Funding Criteria for Child Care Proceedings – Analysis of responses

Introduction

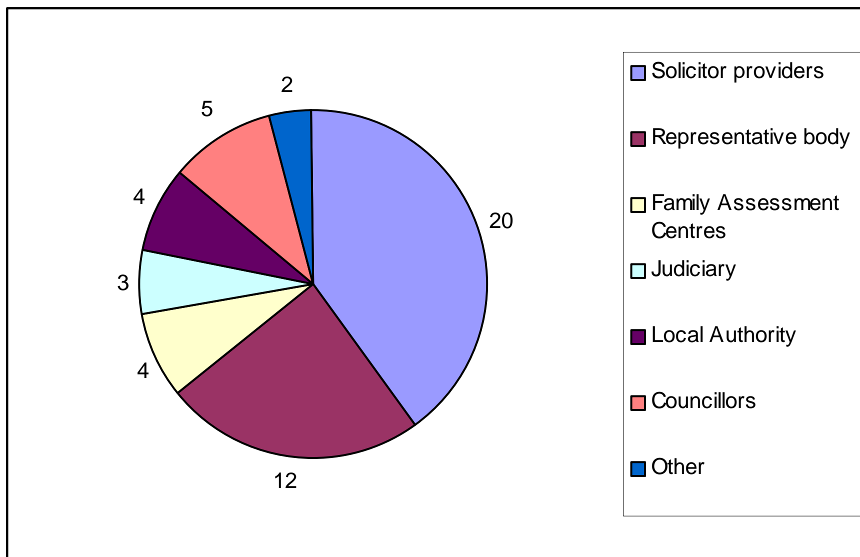
This document provides an analysis of responses received to the consultation *The Funding Code Criteria for Child Care Proceedings.* As well as background and a summary of responses to the consultation it includes a list of respondents to the consultation as an Annex.

Accompanying this paper and published simultaneously is the LSC's detailed response to the consultation, which is set out at section 6 of *Family and Family Mediation Fee Schemes from October 2007*. This document is available on our website at www.legalservices.gov.uk.

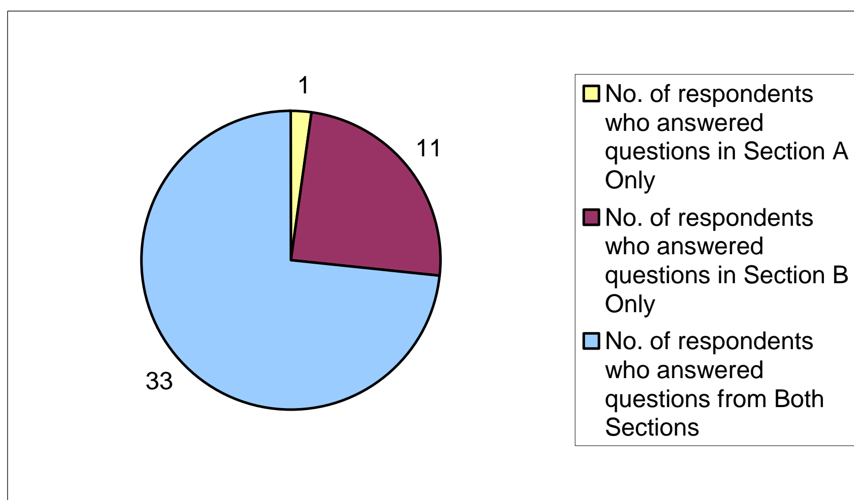
Background and summary of responses

The consultation *The Funding Code Criteria for Child Care Proceedings* was published in March 2007. It suggests changes to the scope and criteria for funding legal representation in public law Children Act proceedings, proposing the introduction of merits criteria for Special Children Act proceedings, primarily care proceedings, and the removal of residential assessments from the scope of legal aid funding.

The consultation closed on 24th May 2007 and 50 responses were received from the following individuals and organisations:



Part A of the consultation, regarding merits criteria for special Children Act cases received 35 responses, broken down as below. Part B, in relation to residential assessments, received 44 responses.



Part A Merits Test

Respondents were not in favour of the introduction of merits criteria in Special Children Act Cases and tended to be of the view that parents and those with parental responsibility should have the absolute right to be represented in care proceedings when they are at risk of having their child removed permanently.

Concern was expressed about the impact on the wider family justice system, with respondents suggesting that the result may be an increase in litigants in person, causing increased cost and delay. The impact of any resulting delay on the child, was raised as a concern.

There were calls for information about the number of cases that would be affected by the proposals and for a cost / benefit analysis. Many were of the view that the proposals would increase place an additional administrative burden on suppliers and pointed to the existing duties of solicitors in relation to the discharge of certificates where public funding is in appropriate. The power of the courts to exercise control was also highlighted by many, although many conceded that in practice the courts prefer parties to remain represented throughout proceedings.

Whilst most broadly disagreed with the introduction of merits criteria some respondents agreed that there are circumstances where parents and those with parental responsibility should be subject to some form of merits criteria and agreed with some of the specific proposals contained in this section of the consultation.

A number of responses highlighted that the premise of the consultation was a rise in cost and that there were other issues, notably experts fees, that required addressing.

1. Do you agree that within Special Children Act Proceedings there are some clients for whom funding is a lower priority?

Some respondents stated that there were some clients for whom they agreed funding is a lower priority in these cases, but most of them considered it difficult to generalise and list priorities. It was suggested that parents or those with parental responsibility who had little or no role in children's lives and have no interest or intention in playing a role in their future should be excluded on an individual basis, rather than automatically, as there are occasions where these people come through to offer a permanent home to the child.

Some suggested that whilst all parents and those with parental responsibility required representation, some would have a limited input and not all such parties would need the same level of representation.

Those who disagreed with this question also pointed to difficulties of generalising:

> “It is easy to think of clients who…might be thought to be people for whom funding is a lower priority than others, but when people in their particular circumstances are looked at individually, it makes no sense to categorise them as a group who are to be treated less favourably” - Association of Lawyers for Children

Many respondents suggested that this should not be an administrative decision but a decision of the court, being of the view that if a client seek out legal advice and receive party status, then they are necessarily involved and deserving of funding.

It was considered by many to be in the interests of the child to allow representation for those who had potential to make a difference to the child’s future and that this could be in terms of ancillary issues, such as contact, which may not be clear at the beginning of the case. Some solicitors and their representative bodies referred to their role of helping clients to come to terms with the fact that the child will not be in their care.

2. Do you agree that there should be no change to the financial eligibility rules for Special Children Act Proceedings? Should the financial position of clients ever be relevant to any reasonableness test?

Most respondents stated that they agreed that there should not be any change to the financial eligibility rules for Special Children Act Proceedings. Most also said that the financial position of clients should never be relevant to any reasonableness test.

Reasons for these views included the importance of these cases to the clients, the high costs of these cases being beyond a party’s control and the administration costs likely to be created by changes to financial eligibility.

3. Do you agree that funding for children in Special Children Act Proceedings should remain an absolute entitlement, subject only to the test for separate representation under criterion 5.4.5.?

Responses to this question were mixed. 15 (43%) stated that they agreed and most considered that where there is no conflict, it is advantageous that children should be represented together. Several went on to say that care should be taken in applying the rule as conflict may arise.

> “We agree that where there is no conflict between the children, normally they should be represented together.” - Legal Aid Practitioners Group

Many respondents were concerned that conflict may later develop, and some were therefore of the view that separate representation may be the best approach where there is a potential for conflict to occur.

Others were of the view that funding for children in these cases should remain an absolute entitlement, whether or not they are separately represented.

Some were unclear about the relevance of criterion 5.4.5. The Law Society considered there to be occasions when separate representation is appropriate and were of the view that they could not agree to the proposal until they received detailed guidance.

Some of those who disagreed were of the view that it should be the court which decides whether a child should be separately represented.

4. Do you agree with the list of parties who might be excluded from funding by a merits test as given in paragraph 4.1?

Respondents tended not to agree with this list as a whole, although some agreed with some of the specific points. Concern was expressed that the tests are subjective and difficult to quantify, making it difficult to justify exclusion from representation. Some suggested the need for flexibility, particularly where clients are vulnerable owing to issues of diversity or disability. They made specific comments as follows:

a) Those with no separate or sufficient interest in the outcome of the proceedings, sufficient to justify their representation. This will often be related to past issues and likely future degree of involvement of the client with the child.

Several responses pointed to paternal families who may not have much day to day involvement with children, particularly where the mother does not wish to involve them, but who may be the best chance for the child to remain within their family. They suggested that these fathers may not appreciate the significance of these proceedings without legal advice.

Some expressed the view that if there is no interest then the client is unlikely to have consulted a lawyer and is unlikely to be a party to proceedings. They were of the view that this is an issue for lawyers and the judiciary rather than an administrative decision for the LSC.

A few responses suggested that representation might reconcile a parent to fact they will have a limited role, or perhaps no role in their child's future, and would thereby reduce the likelihood of disruption in the future.

(b) Parties who have no positive or distinct case to put to the court.

Some respondents stated that these parties were entitled to have their views heard. They were of the view that if a party has sought legal representation and

continues to give instructions, then that that party should continue to be represented.

It was suggested that if parties want to be joined but do not have a distinct case to put, then they are already subject to merits testing and case management by the court.

(c) Clients who require representation but where, in the absence of any conflict of interest, the interests of the client can be protected by being jointly represented with another party.

Some respondents were of the view that where there is no conflict of interest, parties can be jointly represented.

“We accept that where parents live together and there is no conflict or likely conflict, they should be represented together. The instruction of a joint solicitor can also help to keep a focus on the interests of the child.” - Family Justice Council

Many respondents cautioned that conflicts can often develop and are not always apparent at the beginning of the case. This, it was suggested, could lead to delay and prove to be more costly, particularly if new solicitors need to be instructed late in the proceedings.

Some, however, were opposed to this proposal, irrespective of issues of conflict:

”It is not right that a parent is expected to hang on the coattails of another party” – Nelsons Solicitors

(d) Clients who disengage from proceedings or cease to give instructions

Several respondents were in support of this example, where a client ceases to give instructions over a long period of time. There was a suggestion that this should be a high test, after chasing letters, owing to the likelihood of these clients having chaotic lives.

A number of respondents however were concerned that, for a variety of reasons, clients often disengage but then will re-engage some weeks later. This may be owing to learning difficulties of mental health problems or because their case takes a discouraging turn. The impact of this behaviour upon the court was highlighted in terms of clients representing as litigants in person, which could lead to delay, problems with court listing and a potential increase to the Fund, as the other parties are publicly funded.

Several respondents felt that this should be dealt with by rules around discharging certificate rather than by a merits test at the outset. Some however

acknowledge the difficulty of applying this rule in practice, since courts tend to prefer clients to continue to be represented in these proceedings.

(e) Clients who require proceedings to be conducted unreasonably or at unjustifiable expense.

Some respondents agreed with this example, although there was some concern as to the definition of reasonable conduct.

Others were of the view that it is cheaper to ensure these clients have representation from a competent solicitor rather than being a litigant in person. A few respondents stated that most care clients are unreasonable at some stage. A respondent raised the issue of clients who lack capacity and need to be represented by the Official Solicitor and the difficulty caused if the client has lost representation by apparent unreasonableness.

Again, several respondents pointed to the existing LSC regulations.

5. In what way, if at all, should the likelihood of the client achieving the outcome they seek in the proceedings be taken into account in any merits test?

The majority of respondents were of the view that the likelihood of the client achieving the outcome they seek in the proceedings should not be taken into account at all.

It was considered that there are difficulties in defining outcomes, since these cases are frequently not about a fixed outcome. There may be a main outcome of returning a child to parents care, but there can be other outcomes such as the child living with grandparents, or long term foster care where the local authority's plan is adoption, contact with a child in care or securing the best care plan. It was highlighted that the outcome a client seeks is likely to change during the course of the proceedings and a parent may have no reasonable prospect of securing the main outcome, but through representation may achieve an alternative one. Some stated that a successful outcome is that which is in the best interests of the child.

> "Often a successful outcome will be one whereby the parent comes to terms with the fact the child is not going to live with them… the lawyer must help parents to come to terms with what is happening, and work through all the relevant issues…to find a solution that is best for the child… The client will often change their perspective during the proceedings, so the client's own definition of what a successful outcome is will change." - Legal Aid Practitioners Group

Some respondents were of the view that there would be no equality of arms since this test would not apply to a local authority.

6. Are the existing criteria for Other Public Law Children Proceedings also appropriate for parties other than the child in Special Children Act Proceedings? If not, what criteria would be appropriate?

The majority of respondents were of the view that the existing criteria for Other Public Law Children Proceedings are not appropriate for parties other than the child in Special Children Act Proceedings.

They tended to be of the view that parents and those with parental responsibility should continue to receive non-means, non-merits tested funding and that those who wish to be joined should continue to have applications considered as they do presently.

A few respondents, however, were of the view that members of the extended family with whom the child has lived with immediately before the issue of proceedings should become eligible on a non-means, non-merits tested basis. One respondent thought this should be extended to grandparents per se and another was of the view that all public law children cases should be Special Children Act. One respondent stated that there should be more availability of funding for potential applicants for special guardianship orders.

A few respondents were of the view that the existing criteria for Other Public Law Children Proceedings are appropriate for parties other than the child in Special Children Act Proceedings.

7. How should the Commission approach any discretion as to Reasonableness in merits criteria for Special Children Act Proceedings?

Most respondents were of the view that reasonableness should not be introduced into merits criteria for these proceedings. Some stated that it is always reasonable for a parent who has sought legal representation to be represented in care proceedings.

There was some concern over the ability to make such a judgement at the beginning of proceedings and about how the LSC would make such an assessment.

A few respondents felt that such a criteria should be introduced and that it should be clearly set out. Of these a number felt that there could be a presumption at the outset that the party's position is reasonable. Some stated that a wide discretion should be made available to the court and to solicitors.

8. What do you think would be the impact of the funding criteria proposed in this consultation? What proportion of clients is likely to be excluded under such criteria initially or during the course of the case?

Views varied on the impact and on the proportion of clients likely to be excluded. Some said it was difficult to assess from the proposals and that it would depend upon how they were implemented.

Impacts identified included a potential to cause delay and increase in costs, and an increase in litigants in person. Unfairness owing to an inequality of arms was noted by a few, as was the denial of the right to family life and a fair hearing. An increase in administration was identified as a further impact. Some thought that the proposals would lead to little savings to the Fund.

Some were of the view that a strict application would lead to exclusion in significant number of cases but that court would be bound to allow re-engagement in later stages. Many respondents however considered that that a small proportion of cases are likely to be excluded at the outset.

9. At what point in the proceedings is application of the merits criteria likely to have an impact? Is it correct that relatively few cases could be excluded under the merits criteria at the outset of the case?

Respondents were of the view that each case is different and that there is therefore no one likely point of impact for the merits test. Suggestions as to the point of impact included; when assessments are complete, after the filing of evidence, when the local authority decides to pursue a single track plan and shortly before or at the Pre-Hearing Review. Some, including The Law Society, were of the view that it is not possible to make a judgement until the guardian's report is in, and that even then, experts are successfully challenged at final hearings when the outcome of the case appeared clear. Some respondents suggested that timing will change with the introduction of the new Public Law Outline.

Respondents agreed that relatively few, if any, cases could be excluded at the outset, some went on to query why the current criteria are therefore not sufficient. Some considered that no cases should be excluded at the outset as circumstances change as the case develops.

> "At the outset it will be difficult to identify parties who should be denied funding. Later on, particularly after the threshold hearing, it will be appropriate to apply a reasonableness test for the continuation of public funding" - CAFCASS

10. Do you support the introduction of a new devolved power for suppliers to grant legal representation in Special Children Act Proceedings? How should that power operate in practice?

The response to this question was mixed, since many were of the view that the merits test should not be introduced and that the current scheme should continue.

However, several respondents supported its introduction if the grant of legal aid is not automatic.

There was however some concern that the operation of the devolved power would result in additional work for suppliers and may lead to delay. Some expressed concern that the solicitor may incur costs which will then be lost. Others were concerned about the Commission applying hindsight and exercising a subjective view.

On the basis that some merits test is introduced, several thought the new devolved power should operate on the current basis of submission within 5 working days. Others thought that it should be reported on the CLSAPP5, since this does not require the signature of the client, whilst some suggested using the controlled matter form or recording this on the file.

11. At what stages and in what circumstances should suppliers report cases to the LSC? Is the list of reporting obligations at paragraph 5.4 above appropriate?

As with the response to question 4, respondents tended not to agree with this list as a whole, although some agreed with some of the specific points. Most suppliers were of the view that the suggested reporting obligations are not appropriate and repeated the comments made in response to questions 4 and 5. Several stated that the current test of conducting their case reasonably and the current reporting requirements should remain and be sufficient.

Some stated that parents must have the opportunity to test the evidence of all parties at the final hearing. Others reiterated that the court prefers for parties to have representation. The Law Society were concerned that a solicitor may be in breach of a professional obligation reporting in some circumstances.

If some merits test were to be introduced, respondents were of the view that guidance notes would be needed as there was some concern about how reporting would be handled in practice.

In terms of joint representation, concern was expressed that parties may give different instructions at the final hearing and some queried which parent would leave the solicitor who had detailed knowledge of the case.

The suggested time period of 28 days for reporting when a client disengaged or ceased to give instructions was considered by most respondents to be too short a timeframe for vulnerable clients. A suggestion of 3 months was made by a number of respondents as an alternative, whilst others considered a set number of days to be too crude a test of disengagement. Problems with clients disengaging and re-engaging were rehearsed.

12. To what extent should the new standard fee regime influence the way in which any merits criteria are applied.

Some respondents stated that remuneration should not influence whether clients obtain or continue to have representation.

A number of respondents, including The Law Society, were concerned about proposals to pay half the standard fee for incomplete cases and felt that providers should not be penalised for reporting a case.

> "The Law Society does not agree that only half the standard fee should be paid, not least because the work may well be front loaded. It does not accept the LSC's argument about swings and roundabouts in such cases. Solicitors should not be penalised for giving unpalatable advice." - The Law Society.

Several respondents were concerned that the fee schemes are based upon caseloads and average costs remaining the same and that cases excluded by these proposals will by definition be cheaper, thereby removing the balance in the swings and roundabout principle. A few commented that if these cases were removed then the fees would need to be increased to take account of lower cost cases.

Some respondents did not see the basis for the link between merits test and the mechanism by which the solicitor gets paid and asked for the issues raised by it to be clarified.

Part B – Residential Assessments

Respondents were of the view that residential assessments can be valuable in appropriate cases. However responses to this section of the consultation were mixed, particularly in terms of where the obligation for funding such assessments should lie.

13. Do you agree these assessments are outside the ambit of the legal aid budget as they are primarily about possible rehabilitation and are likely to involve treatment, therapy or other rehabilitative work?

9 respondents (20%), including The Law Society the Legal Aid Practitioners Group, were of the view that residential assessments are outside the ambit of the legal aid budget.

> "The costs of such assessment are high and although we believe such costs are often worthwhile we believe the CLS Fund cannot continue to meet such costs". - The Law Society

Most of these, however, disagreed that this was because they are primarily concerned with treatment, therapy or other rehabilitative work, but considered that cost of such assessments should be met by the local authority, which has duties to a child in need.

Most respondents, whether they agreed with above question or not, were of the view that residential assessments can be a useful tool to provide evidence to the court in deciding the future of the child.

Many felt that it was difficult to make a clear distinction between assessment and treatment, therapy or rehabilitative work. Several respondents, including the Association of Lawyers for Children and solicitor providers who endorsed their response, were of the view that the extent that residential assessments involve treatment, therapy or other rehabilitative work is set out clearly in the case law.

Some of those who disagreed with the question, including the Association of Lawyers for Children, acknowledged the burden to legal aid fund and suggested that funding ought to be the subject of multi party negotiation and agreement between relevant agencies such as local authorities, health and government departments. They were concerned that withdrawal of funding, without alternative arrangements, would lead to a risk that more children could be permanently removed from their families.

The Law Society highlighted that local authority care solicitors have particular concerns as to residential assessments being removed from scope, reporting that most local authorities are unable to fund residential assessments. The Family Justice Council expressed concern about the financial burden shifting back to local

authorities. Many respondents, including local authorities themselves, pointed to the strain on local authority budgets, and were concerned that they would be unable to provide the additional funding.

Some, including CAFCASS, were of the view that there are some situations where the assessment could and should have been obtained by the local authority, prior to the proceedings. Some residential family assessment centres were of the view that local authorities should pay a higher proportion of the costs, rather than the costs being split equally between the parties, owing to their responsibilities towards children, and their parents.

> "Following re G it is the case that local authorities have been refusing to fund certain assessments and so the court has been ordering the LSC to fund them " - The Greater London Family Panel's Legal Committee

Residential family assessment centres asserted that their work was primarily about assessment and not rehabilitation, but stated that it was hard to make the distinction, with therapy being a critical part of the assessment. They were concerned that the proposals would lead to a reduction in funding and the number of assessments and a potential closure of services. They pointed to favourable outcomes for families they work with.

> "The LSC's proposals to withhold legal aid in relation to residential assessment will in practice put an end to this form of assessment as [there are] no others with the means to pick up the costs". - Browning House Family Assessment Centre

14. Are there any costs of these assessments that rightly fall to the client and therefore should be funded from the legal aid budget? Please give examples of these.

Those who considered residential assessments to be outside the remit of the legal aid budget tended to suggested that the costs of experts reports as a result of the residential assessment should fall to the legal aid budget, but that they should be clearly restricted and shared.

Several respondents, as with the previous question, referred to current case law and were of the view that the costs of the assessment, except treatment and therapy should be shared as the court directs.

15. Do you agree that these assessments generally add insufficient value to the outcome of proceedings to justify the delay and costs involved given the availability of community based assessment?

Almost all of the respondents disagreed with this question. Respondents were of the view that residential assessments are valuable in certain cases and many of them, including family providers, residential family assessment centres, local authorities, lead bodies and the Family Justice Council, provided examples of cases where they considered residential assessments to have added sufficient value to the outcome of proceedings.

It was considered by many that community assessments do not provide enough information for the court to make a determination in all cases and that residential assessments can be the preferred option, particularly in cases where there is a significant risk to the child.

Some respondents were of the view that insufficient research has been undertaken to evaluate the effectiveness of residential assessments.

Many respondents challenged the notion that residential assessments contributed to delay. Some were of the view such assessments could "make or break a case" quickly. Residential family assessment centres stated that nearly all assessments are undertaken within 12 weeks but that there are some circumstances where they can be extended. Browning House Family Assessment Centre stated that in the majority of cases the assessment was completed by 20 of the 40 weeks envisaged for the conclusion of care proceedings.

Some were of the view that residential assessments are no more expensive than other types of assessment. Many respondents expressed the view that residential assessments may be cheaper comparatively in the long term and they pointed to the relative costs of placing a child in care and the savings thereby created for local authorities and for child health and development. Some stated that the interests of the child, rather than issues of funding, should be the primary issue.

Respondents expressed concern about shifting costs between organisations and called for a coordinated approach to the funding of residential assessments.

Conclusion and next steps

1. We are grateful to those who have taken the time to respond to this consultation. We received many useful comments, case studies and examples that have informed the decisions reached. We have considered concerns expressed in the context of our objectives of achieving future sustainability of the legal aid system, ensuring access to services for clients and value for money to the taxpayer.

2. We have included our response to this consultation as part of *Family and Family Mediation Schemes from October 2007: Consultation Response.* It is available on our website at www.legalservices.gov.uk.

Consultation coordinator contact details

If you have any complaints or comments about the **consultation process** rather than about any topics covered by this paper, you should contact the Legal Services Commission's Consultation Coordinator, Holly Perry on 020 7759 0000. Alternatively, you may wish to write to the address below:

Holly Perry
Consultation Coordinator
Secretariat
Legal Services Commission
85 Gray's Inn Road
London
WC1X 8TX

If your complaints or comments refer to the topics covered by this paper rather than the consultation process itself, please direct them to:

Simone Hugo-Lake
Civil Policy - Family
Legal Services Commission
4th Floor
12 Roger Street
London WC1N 2JL

The Consultation Criteria

The six consultation criteria as set out in the Cabinet Office Code of Practice are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation coordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

List of respondents (Annex A)

Below is a list of respondents to the consultation

Name	Organisation
	Access Law LLP
	Association of Lawyers for Children
Mrs F J Hedar, Partner	Atkinson & Firth Solicitors
	Bates Wells & Braithwate Solicitors (Sudbury, Suffolk)
David Johnston, Assistant Director	Blaenau-Gwent CBC
Jim Siller, Chairman	Browning House Family Assessment Centre
	CAFCASS
	CAFCASS CYMRU
Elizabeth Bower	Children & Families Law Firm
	Daniel & Harris Solicitors
Robert Taylor	Deputy Circuit Judge
Alex Dye	Fairweather Stephenson Solicitors
	Family Justice Council
Bruce Edgington	Family law Consultant and agency advocate
Ian Garner, Director	Family Mediation in Sussex
Bridget Lindley, Deputy Chief Executive and Legal Adviser	Family Rights Group
	Fisher Meredith Solicitors
	Flintshire County Council
Mark Harrison	Foley Harrison Solicitors
	Foot Anstey
	Gloucestershire CC Children & Young People's Directorate
D Lennox	Harthills Solicitors
Penny Logan	HCL Hanne & Co. Solicitors
Sid Brighton, Chief Executive	Justices' Clerks' Society
	Kent CC, Children Families and Education division
Councillor Andrew Carter	Leeds City Council
Councillor Bernard Atha	Leeds City Council
Councillor Richard Brett	Leeds City Council (Childrens Services Unit)
Councillor Valerie Kendall	Leeds City Council (Roundhay Ward)
Councillor Ann Castle	Leeds City Council Adoption Panel
	Legal Aid Practitioners Group
Mary Mullin	National Youth Advocacy Service
Hilary Freeman	Nelsons Solicitors
Robina Z Boydon	Nowell Meller Solicitors
Murray Heining	on behalf of Association of Law Costs Draftsmen (ALCD)
Alan Bean	on behalf of Birmingham Child Care Lawyers Group
Paul Tudor, Vice Chair	on behalf of Dudley Lodge Residential Family Assessment Centre
Jeni Styring, Pauline Lloyd, Paul Ewings	on behalf of Ewings & Co. Solicitors, Family department

Ann Fletcher	on behalf of Greater London Family Panel of Justices, Legal Committee
Carol Pritchard	on behalf of Nottinghamshire Law Society, Family law
John Wilson	on behalf of Richard J Knaggs & Co., Brown Beer Nixon Mallon, and Appleby Hope Matthews Solicitors
	Parker Rhodes Solicitors
	Resolution
Karen Richards	Social Worker
Barbara Corbett	Solicitor
Sue Pettigrew, Chair of Consortium	The Consortium of Residential Family Assessment Centres
	The Law Society
	The Magistrate's Association, Family Proceedings Committee
	Watson Esam Solicitors
Dr Roger Kennedy	West London Mental Health NHS Trust
	Wolferstans Solicitors