes will affect children in England and Wales.

This assessment considers six of the most significant changes in the Family Justice section of the Bill. We consider each change in turn, looking at the likely impact it will have on affected children and whether the rights of such children are given appropriate respect and the Convention on the Rights of the Child is complied with.

The most important of these rights engaged by these proposals are:

- Article 3: the best interests of the child must be a primary consideration
- Article 6: the child's right to survival and development
- Article 9: the right of a child not to be separated from their parents except where such separation is necessary for the best interests of the child
- Article 12: the right of children to express their views and have their views given due weight
- Article 18: the obligation on signatories to the Convention on the Rights of the Child to use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child
- Article 19: the right of children to be protected from physical or mental violence
- Article 20: the right to special protection and assistance for children who cannot be looked after by their family
- Article 34: the right of children to be protected from sexual exploitation and abuse

⁶²The Government Response to the Family Justice Review: A system with children and families at its heart, Department for Education, February 2012

Children affected

The changes will impact on substantial numbers of children, almost all of whom will be at a time of real uncertainty and vulnerability in their lives.

In 2011, 109,656 children were involved in **private family law applications** in England and Wales⁶³. Around 1 in 10 child contact arrangements are thought to be ordered by the courts⁶⁴.

The number of children involved in **public family law applications** made by local authorities in England and Wales has risen steadily since 2009, reaching 29,492 children in 2011⁶⁵. The great majority of these children will have been living in very difficult circumstances: the most common reasons for applications are parental drug or alcohol misuse, parental ill-health, and domestic violence⁶⁶. Entering care is also strongly associated with poverty and deprivation including low income, parental unemployment and relationship breakdown and over 60% of children are in care due to abuse or neglect⁶⁷.

What children and young people say

This section draws extensively on work carried out with children with experience of private and public family law proceedings who were consulted at the request of the Family Justice Council's Voice of the Child sub-group⁶⁸ to inform the Family Justice Review.

The key messages from the 35 children and young people aged between 3 and 17 years who were involved in the consultation were:

Children want **adults to listen, hear them, understand them and act** on that understanding. They want to know what happens to what they have said. Even young children can express how they feel about their circumstances, given thought, patience and the right skills. Adults need to understand all the pressures upon children – from what is happening in their family and from the court process. Many children value the emotional support provided by their extended family enormously.

They want to know about the **different people and plans and decisions involved in the court process**. These explanations need to be given not just once but again when they are needed. They could be written down so that children can look at them later.

Children need their **own plan as to how they would like to be supported and have**

⁶³Judicial and Court Statistics 2011, Ministry of Justice

⁶⁴Office for National Statistics (2008) Omnibus Survey Report No.38, Non-resident parental contact, 2007/8, A report on research using the National Statistics Omnibus Survey produced on behalf of the Ministry of Justice and the Department for Children, Schools and Families.

⁶⁵Judicial and Court Statistics 2011, Ministry of Justice

⁶⁶CAFCASS 'Three Weeks in November: Cafcass Care application Study, 2012

⁶⁷Jones, R., Everson-Hock, E., Guillaume, L., Papaioannou, D., Duenas, A., Goyder, E., Chilcott, J. & Payne, N. (2010) Review E4: factors associated with outcomes for looked after children and young people: a review of the literature.

⁶⁸'Do more than listen. Act.' Consultation response to the Family Justice Review undertaken for the Family Justice Council's Voice of the Child sub-group, Office of the Children's Commissioner with the Family Justice Council, July 2011

their voice heard. Some children would have liked to speak directly to the judge, some would have liked to have somebody to share their views on their behalf, and others would have liked to use letters and drawings. The choices should be made clear to them and their ideas as to who can help them should be taken seriously. Children are often anxious about the consequences of what they might say for their families. All involved professionals need expertise and skill to safely enable all – but particularly younger children – to share their perspective without pressure. Observation and listening are important in addition to asking children for their views.

Many of the **same messages** came from the children and young people who had been through **different kinds of court proceedings**. This showed that even when children were looked after and had the right to be heard in their care plans, many still did not understand what was happening. Children whose parents are separating may get less support and have even greater worries about telling someone their views.

Many similar themes emerge in other research and consultation with children and young people. The **Family Justice System Young People's Board's** top five wishes for 2013⁶⁹ reflect children's desire for more information about the court process, more support and help from adults during the process, the opportunity for children to give feedback about their experiences, together with ensuring that cases don't drag on and always stay focused on children's needs. Young people working with the Who Cares? Trust said that professionals needed to be well-trained, committed and creative to make sure that children really feel like their needs and views are being put first. Like other young people, they had many ideas for ways in which children could give their views and courts could become more child-friendly. They said they were worried about the ability of social workers to make a plan in the best interest of the child because they have high caseloads. They didn't trust them to always do a good job and thought that judges need to scrutinise care plans.

Consultation and research with young people with experience of **private family law processes** highlights their reliance on their parents and family members for support and information about the process, and on professionals where these were involved. Children whose parents had been involved in mediation had very rarely been asked for their views⁷⁰.

Fortin et al's (2012) recent research with young adults on their experiences of parental separation and contact arrangements, suggests that the quality of contact with non-resident parents is more significant and important to children than the quantity of contact⁷¹. In turn – successful, good quality contact was shown to be linked to a number of inter-related factors, including the absence of conflict or domestic violence between the parents and children enjoying good pre-separation relationships with their non-resident parents. The study uses quantitative and qualitative evidence from young adults to show

⁶⁹ Family Justice System Young People's Board calls for swifter action in family courts in 2013, http://www.cafcass.gov.uk/news/2013/young_peoples_wish_list_for_2013.aspx

⁷⁰ CAF/CASS - Private Law Consultation - "How It Looks To Me" (2010). The majority of the 135 children and young people who participated in this consultation had been supported in some way by CAF/CASS staff.

⁷¹ Jane Fortin, Joan Hunt, Lesley Scanlan, Taking a longer view of contact: Perspectives of young adults who experienced parental separation, Nuffield Foundation Final Report, University of Sussex and University of Oxford, November 2012

that individual children often have clear and well-founded views about the contact they want, and that **children's views and best interests must lie at the heart of all decisions about contact.**

Private family law provisions: Mediation

This provision will require any person **before making any family law application to the court a person to attend a family mediation information and assessment meeting (MIAM).** The details of the meetings, and who is exempt from the requirement to attend them, will be set out in the Family Procedure Rules. Those affected by domestic abuse will be exempt.

Encouragement has of course been given to resolving civil disputes of all sorts, including family matters, by mediation for many years. People receiving legal aid already have to attend a MIAM, unless they are exempted. This proposal will mean that all applicants – whether privately and publicly funded – must attend a MIAM. Although the requirement is limited to attending an initial meeting, the provision is clearly intended to ensure that more separating couples make use of mediation to agree arrangements for their children, and so that fewer cases have to be resolved in court.

In principle, **children should benefit when lengthy confrontation in the court room is avoided,** and where informal resolution of family disputes is supported by appropriate use of high quality mediation.

However, in order to ensure that the best interests of children whose parents are separating are the primary consideration, **more robust protections are required so that children's safety is prioritised, and their interests and views are considered** – both in a MIAM and in any subsequent mediation⁷².

The Government is clear that **mediation is not likely to be appropriate where there is a history or risk of domestic violence or abuse.** However, the proposed exemptions do not offer sufficient safeguards to ensure that cases where children are vulnerable to abuse or harm are not inappropriately referred to a MIAM. The government proposes changing the pre-application protocol so that the definition of domestic abuse – and therefore the exemption from the requirement to attend a MIAM - mirrors that in the Legal Aid, Sentencing and Punishment of Offenders Act 2012⁷³. Applicants will be exempt where a child protection plan is in place or where there is documentary evidence of domestic violence. These are limited exemptions which are unlikely to cover all the circumstances where children are at risk of harm. Assessment of risk prior to MIAM must be undertaken by those with suitable knowledge and expertise, but it is not clear that this will happen

Research consistently indicates that **a high proportion of contested private law cases involve allegations of domestic abuse or risk of harm to children.** For example, Hunt

⁷² In contrast to Scotland, children in England and Wales have no domestic legal right to be consulted in the large majority of divorces and separations where care and contact arrangements are not before the court.

⁷³ Justice Committee, Pre-legislative scrutiny of the Children and Families Bill, 14 December 2012, para 96

and McLeod's recent study of court files found that resident parents raised concerns over serious welfare issues in just over half of cases where a parent had applied for a contact order⁷⁴. Liz Trinder's recent work shows that safety issues are often present even where the 'harm' box on the C100 application form had not been ticked: with 20% of mothers in these cases reporting a non-molestation or occupation order having been in place at some point. Her paper also raises concerns about whether a robust mediation risk assessment is likely given the lack of a central supervisory body and different routes to accreditation⁷⁵.

This evidence indicates there are likely to be a significant number of cases where the adult applicant will be required to attend a MIAM, even though children are at risk of harm. In its Concluding Observations in 2008, the CRC recommended that the UK government "*strengthen support for victims of violence, abuse, neglect and maltreatment in order to ensure that they are not victimized once again during legal proceedings*"⁷⁶. Without greater safeguards and a wider definition of 'harm' to children, **there is a risk of inappropriate referrals resulting in delay and greater conflict, and posing a risk to children's rights to survival (UNCRC Article 6), protection from violence (UNCRC Article 19) and protection from sexual abuse (UNCRC Article 34).**

Sensitive disputes which involve children need to be handled by appropriately trained and skilled professionals. There is a real danger that in the informal environment of mediation the perspective of the children will not always be given the necessary prominence thereby neglecting to ensure that the best interests are paramount. The paramountcy principle in section 1 of the Children Act 1989 only applies when the *court* is deciding questions relating to the upbringing of children. When the same questions are being resolved by mediation there will be no such statutory requirement to abide by the paramountcy principle. Given that the proposals are intended to ensure that many of the decisions that have hitherto been made by the courts will be made in the mediation process **it is essential that the mediation framework is explicitly enveloped in a requirement to act in the best interests of the child**, and that mediators will have the necessary expertise to deal with these cases.

Such a requirement is necessary in order to ensure compliance with article 3 of the Convention on the Rights of the Child. The Council of Europe's Child-Friendly Justice Guidelines are clear that

*"Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings."*⁷⁷

⁷⁴ see Cassidy, D. and Davey, S. (2011) 'Family Justice Children's Proceedings – Review of Public and Private Law Case Files in England and Wales', Ministry of Justice, and Hunt and McLeod's recent study of court files found that resident parents raised concerns over serious welfare issues in just over half of cases where a parent had applied for a contact order

⁷⁵ Professor Liz Trinder, 'Playing Safe? The Family Justice Review and the Management of Risk in Private Law Cases', paper to the 2011 Dartington Hall Conference.

⁷⁶ Committee on the Rights of the Child, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, October 2008, para 51 (c)

⁷⁷ Guidelines on child friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, para.26

There is no mechanism for ensuring that the wishes and feelings of any children affected will be ascertained and respected. Whilst it is appreciated that this may be dealt with in the Family Procedure Rules there is nothing in the current proposals to ensure that they are. Current guidance for mediators is clear that the decision about whether or not to seek children's views rests with adults

“Mediators must encourage participants to consider the children’s wishes and feelings. If appropriate they may discuss with them whether and to what extent it is proper to consult the children directly in order to ascertain their wishes and feelings.”⁷⁸

However, recognition of the need to listen to children and have regard to their views are a primary consideration as required by article 3 of the Convention on the Rights of the Child and is necessary in order to comply with article 12 of the Convention:

“Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to ‘the best interests of the child’. For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision-makers and in mediation processes.”⁷⁹

International experience suggests that even where ensuring children's voice is heard in mediation has been a priority for lawmakers, realising this right in practice has been a challenge⁸⁰. It is therefore **important that children's Article 3 and Article 12 rights are clearly spelled out within legislation**. We recognise that there will be limitations on how far these rights can be addressed within an introductory Mediation Information and Assessment Meeting, but nevertheless regard it as important **that children's interests, views, wishes and feelings are placed at the centre of the mediation process from the earliest stage**.

Private family law provisions: Child Arrangement Orders

Under the second proposed change to the Family Justice System it is proposed to amend section 8 of the Children Act 1989 to conflate the existing contact and residence orders into “child arrangement orders”.

It is difficult to predict what impact, if any, these proposals will have on children's rights to family life and to a relationship with their parents. The change is intended to promote a more consensual and child-focused approach by parents to the resolution of family disputes. A number of stakeholders have suggested the new terminology could result in confusion amongst parents, possibly to the detriment of children, and introduce confusion or delay into international cases involving children⁸¹. It will be important to ensure it is

⁷⁸ The Family Mediation Council, Code of Practice for Family Mediators, para 5.7.2

⁷⁹ UN CRC General Comment no.12 (2009) The Right of the Child to be Heard

⁸⁰ James, A. et al 'The Voice of the Child in Family Mediation: Norway and England, International Journal of Children's Rights 18 (2010) pp.313-33; Henry, P. & Hamilton, K., Inclusion of Children in Family Dispute Resolution in Australia: Balancing Welfare versus Rights Principles, *The International Journal of Children's Rights*, Vol.20 (4) pp. 584 – 602

⁸¹ House of Commons Justice Committee, Pre-legislative scrutiny of the Children and Families Bill; HC 739, 14 December 2012.

clear how the best interests of the child will be protected in such cases, and what is the precise meaning of the arrangements when applied in cases involving other jurisdictions.

Private Family Law: Parental involvement

The current position

Section 1 of the Children Act 1989 sets out in clear and easily understood language the principles the courts are to apply when they are making decisions about the upbringing of children or the administration of a child's property or income derived from it. In making such decisions "the child's welfare shall be the court's paramount consideration". This is widely known as the "paramountcy principle".

Section 1 goes on to require the court when making an order under section 8 (such as where the child will live and what contact he or she will have with estranged parents⁸²) to have regard to, among other things, the wishes and feelings of the child concerned and his or her physical, emotional and educational needs.

These principles have been applied by the family courts since the Children Act came into force in 1991, the same year that the UK government ratified the Convention on the Rights of the Child. The principles set out in section 1 of the Children Act 1989 are consistent with those found in the Convention on the Rights of the Child, particularly articles 3 and 12.

The proposed arrangements

The explanatory notes to the Bill set out how the presumption of parental involvement will work. If a parent can be involved in the child's life in a way that does not put the child at risk of suffering harm (whether that be through direct, indirect or supervised contact) the presumption applies to that parent and the court must then go on to consider whether the presumption is rebutted on the basis that it is shown that the involvement of that parent would not in fact further the child's welfare.

Importantly the paramountcy principle remains and so when deciding on the arrangements for children of estranged parents the family court will still be bound by the requirement that the child's welfare shall be its paramount consideration.

Impact of the Proposals

Article 9(3) of the UNCRC says

"States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests"

⁸² It is proposed that section 8 be amended to refer to 'child arrangements orders'

When read with Articles 18 and 7 of the CRC, Article 9(3) implies that the involvement of both parents in the child's life is in his or her best interests, unless it is proved to the contrary.

The importance of direct and regular contact between child and parent, except where this would be against the child's best interests is also reflected in the European Convention on Contact Concerning Children⁸³. Strasbourg case law is clear that children and parents' enjoyment of each others' company constitutes a fundamental element of family life under Article 8 of the ECHR, and under case law, parents are protected against discrimination by the courts when considering a parental dispute⁸⁴

We welcome the government's intention that children should be able to sustain strong, supportive relationships with both parents after separation, where it is beneficial for them to do so. There are of course many cases where it is in the best interests of children of estranged parents for parenting to be actively shared. Nothing in the current arrangements prevents the court from making orders for such an arrangement, and there is no presumption in current domestic law that a child's mother should be considered the primary carer, in preference to the father.

There is no evidence that we have been able to find which indicates that courts are failing to take into account the importance of children's relationship with both parents in determining the best interests of children. A study commissioned by the Ministry of Justice **did not find any evidence of court bias against non-resident parents** in 308 sample cases relating to contact disputes⁸⁵. Recent qualitative research with young adults about their experience of contact when children suggests that problems with contact are rarely the result of obstruction by resident parents, and highlights a range of different factors which underpin successful contact. It demonstrates **the importance of basing decisions about contact on the specific circumstances of each child**, allowing for arrangements to be flexible and evolve. Critically, the research shows that children were often very clear about their own needs, that their involvement in decision-making is associated with positive contact experiences, and that if children resist contact with non-resident parents, it is often for their own reasons and related to the behaviour of the non-resident parent.⁸⁶

The court currently makes decisions in a minority of cases and these are already likely to be the most adversarial. If the current proposals are enacted, where the courts are faced with difficult decisions about the arrangements for the care of children there is a danger that a default position emerges which favours involvement of both parents, even where this a position which may be inimical to the best interests of the child.

⁸³ Entered into force in the UK on 1/4/2007.

⁸⁴ Fortin, J. 'Children's rights and the developing law', p.493, 2009

⁸⁵ Hunt, J. & MacLeod, A. '*Outcomes of applications to court for contact orders after parental separation or divorce*', Ministry of Justice, 2008

⁸⁶ Fortin, J., Hunt, J. & Scanlan, L. 'Taking a longer view of contact: Perspectives of young adults who experienced parental separation', Sussex Law School, November 2012

We recognise that the government does not propose any amendment to the paramountcy principle found in section 1(1) of the Children Act 1989. We also recognise that the requirement to have regard to the wishes and feelings of the child (as required by article 12 UNCRC) currently found in section 1(3) of the Children Act 1989 will not be changed. Nevertheless, we believe that there is a **real danger that the paramountcy principle (which reflects the article 3 UNCRC duty) may be diluted by these proposals and we regard this change as potentially contrary to the best interests of children.**

The government anticipates that the amendment will encourage separating parents to adopt less adversarial and entrenched positions in relation to the care of their child⁸⁷. However, if the provisions are widely (mis)interpreted as a presumption of equally 'shared time', there is a risk of greater conflict and litigation focused on parents' wishes rather than the child's needs and interests. A number of stakeholders have suggested that a belief that there is a presumption of shared time would lead parents (largely women) to believe that it was pointless to report domestic violence or child abuse. **Careful monitoring** would be required to ensure the meaning of 'involvement' has been effectively communicated to the public and understood, and that neither of these unintended, but very serious consequences resulted from the provision.

Control of expert evidence, and of assessments, in children proceedings

This proposed change to the Family Justice System seeks to control the use of expert evidence and assessments in children proceedings. Profligate use of experts in children proceedings can cause delay to the resolution of decisions for children which is inimical to the child's best interests. Unnecessary and duplicate assessment of children may be intrusive and in some cases positively detrimental to the child.

However, the use of experts in appropriate cases will be needed to ensure a decision is made which is in the best interests of the child (**UNCRC Article 3**). Without the right expertise, there is a risk that inappropriate decisions will be made which do not reflect children's best interests, and/or that some decisions may then be challenged in the appellate court, leading to further disruption and distress for children.

Under the proposals, the court will be able to decide on the admissibility of such reports. **We therefore regard the change as likely to support children's best interests.**

Public family law provisions: Time limits in proceedings for care or supervision orders

This provision imposes **a time limit of 26 weeks in care and supervision proceedings**, and requires courts to have particular regard for the impact of a case's timetable on the welfare of the child.

⁸⁷ Children and Families Bill 2013: Contextual Information and Responses to Pre-legislative Scrutiny, February 2013

Children involved in care proceedings currently wait a long time for their case to be decided: the average length of cases closed in 2009 involving an application for a care order was 54 weeks⁸⁸. Case lengths vary across different areas, and according to how complex the case is: the mean duration for cases where the application was made in 2004 with no complexity factors was 41.8 weeks compared with 63.6 for those with two⁸⁹. Chronic delays that have resulted in such cases sometimes taking over a year to resolve have been damaging to children and have had significant detrimental impact on their development.

The need to avoid undue delay is reflected in the Council of Europe's Guidelines on Child-Friendly Justice

"In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law. ... In family law cases (for example parentage, custody, parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on the family relations."⁹⁰

We therefore agree it is right that the majority of cases should be completed within a 26 week timeframe, or indeed more quickly if this is in the best interests of the individual child. However, a strict time limit carries the risk that decisions are made too quickly in some cases where the complexity of cases and children's interests justifies more time being taken, or where interventions with the child's family need to be given time to work. In particular, it is important that adequate time, information and support is available to enable children to have a voice and to have their views heard (UNCRC Article 12)⁹¹, to enable them to maintain a relationship with their birth family if possible (UNCRC Article 9; ECHR Article 8), or to sustain relationships with siblings, grandparents and other relatives (ECHR Article 8).

The UN Guidelines on Children in Alternative Care highlight the importance of individual consideration for each child, and of listening to their views:

"Decision-making on alternative care in the best interests of the child should take place through a judicial, administrative or other adequate and recognized procedure, with legal safeguards, including, where appropriate, legal representation on behalf of children in any legal proceedings. It should be based on rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis, by suitably qualified professionals in a multidisciplinary team, wherever possible. It should

⁸⁸ Cassidy, D. and Davey, S. 'Family Justice Children's Proceedings – Review of Public and Private Law Case files in England and Wales', Ministry of Justice Research Summary 5/11, November 2011

⁸⁹ Masson, J., Pearce, J. and Bader, K., Care profiling study, University of Bristol, Ministry of Justice Research Series, No. 4/08, 2008. Complexity factors include: If more than 1 child -different pathways, different placements or different orders all cases; concurrent criminal proceedings, more than 1 local authority, potential immigration issues, more than 6 experts, more than 1 interlocutory dispute.

⁹⁰ Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice. Adopted by the Committee of Ministers on 17 November 2010, paras. 50 - 51

⁹¹ This may be through the Guardian system, or – for some children – through giving evidence directly to the court. "Working Party of the Family Justice Council: Guidelines in relation to children giving evidence in family proceedings" December 2011 sets out issues for consideration where children themselves give evidence.

involve full consultation at all stages with the child, according to his/her evolving capacities, and with his/her parents or legal guardians.⁹²

Notwithstanding tighter timeframes, **children's views, wishes and feelings must be heard and taken into account in critical decisions about their lives.** A modernised family justice programme must ensure child-friendly procedures, well-trained staff, support and timely appropriate information for children in order to ensure to fulfil their Article 12 rights.

We recognise the challenges involved in reducing avoidable delay whilst ensuring that the best interests of each and every child are fully explored and protected. For some children, more than 26 weeks will be needed. The approach taken in the published Bill on granting extensions only where there is **specific justification** is proportionate and more likely to serve the best interests of individual children than a prescribed list of 'exceptional cases'.

Consistently good practice in pre-proceedings work will help ensure timely decision-making, but early identification of complex cases is needed so that a longer case length can be timetabled where needed. The proposals as they stand do not adequately ensure early identification of either complex cases or cases where the particular facts are such that the proceedings cannot be resolved within 26 weeks. Early identification may be supported by changes to the Family Procedure Rules. Nevertheless, there remains **a risk of recurrent late extensions of the timetable by 8 weeks, which would increase uncertainty and disruption for children and would not be in their best interests.**

Public family law provisions: Care plans

This proposal involves limiting the scope of the court to scrutinise plans for the future care of children, with a requirement to consider the "permanent provisions" of the plan, together with arrangements for contact set out in section 34(11) of the Children Act 1989.

We believe that the proposals **fall short of promoting the best interests of children.**

The proposals do retain the discretion for the court to look beyond the permanence provisions and scrutinise the key decisions and issues considered by a local authority in arriving at a care plan, or at a decision to return children to the birth family. This is an important safeguard.

Whilst noting that the proposed section 3A (b) does not preclude the court from considering the care plan as a whole, we are concerned that the presumption will be that the court will not do so. We regard the definition of 'permanence' in the legislation, with its focus on different placement options, as too narrow. Permanence is better understood to be a framework of emotional, physical and legal conditions that gives a child a sense of security, continuity, commitment and identity⁹³. There is a risk that the narrow focus of the Bill could limit scrutiny of these vital aspects of permanence, leading to low quality care

⁹² UN Guidelines for the Alternative Care of Children, para.57, 2010

⁹³ Social Care Institute for Excellence, Permanence Planning for Practitioners

plans with a lack of appropriate detail. **This would fall short of the ‘special care and assistance’ required by UNCRC Article 20 for children deprived of their family environment.** The written reasons of the Family Proceedings Court are held on file and provide an important record for the young person at a later date⁹⁴.

A systematic review of research on the views of looked-after children and young people demonstrates how important a wider view of permanence is⁹⁵. Children reported that the care they received often fell short in many important areas including: love and affection, a sense of belonging and continuity, someone to support them, encourage them to achieve, and provide practical support such as help with homework; opportunities to talk to someone confidentially about their concerns; having personal relationships with professionals who listen, are accessible, and can be relied on to be there for children and get things done; (for many) the opportunity to maintain contact with their birth families; feeling ‘normal’ and being free from stigma and negative attitudes; and encouragement to attend and do well at school.

Placement choice is a key element of a care plan, but evidence points to the importance of other elements in outcomes for looked-after children. For example⁹⁶:

- Treatment/therapeutic foster care is positively associated with placement stability and reduced behavioural problems
- Sibling co-placement has a positive (although modest) impact on reducing emotional and behavioural problems.
- Adult mentorship is positively associated with self-esteem, level of good health and participation in higher education, and is also linked to lower rates of suicide ideation.
- Number of placements is a risk factor which is associated with a reduced likelihood of a positive outcome. Placement stability is a protective factor that is associated with fewer placement moves and fewer emotional and behavioural problems.

The court’s attention is required to ensure that the future support needs of the child and carers are met. This includes planning for a child’s return to the family, which is more likely to be successful when support needs are fully accounted for.

The context within which these changes are taking place mean that the court scrutiny remains important

- It is of concern that the Guardians may also in the future have a lighter touch. The tandem model, with the Children’s Guardian and the child’s solicitor working closely together, is a highly valued feature of the court system. It ensures that children are well represented, their voice is heard, and that the court receives good

⁹⁴ Magistrates Association, Comments on All Party Parliamentary Group on pre-legislative scrutiny on Children and Families Bill, December 2012

⁹⁵ Dickson K, Sutcliffe, K and Gough D (2009) The experiences, views and preferences of Looked After children and young people and their families and carers about the care system

⁹⁶ Jones, R., Everson-Hock, E., Guillaume, L., Papaioannou, D., Duenas, A., Goyder, E., Chilcott, J. & Payne, N. (2010) Factors associated with outcomes for looked after children and young people: a review of the literature.

- advice about their needs and wishes.
- There are well-documented limitations upon the work of the Independent Reviewing Officer, particularly in respect of adequate independence to facilitate challenge to the local authority care plan and their continuing heavy workloads. These limitations at present prevent them providing an adequate means of scrutiny to ensure the care plan meets the child's needs.

Reform of Special Educational Needs (SEN) provision

Reform of SEN provision: Key issues

1. Our assessment considers how the Bill's clauses on SEN provision will impact on the best interests of disabled children and children with SEN, including whether their views will be taken into account (UNCRC Art.12); the rights of disabled children to live a full and decent life (Art. 23); rights to health (Art.24); education (Art.28 and UNCRPD Art 24); and the child's right to an education which helps them fulfil their potential (Art. 29).
2. The government's stated objective for the reform programme is to break down barriers, bureaucracy and delays which stop vulnerable children getting the provision and help they need through a simpler, single assessment and integrated plans. **Achieving this objective would mark a step-change in the realisation of the rights** of disabled children and children with special educational needs.
3. With so many adults and organisations involved, it is important that decisions about provision are driven by what is best for children (UNCRC Article 3). However, there is no explicit requirement on the face of the Bill **for children's best interests** to be a primary consideration in decision-making about provision.
4. Article 12 of the UNCRC requires that children's views are taken into account when decisions are made which affect them. There is a considerable body of evidence which shows that disabled children and children with SEN are not always consulted about their support needs or local services. Clause 19 of the Bill, which places a duty on local authorities to have regard to children's views and wishes, and to support their participation in decisions that concern them, should **go a long way to support children's realisation of their Article 12 rights**. Engagement and consultation with children needs to be supported by accessible and age-appropriate information provision (UNCRC Article 13).
5. We recognize the importance of effective joint commissioning and integrated working. Nevertheless, provisions for **Education, Health and Care Plans (EHC)** plans offer no new rights to high quality health care or social care for children with a plan (Article 24; Article 23).
6. Article 23 UNCRC requires states to provide assistance to disabled children 'in a matter conducive to the child's achieving the fullest possible social integration and individual development'. EHC plans will not be available to disabled children who do not have special educational needs, or children with SEN who then cease to have SEN. We recognize the complexities involved in reform: however the reforms **stop short of a fully integrated system which puts vulnerable children and their needs at the centre of decision-making**.

7. Provisions enabling **children under 16 years to appeal**, following pilots, offer a welcome opportunity for children's views to be heard (UNCRC Article 12). It will be important for children who appeal to be adequately supported.
8. The extension of obligations to academies and further education institutions is an important change which **will ensure all duty-bearers meet their obligations to children with SEN**. The exceptions under which a school can decline a request from a child with an EHC plan are too broad and could enable schools to object to almost any request.
9. The **'local offer'** has potential to make a real difference to disabled children and young people and those with special educational needs by making sure they have accessible information, and the services they need. These could encompass **other rights which young people say are important to them (for example, access to play, leisure, culture and sport)**. The CRC requires States to put safeguards in place **to ensure that devolution does not lead to discrimination in the enjoyment of rights by children** in different areas. The Bill does not provide for minimum standards to be set for local offers, or for mechanisms to ensure the offer is implemented in practice, and so does not provide these safeguards.
10. Clause 69 excludes children in detention from the provisions of the Bill. **Children's rights to education set out in international and regional human rights instruments are not reduced when a child is deprived of their liberty, and – as such – this exclusion is in breach of the requirements of the UNCRC**. There is a particularly high level of special educational need, as well as emotional and mental health need amongst this small group of children: they are amongst the most vulnerable children in England. The UNCRC and supporting guidelines require that children in the juvenile justice system are treated as children and in a way which promotes their reintegration into society. The exclusion of children in detention from the Bill's provisions on special educational needs represents a missed opportunity to move towards meeting these standards.

Introduction

Section 3 of the Children and Families Bill proposes replacing chapter 1 of Part 4 of the Education Act 1996 with a new regime for providing support for children with special educational needs. However, under the proposals, statements of special educational need will be substituted by education, health and social care plans: 'EHC plans'. The changes will apply in England.

The proposals are complex and interlinked. This assessment focuses on three areas in particular: proposals for Education, Health and Care plans (including school admissions, appeals, and personal budgets); the local offer; and the exclusion of children in detention from the provisions of the Bill.

The most important UNCRC rights engaged by these proposals are:

- Article 3: the best interests of the child must be a primary consideration
- Article 12: the right of children to express their view and have their views appropriately considered
- Article 13: the right of children to say what they think and to seek and receive information
- Article 23: the right of disabled children to enjoy a full and decent life in conditions that ensure dignity and promote self-reliance and facilitate the child's active participation in the community
- Article 24: the right of children to the enjoyment of the highest attainable standard of health
- Article 28: the right of the child to education
- Article 29: the right of the child to an education which is directed to the development of the child's personality, talents and mental and physical abilities to his or her fullest potential.
- Article 40: the right of the child accused or guilty of breaking the law to be treated with dignity and respect

We have also considered the UNCRC General Comment on Children with Disabilities, and the UN Convention on the Rights of Persons with Disabilities: particularly Article 7 (Children with disabilities) and Article 24 (Education). Both underline disabled children's rights to an inclusive education.

Article 2 of the ECHR enshrines a right to education, but this is a limited right which accords broad discretion to States in relation to provision for children with special educational needs, and does not impose a positive obligation to provide an effective

education for children with special educational needs⁹⁷.

Children affected

It is important to recognise at the outset that these proposals will affect many thousands of the most vulnerable children in England. The latest available figures show that in 2011/12 there were 1.62 million children with special educational needs of whom 226,000 had statements of special educational need⁹⁸. Looked-after children, children eligible for free school meals, boys and children from some ethnic minority backgrounds are over-represented in this group.

The Bill is intended to result in a “*single, simpler assessment process for children with SEN or disabilities*”.⁹⁹ [our emphasis] Not all children with special educational needs are disabled, and not all disabled children have special educational needs. There are an estimated 570,000 disabled children in England, around 100,000 of whom have complex care needs¹⁰⁰. An estimated one-quarter of disabled children have no special educational needs¹⁰¹.

What children and young people say

Children and young people who have special educational needs or are disabled and may be affected by this legislation are a hugely diverse group, with many different views, personal circumstances and experiences.

To build up a picture of these experiences, we visited the AHA! (Aiming High Advisory Group) in Brighton and Hove and asked them what they felt was most important if disabled children were to realise their right to a full and independent life. They had many ideas: help with money, shopping, bills and later finding a job. It's important that children just try things like shopping and using the bus, knowing that there's support available to call on if needed. Activities like swimming and bowling, and spending time with friends and family are part of a full life.

The group also talked about the support they had received and what suggestions they wanted to make to decision makers. Group members talked about key people with whom they'd built up a relationship with, and who made a difference to them. Trust and confidentiality were important. Bullying was a big issue, with a lasting impact on young people's confidence. Adults needed to work harder to get the balance right between making sure young people are safe on the one hand, and giving them freedom, responsibilities and respecting their privacy on the other. Specific suggestions included more and better transport, youth clubs and holiday schemes, and support for young

⁹⁷ MacDonald, A. Rights of the Child: Law and Practice, 2011

⁹⁸ Children with Special Educational Needs: An analysis – 2012, Department for Education, October 2012. In addition, there are approximately 163,000 learners aged 16 to 24 with a self-declared learning difficulty or disability in further education (2008/9 figures from the Green Paper).

⁹⁹ Department for Education, Press Notice Children and Families Bill to give families support when they need it most, May 9th 2012

¹⁰⁰ HM Treasury and Department for Education and Skills, Aiming high for disabled children: better support for families, 2007

¹⁰¹ Porter, J., Daniels, H., Georgeson, J., Hacker, J., Gallop, V., Feiler, A., Tarleton, B. & Watson, D. (2008) Disability data collection for children's services. DCSF Research Report DCSFRR062. University of Bath, University of Bristol

people when they left college and school.

We also reviewed a range of recent research reports and consultations. However, this short summary is unlikely to reflect the full range of views. In particular, available research and consultation tends to focus on disabled young people. We found little distinct evidence about the experiences of children and young people who are not defined as disabled but have special educational needs, and in particular those who do not have SEN statements, but are supported through school action, or school action plus.

“Give me a choice and don’t assume you know what I want.”¹⁰²

Disabled children often get little opportunity to participate in **decisions about their own care**, and parents/carers are often asked for their views instead of the young person¹⁰³. Some groups are reported to be less likely than others to be involved in decision-making about their care: younger children, disabled young people in care, disabled young people from ethnic minority backgrounds and those with more complex needs¹⁰⁴. Children report they often have a limited understanding of the discussion they have been involved in because they have not received adequate explanation or information, or information had not been provided in accessible formats¹⁰⁵. Children are often very aware of their needs and want to be heard when they make their feelings and views known about their education and the support they would like as an individual¹⁰⁶. Children **would like to be involved in discussions that affect them**, to be given a choice, and for adults not to assume they know what children want¹⁰⁷.

“Children and young people don’t seem to be able to get involved in discussions that affect us.”¹⁰⁸

Opportunities for children and young people to **get involved in wider decision-making about services, commissioning, and strategy vary a lot from place to place**. Disabled children who get little opportunity to participate in decisions about their own care may find it difficult to build up the confidence to get involved in strategic decision-making¹⁰⁹. Evaluations of pilot programmes on individual budgets¹¹⁰ and the current pathfinders¹¹¹ suggest that there have been limited opportunities for children and young people to shape the direction of these pilots, or to assist in developing sustainable models for young people’s participation in decision-making. This is a shame, because disabled children and young people have productively engaged in decision-making (for example through the Aiming High for Disabled Children commissioning process in local authorities), and they have plenty to say about what makes participation worthwhile: their involvement has to be timely; their access and information needs have to be properly met;

¹⁰² Every Disabled Child Matters, Manifesto

¹⁰³ VIPER project, summary in CYP Now, 2012

¹⁰⁴ VIPER project, submission to Education Select Committee, October 2012

¹⁰⁵ Franklin and Sloper ‘Participation of disabled children and young people in decision-making relating to social care’, 2006

¹⁰⁶ Lewis et al ‘My school, my family, my life’

¹⁰⁷ Every Disabled Child Matters, Manifesto

¹⁰⁸ Every Disabled Child Matters, Manifesto

¹⁰⁹ VIPER ibid

¹¹⁰ Prabhakar et al ‘Individual budgets for families with disabled Children: final evaluation report’

¹¹¹ reference needed

creative and fun approaches which provide an opportunity for socialising; and disabled young people need to be told what happens after they have participated and whether their involvement has made a difference¹¹²¹¹³.

“[I want] to be able to go out with friends of my own age, not my mum and dad.”¹¹⁴
“It may be hard to believe, but even I have things that I want to keep private.”¹¹⁵

Disabled children and young people consistently describe how much they **value opportunities to be treated just as children or teenagers**, and to socialise and mix freely with other people their age¹¹⁶¹¹⁷¹¹⁸. The effect on children’s lives of constant adult presence and surveillance is a recurring theme in research and consultations with disabled children and young people¹¹⁹. Participation in informal groups and spontaneous meeting with friends after school difficult, both because of access problems and the need to pre-plan activities and support needs, and sometimes because of lack of confidence¹²⁰. Extra-curricular activities are valued in their own right and because they allow children to take risks, to escape from over-protective adults and to mature¹²¹. Physical access and transport barriers to sport and leisure activities result in segregation, while disabled children and young people’s participation in art and creative activities is often limited¹²². Some research shows that families of children with life-limiting or life-threatening impairments experience particular isolation and poverty¹²³. Even within formal participation structures for young people – for example – at local government, disabled children are less likely to be involved in mainstream participation opportunities alongside non-disabled young people¹²⁴.

“If I could change one thing, it would be that ‘average’ is all a disabled child is allowed to be.”¹²⁵

“[What does disability mean?] We all get picked on”¹²⁶

The individual support disabled children and young people receive in the educational system is important – they welcome being treated sensitively and their individual needs being taken seriously¹²⁷. Disabled children and young people in both mainstream and special schools report many happy experiences, good friendships and supportive, empowering adults¹²⁸. Where experiences are not so good, there are several common themes: low expectations by adults about what disabled children can achieve, physical

¹¹² VIPER project, submission to Education Select Committee, October 2012

¹¹³ Franklin and Sloper, *ibid*

¹¹⁴ Young person quoted in CDC response to ODI consultation on ‘Fulfilling Potential’.

¹¹⁵ Child quoted in ‘Life as a Disabled Child: a qualitative study of young disabled people’s perspectives and experiences’.

¹¹⁶ ‘Talk to me like a teenage girl: How do disabled teenagers with little or no speech see their friendships’, *ref?*

¹¹⁷ Council for Disabled Children, submission to Office for Disability Issues consultation on ‘Fulfilling potential’

¹¹⁸ Every Disabled Child Matters, Manifesto

¹¹⁹ Life as Disabled Child, *ibid*

¹²⁰ Lewis et al ‘My school, my family, my life: Telling it like it is’, 2006

¹²¹ Lewis et al, *ibid*

¹²² Goodley and Runswick-Cole, ‘Does every child matter, post-Blair? The interconnections of disabled childhoods.’ *date*

¹²³ Goodley and Runswick-Cole, *ibid*

¹²⁴ VIPER project, submission to Education Select Committee, October 2012

¹²⁵ Council for Disabled Children, response to ODI ‘Fulfilling Potential’ consultation.

¹²⁶ Young person quoted in ‘Life as a Disabled Child’

¹²⁷ Lewis et al, *ibid*

¹²⁸ Lewis et al, *ibid*

and other access barriers, and importantly, experiences of bullying and being picked on. These underline the need to complement individual support packages with more systemic changes to ensure accessible, safe schools which are committed to equality and respect, and challenge bullying and unfairness. Disabled children report that transition between primary and secondary, between different kinds of schools, and into adulthood is often a challenge¹²⁹.

The Proposals: Education, Health and Care Plans

The Current Position

The current arrangements in the Education Act 1996 are complex and have been criticised for being slow and bureaucratic¹³⁰. At the end of the process a statement is produced which details the child's needs, the provision which will be made, the school or type of school which the local authority considers to be appropriate for the child, the child's non-educational needs and the provision that will be made available to meet these needs.

In parallel to this process children's services authorities are required to assess the needs of all children who are disabled or need support to ensure that they achieve a reasonable standard of health or development.¹³¹

A parent of a child who has a statement of special educational need may appeal to a Tribunal if a local authority decides not to make a statement, or if they disagree with the content of the statement. Many disputes arise from the failure of the local authority to "name" the school that the parents want for their child. In this regard it is important to emphasise that in naming the school or type of school in the statement of special educational need the local authority is not obliged to name the school preferred by the child's parents if to do so would be an inefficient use of its resources¹³².

The Proposed Arrangements: EHC plans

In its Green Paper, 'Support and Aspiration: A new approach to Special Educational Needs and Disability' (2011), the government outlined its vision:

"to put in place a radically different system to support better life outcomes for young people; give parents confidence by giving them more control; and transfer power to professionals on the front line and to local communities".

The current regime needs review as it frequently fails to produce timely and appropriate outcomes for children. If the reform programme was to achieve its objectives, this would mark a step-change in realising the rights of a large number of children whose best

¹²⁹ 'Life as a disabled child'

¹³⁰ See for example, the Education Select Committee's report of 2006 on SEN, which refers to 'significant failings in the system that need to be dealt with'.

¹³¹ Children Act 1989, section 17.

¹³² Education Act 1996, Schedule 27 para 3

interests are not served by the current system.

The proposed EHC plans are the cornerstone of this new vision. Details about the process are, as would be expected, not set out in the Bill. We do however see the general scheme which is to promote co-operation between the relevant bodies (including school academies) and produce a 'local offer' which appears to be a statement of the support that a local authority 'expects' to be provided in each local area. The detail of what is to be included in the local offer is to be set out in regulations.

A distinction is drawn in clauses 33 and 34 between children and young people with EHC plans and children and young people with special educational needs but have no EHC plan. Under clause 36 local authorities must assess a child's educational, health and social care needs if it is of the opinion that it "may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan". Clause 36 also provides that local authorities must decide whether it is necessary for a child to have an EHC plan.

As with the current regime parents may request a particular school for their child but there is no obligation to name the requested school if to do so would result in an inefficient use of the local authority's resources (clause 39(4)).

There are four important aspects to the new scheme which are of note.

- The provisions apply to children and 'young persons', a 'young person' being a person over compulsory school age but under 25,
- Appeal to the Tribunal may be made by either the child's parent or a 'young person' (and – following piloting – by children under 16)
- When a local authority is notified by a parent or young person of an intention to appeal, the local authority must arrange for a mediation adviser to provide information and advice about pursuing mediation with the local authority, except where the only issue in dispute is the inclusion of a named school in the EHC plan.
- A local authority must prepare a personal budget for a child or young person with an EHC plan if asked to do so by the child's parent or the young person

Impact of the Proposals

The government's ambition – encompassing early identification of needs, supporting children to achieve their full potential, and a package of support encompassing education health and social care which meets children's and families' needs - would, if realised, make a real difference to the realisation of children's rights to health and education, and (for those disabled children affected) the rights of disabled children to

'effective access to and [receives] education, training, health care services, rehabilitation, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development'. (Article 23 (3))

These changes are taking place in a difficult financial climate and against a backdrop of major reforms in school funding, the NHS and adult social care. The pathfinder pilots are at an early stage and have yet to generate clear outcomes or lessons. Combined, these factors make it difficult to assess the likely real-life impact of the provisions in the Bill on children's lives.

Although the threshold for an EHC plan is the same as that for a SEN statement, it is apparent therefore that local authorities will retain a great deal of latitude as to whether to assess the educational needs of the child and if so, whether to produce an EHC plan.

Although an analysis of the new scheme shows that it contains some significant changes the proposed scheme is broadly similar to the current system. Provision required to meet the health and social care needs of children with special educational needs can be included in the current statements of special educational need. We recognise that joint commissioning duties are designed to promote integrated working to support children with special educational needs. However, **the proposed system does not contain any new entitlement to social care or health care**. It may therefore not improve the welfare of children with special educational needs who have other needs that require support. This is because even where an EHC plan is in place the duty to ensure provision set out in the plan is provided only applies to the educational provision in the plan and not the social or health care aspects of the plan. There is therefore a very serious concern that in practice there will be little difference between the current statements of special educational need and the proposed EHC plans.

Greater protections for 16 to 18 year olds in further education are very welcome. This assessment does not comment in detail on changes to Special Educational Needs provision focused on 19 to 25 year olds. It is expected that **costs for will be met using funding already available for this age group**. However, given the current difficult financial climate, we would be concerned if budgets for children with SEN were put under pressure as a result of a higher than expected increase in young people participating in education with EHC plans¹³³.

UNCRC Article 3: best interests of the child

UNCRC Article 3 requires that the **best interests of the child** must be a primary consideration in all actions concerning children. The Bill does not include an explicit requirement that the child's best interests be a primary consideration in decisions about EHC plans, personal budgets or elsewhere.

As a result of changes made during the process of pre-legislative scrutiny, clause 19(d) now includes a requirement for local authorities to have regard to the "need to support the child and his or her parent, or the young person, in order to facilitate the development of

¹³³ We are also aware that, by convention, Ministers are unable to make commitments on behalf of their successors. As a result, there is no certainty that future Ministerial teams will stand by assurances to fund provision for young people over compulsory school age and under 25 years, other than what is on the face of the Bill. The single high needs budget to be established by local authorities from within their Dedicated Schools Grant will cover all high needs children and young people resident in the area from ages 0-25 years, suggesting that higher demand in the upper age ranges may put pressure on resources for children.

the child or young person and to help him or her achieve the best possible educational and other outcomes” in cases concerning children or young people with SEN. This is a welcome general principle that local authorities must have regard to in exercising their powers and duties under this part of the Bill. However, it does not amount to a statement of the best interests principle. In particular, it is not clear how the requirement would be used to resolve situations where there were disagreements over desired outcomes for children, or the best ways of achieving them, or where parents’ and childrens’ wishes and interests were at odds – for example, over desired outcomes or provision in EHC plans, or the use of personal budgets.

UNCRC Article 12: Children’s right to be heard

Under UNCRC Article 12, **children have the right to say what they think in all matters affecting them, and to have their views taken seriously.** As the section above on children and young people’s views makes clear, this is a key right which is often not met for disabled children and children with Special Educational Needs. Despite a strong emphasis in the existing SEN Code of Practice on children’s involvement, current practice often fails to ensure children’s views are understood and taken on board¹³⁴. In 2008, the CRC highlighted concerns that *“insufficient action has been taken [in the UK] to ensure the rights enshrined in article 12 to children with disabilities”*¹³⁵

Clause 19 of the draft Bill says that a local authority must have regard to “views, wishes and feelings of the child and his or her parent, or the young person”, the importance of their involvement in decision-making, their need for information and support to enable participation, when ‘exercising a function in the case of a child or young person”. **This new clause offers an important - and very welcome – principle designed to ensure that the views of disabled children and children with SEN are taken into account in decisions about their lives.**

However, it is not always clear how this requirement will be interpreted in the context of particular decisions – for example, when the EHC plan is sent to the child’s parents or the young person for review¹³⁶, or decision-making about personal budgets.

Provisions enabling **children to appeal on their own behalf**, subject to successful pilots, provides a welcome opportunity to meet the requirement in UNCRC Article 12(2) that children should be able to “be heard in any judicial and administrative proceedings affecting the child.” The UNCRC has set out a range of considerations and support which will be need to be reflected in pilots if children are to make effective use of this right¹³⁷.

Article 23: the rights of disabled children

¹³⁴ Fortin, J., ‘Children’s Rights and the Developing Law’, 2009

¹³⁵ UN CRC, Concluding Observations on the United Kingdom, October 2008, para 32

¹³⁶ ‘Young person’ here refers to someone over compulsory school age and under 24 years old who is covered by the legislation.

¹³⁷ UN Committee General Comment no 12 (2009) The right of the child to be heard

Whilst the express intention of the Bill is to provide “significant improvements to the support provided to children and young people”¹³⁸ the proposals fall short of providing a “right” for children with disabilities to “special care” as required by article 23 UNCRC. If disability is broadly defined as it is in section 17(11) of the Children Act 1989 most children with special educational needs fall within the rubric of article 23 UNCRC. A significant proportion of these children are likely to have interlocking health, education and care needs: indeed, the purpose of the SEN reforms is to respond more effectively to these interdependencies.

As we have seen the only duty to provide for children with EHC plans is to the educational aspect of the plan. The provisions of the Bill will retain the position established in case law: that health and social care provision (for example, therapies) is to be treated as special education provision if it is required wholly or mainly for the purposes of education or training¹³⁹. This is very welcome. However, the failure to provide a right to the social and healthcare aspects of the plan is an important omission which falls short of the obligation found in article 23 UNCRC. The tribunal will only be able to enforce the educational aspect of the plan, leaving complaints procedures and judicial review as the only means of challenge to Social Services and Health.

The local authority will be given a duty to identify and have responsibilities for all children in their area with Special Educational Needs. This duty will not include a duty to identify or have responsibilities for disabled children or those with a health condition unless they need special educational provision. Equally, children with an EHC plan may lose their entitlement to the health and social care aspects of the plan if it is deemed they no longer have special educational needs.

We recognise the complexities involved in reform: however the reforms **stops short of a fully integrated system which puts vulnerable children and their needs at the centre of decision-making**. This is particularly problematic for children and young people, such as those with autistic spectrum disorders, who frequently fall between two services - education and health - in recognition, assessment and treatment.

Article 24: rights to health

In ratifying the UNCRC the UK government recognised “the right of the child to the enjoyment of the highest attainable standard of health”. In 2008, the UN CRC expressed concern that “*children with disabilities [in the UK] continue to face barriers in the enjoyment of their rights guaranteed by the Convention, including the right to access health services, leisure and play*” [our emphasis]¹⁴⁰. Article 2 of the UNCRC expressly prohibits discrimination on the grounds of disability. States must strive to ensure that disabled children have full and equal access to health services.

A plan that sets out what the child or young person’s health needs are that **does not**

¹³⁸ See Forward by the Minister of State for Children and Families

¹³⁹ Government response to Education Select Committee, February 2013

¹⁴⁰ UN Committee on the Rights of the Child, Concluding Observations, United Kingdom of Great Britain and Northern Ireland, 2008, para. 52

provide with the child with the right to the healthcare provision set out in that plan falls short of this obligation.

Article 29: rights to education which develops every child's personality, talents and abilities to the full

A similar criticism is made with respect to article 29 UNCRC which requires that the education of the child shall be directed to “the development of the child’ personality, talents and mental and physical abilities to their fullest potential”. The language used in this article is important. The state “shall” ensure that the education of children is “directed” towards “the development of the child’s personality, talents and mental and physical abilities to their fullest potential”. The proposed Bill does not however meet this mandatory requirement. The proposals are not directed in this way by its failure to ensure that the holistic needs of the child are met. An **EHC plan which mandates the provision of specific educational provision but merely sets out the social and health care needs of the child without any requirement to meet those needs is not directed at “the development of the child’s personality, talents and mental and physical abilities to their fullest potential”**.

UNCRC Article 28, and UN Convention on the Rights of Persons with Disabilities, Article 24

UNCRC Article 28 sets out the right of every child to an education. The Committee states that “*Children with disabilities have the same right to education as all other children and shall enjoy this right without any discrimination and on the basis of equal opportunity as stipulated in the Convention.*”¹⁴¹

UNCRPD sets out the right of people with disabilities to be able to “*access inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live*”.

The Bill includes a number of provisions relating to admissions and the obligations of schools and other institutions:

- The extension of obligations to academies and further education institutions is an important and positive change which **will help to ensure duty-bearers meet their obligations to children with SEN**.
- The exceptions under which a school named in an EHC plan can **decline a request from a child for admission are too broad** and could enable schools to object to almost any request, in a way which does not serve children’s best interests.
- Under the provisions in 34 (9) of the Bill, Special Academies will be able to admit children young people permanently even if they do not have an EHC plan. The

¹⁴¹ UN Committee on the Rights of the Child, General Comment No 9 (2006), The rights of children with disabilities, para 62

approach to inclusive education set out in UNCRPD and the CRCs General Comment on Children with Disabilities requires that disabled children should be educated with their peers if this meets their needs. There is no obvious reason why children and young people who do not meet the threshold for an EHC plan cannot be educated in mainstream schools: this provision is not **in line with the UK's obligation to promote inclusive education**.

The proposals: The 'Local Offer'

Local authorities will be required to produce information on the education, health, care, school/college transport services they expect to be available locally, together with the support they offer to prepare young people for transition to adulthood and independent living – this will be called the local offer. They will also have to ensure advice and information available is available locally for parents and young people.

The impact of the proposals

A robust and clearly defined local offer could contribute in a practical way to the realisation the rights of disabled children and children with special educational needs, particularly those who do not meet the threshold for an EHC plan, and so do not gain individual entitlements under these proposals. A good local offer could also ensure that an adequate range of local services remains available to children, families and young people who opted for personal budgets.

In order to contribute effectively to the realisation of children's rights, a local offer would need to be designed in consultation with children, young people and their families (Article 12); provide information in an accessible and age-appropriate way (Article 13); and designed in a way that avoids big disparities in outcomes between children in different local authority areas (Article 4)¹⁴².

A local offer could also set out a wider range of services, addressing *inter alia* **disabled children's rights to play, leisure, recreational and cultural activities**. These are very important to disabled children and young people.

We recognise that provision by schools and some other agencies set out in the local offer may reflect their statutory duties to provide care or services, and that the local offer may provide families and children with a useful source of information.

However, **the proposed local offer as set out does not confer new rights on children or families**. There is no mechanism (aside from a complaints process) for ensuring what is in the offer is actually implemented, for establishing a 'baseline' of national minimum standards to be met across different local authority areas, and it is left to regulation to set out how children and young people will be involved in the development of the offer.

Children in detention

¹⁴² UN CRC's 2003 General Comment on 'General Measures of Implementation for the Convention on the Rights of the Child' requires states to put in place "safeguards to ensure that decentralization or devolution does not lead to discrimination in the enjoyment of rights by children in different regions".

Clause 69 provides that children and young people in detention should be excluded from the draft clauses' arrangements. The explanatory notes to the Bill explain that Provision 562c of the Education Act 1996 'makes provision for this group' – but this provision is that *“a local education authority may make arrangements for a person who is detained in pursuance of such an order to receive the benefit of educational facilities provided by the authority”*.

Children detained on remand are now deemed by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to be looked after children under section 20 of the Children Act 1989 and will therefore be covered by the provisions of the Children and Families Bill. Clause 47 sets out what happens when a child or young person who previously had an EHC Plan is released from detention.

Impact of the proposals

This provision relates to a particularly vulnerable group of children. Twenty-five per cent of children and young people in the youth justice system have identified special educational needs, 46% are rated as under-achieving at school and 29% have literacy and numeracy problems.^{143 144} Approximately 60% of children and young people in the youth justice system have significant speech, language and communication needs¹⁴⁵.

The CRC is clear that juvenile justice systems should ensure *“treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming a constructive role in society.”*¹⁴⁶ Under the UNCRC, **children in detention retain their rights *inter alia* to education (UNCRC Article 28 and 29), health (UNCRC Article 24) and – if they are disabled – special care and support (UNCRC Article 23)**. Rights to education set out in international and regional human rights instruments are not reduced when a child is deprived of their liberty¹⁴⁷.

Standards for provision for children in detention are set out in detail in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the 'Havana Rules')

*Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education*¹⁴⁸.

High quality education for children in detention, combined with supportive health and other intervention, is a key potential route for rehabilitation. Recent years have seen

¹⁴³ Youth Justice Board. (2006). Barriers to engaging in education, training and employment. London.

¹⁴⁴ 23% of young offenders met the criteria for learning difficulties (IQ<70), and 36% had borderline learning difficulties, according to R.Harrington et al (2005) quoted in Fortin, J. 'Children's Rights and the Developing Law', 2009. A further percentage are likely to have special educational needs resulting from behavioural, social and emotional problems.

¹⁴⁵ Bryan, K. Freer, J. and Furlong, C. (2007). Language and communication difficulties in juvenile offenders. International Journal of Language & Communication Disorders, 42, 505 -520.

¹⁴⁶ UN Committee on the Rights of the Child, General Comment no. 10, Children's rights in Juvenile Justice, 2007

¹⁴⁷ Van Bueren, G. (1998), The International Law on the Rights of the Child

¹⁴⁸ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Adopted by General Assembly resolution 45/113 of 14 December 1990, para.38

welcome increases in the participation of children in custody in education¹⁴⁹. However, in their mid-term report on progress implementing the 2008 recommendations of the UN CRC, the four Children's Commissioners highlighted concerns "*about the quality and breadth of education available in custody*" and that "*in England a young person in custody can lose their Special Educational Needs statement*"¹⁵⁰ The OCC's report '*I think I must have been born bad*' documented wide variation in service provision in the youth justice system for young people with mental health needs, learning disabilities and speech, language and communication difficulties.¹⁵¹

While disabled children and children with SEN in detention and their parents cannot choose their place of education, they retain their rights to education, health and appropriate support, and should otherwise be afforded equivalent educational, health and care services and support as would be offered to other children in the local authority's area. **The exclusion of children in detention from the Bill's provisions on special educational needs is in breach of the UNCRC and represents a missed opportunity to promote the rights and rehabilitation of some of the most vulnerable children and young people in England.**

¹⁴⁹ See for example, Murray, R. 'Children and Young people in Custody 2011-12', Her Majesty's Inspectorate of Prisons and Youth Justice Board.

¹⁵⁰ UK Children's Commissioners' mid-term report to the UK State Party on the UN Convention on the Rights of the Children, November 2011

¹⁵¹ 'I think I must have been born bad': Emotional wellbeing and mental health of children and young people in the youth justice system, July 2011

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