

The Family Justice System

This briefing paper was prepared by the LexisNexis legal intelligence team

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Background points

1. Reform of the family justice system and spending review cuts will alter the way that those on low incomes can access justice.
2. The coalition government consultation on legal aid funding closed on the 14 February 2011. It is anticipated that family legal aid will be greatly restricted and no longer available in the majority of family cases, unless there has been recent domestic violence or the proceedings relate to a local authority application in relation to children.
3. The likely cuts in family legal aid availability follow the judicial review of the Legal Services Commission's tendering process in 2010 which had cut the number of firms able to offer legal aid from 2,400 to 1,300. The High Court ruled that the tendering process was "*unfair, unlawful and irrational*". The Law Society argued the tendering process was so flawed it threatened to create "*legal aid deserts*" around the country.
4. Citizens Advice Bureaux and law centres are experiencing funding cuts. The Ministry of Justice's impact assessment shows that cuts will result in voluntary organisations that provide legal aid losing 77 per cent of their legal aid income.
5. It was announced in December 2010 that nearly one third of magistrates' courts (93 out of 300) and 49 county courts would close. Plans to build new courts have been cancelled.
6. The changes come about at a time when the family justice system is tackling the most significant overhaul of the procedural rules governing family proceedings in the last 20 years with the introduction of the new Family Procedure Rules 2010 (FPR 2010) taking effect from the 6 April 2011. At the time of writing a number of key practice directions linked to the rules are still awaited.
7. The new FPR 2010 includes a protocol which provides for all applicants who wish to issue relevant family proceedings to show that they have either attended a mediation and information assessment meeting with a mediator or that they are exempt from doing so. The protocol takes effect from 6 April 2011 but as yet the definition of a "mediator" has not yet been made available.
8. In 2010 a Family Justice Review was launched to examine the effectiveness of the family justice system and the outcomes it delivers, and to make recommendations for reform. The call for evidence closed in September 2010 and an interim report with recommendations for reform is expected in spring 2011.
9. In January 2011 the Law Commission issued a consultation paper *Marital Property Agreements* (Law Com 198) in relation to pre-nuptial, post-nuptial and separation agreements. The paper sets out a range of potential issues and options regarding marital agreements. The Law Commission has requested

responses to the paper from members of the public, the legal profession and other interested parties. The consultation closes on 11 April 2011.

Impact of changes

10. There has been a strong growth in the number of parties to family proceedings who are unable to obtain legal representation and act as “litigants in person”. Legal aid cutbacks, the introduction of the new FPR 2010 and court closures will particularly impact on litigants in person, with the resulting effect of more court time being needed to deal with cases in which the parties are not legally represented, further increasing already long waiting times for hearings.
11. Delays in children proceedings may mean that vulnerable children are affected by delays in care proceedings in England and Wales. In private children proceedings (i.e. between parents regarding residence and contact) delays in obtaining reports from the Children and Families Advisory Service (CAFCASS) and limited court resources are also leading to delays.
12. It has also been reported that there are significant regional differences in county court proceeding times, examples given include 65 weeks in London compared to 46 weeks in Humber and South Yorkshire producing a “postcode lottery”. Court closures and limits on legal aid are likely to exacerbate this.

Alternatives methods

13. Alternative Dispute Resolution (ADR) methods, including mediation, in family proceedings are an alternative method of providing access to justice.
14. ADR cannot be a universal panacea - not every family case will be suitable. Examples of scenarios which may arise from the new mediation protocol are:
 - Cases of domestic violence – the mediation requirement does not apply where there have been domestic abuse allegations leading to police investigation or the issue of civil proceedings within the preceding 12 months. This does not address cases where either the domestic violence or abuse has been unreported but nonetheless would make mediation unsuitable because of issues between the parties and the concerns of the victim or where the domestic violence occurred more than 12 months ago but was no less serious than more recent domestic violence; and
 - Cases where a party may pay “lip service” to the concept of mediation but with no real intention to resolve issues via mediation.
15. In addition the lack of information regarding the experience, training and professional standards of mediators who may run mediation and information assessment meetings is a concern at this late stage prior to the introduction of the protocol on 6 April 2011.
16. The cutbacks in legal aid may lead to some parties taking a more reasonable approach and reaching a settlement either directly with the other party or with the assistance of ADR. Inevitably, there will be cases which cannot be settled for a number of reasons. In private children cases the consequences may be an increase in the number of children who have no further contact with a parent.

In financial cases, lack of agreement may lead to housing issues, more welfare benefit claims and a greater number of children living below the poverty line. This means that the advice that such families may need on housing and welfare benefits will be less available.

Reforming family law

17. There is a lack of reform regarding some key areas of family law. The President of the Family Division, Sir Nicholas Wall, recently called for reform to the law relating to cohabitants and stated that women cohabitants, in particular, are often severely disadvantaged by being unable to claim maintenance and having their property rights determined by the law of trusts. In addition the President recently noted in a case involving £25 million that *“it seems to me unfortunate that our law of ancillary relief should be largely dictated by cases which bear no resemblance to the ordinary lives of most divorcing couples and to the average case heard, day in and day out, by district judges up and down the country.”* The recommendations of the Law Commission on marital agreements in due course will hopefully bring much needed clarity for those parties who have sufficient assets to make such an agreement warranted; for those without, their access to family justice will be limited.