

## **Analysis of responses to the consultation on non-allowable disbursements and Funding Code guidance in Family cases**

### **1. Introduction**

1. This document provides an analysis of responses received to the consultation **Family cases - non-allowable disbursements and Funding Code guidance**. It sets out the background to the changes and a summary of responses received to the consultation.
2. The Legal Services Commission's (the Commission) revised Funding Code guidance has been published and is available on its website at [http://www.legalservices.gov.uk/civil/family/legal\\_guidance\\_updates.asp](http://www.legalservices.gov.uk/civil/family/legal_guidance_updates.asp) and in the updated Legal Services Commission Manual. The provisions clarifying the funding of risk assessments and those setting out the future funding of contact activities under the Children and Adoption Act 2006 (the Act) were effective from 8 December 2008, when the remaining provisions of Part 1 (ss1-5 and 8) of the Act were implemented. The revised guidance in relation to the funding of contact assessments and other contact services carried out by contact centres and other organisations is effective from 6 April 2009.
3. The guidance was finalised following discussions with the Court and Family Court Advisory Support Services (Cafcass), CAF/CASS CYMRU, the Department for Children and Families (DCSF) and the Welsh Assembly Government (WAG). Prior to finalising the guidance the Commission considered the *Children and Adoption Act 2006 - Children Act 1989 Contact Activity Directions and Conditions (Financial Assistance) (England) Regulations 2008* laid on 17 November 2008 and the Cafcass 'Guidance to Cafcass Practitioners on their new roles in supporting the courts in their use of the new provisions in the Children and Adoption Act 2006'.
4. If you have any comments, please contact us at the address below:

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## **2. Background**

1. The consultation paper proposed changes to the list of non-allowable disbursements in family cases set out in Volume 3, Part C Legal Services Commission Manual, as well as to the related guidance on authorities in Volume 1, Part D of the Manual, and on assessments as to the suitability of mediation in Volume 3, Part C of the Manual.
2. The proposed changes:
  - set out the legal aid funding position on new contact activities being introduced by the implementation of the remaining provisions of Part I of the Act
  - clarified the availability of legal aid funding in relation to risk assessments and
  - amended the existing exceptional funding position on disbursements in relation to contact assessments and other contact services.

### *Children and Adoption Act 2006*

3. The provisions of the Act requiring Cafcass/CAFCASS CYMRU to carry out risk assessments where they suspect a child is at risk of harm were effective from 1 October 2007. The remaining provisions of Part I of the Act were implemented on 8 December 2008. Their effect is to amend section 11 of the Children Act 1989, by inserting sections 11A-11P into the 1989 Act. These provisions confer additional powers on the courts, when they are dealing with section 8 (Children Act 1989) contact applications. The Act gives courts more flexible powers to facilitate child contact where it is safe to do so and to enforce contact orders, including the power to direct those involved to attend 'contact activities' such as parenting programmes/classes, information sessions about mediation or programmes aimed at addressing violent behaviour. These activities are designed to help people recognise the importance of the continuing involvement of both parents in their child's life and to give practical help in making arrangements for that involvement.
4. The Court can also ask a Cafcass officer or Welsh Family Proceedings officer to monitor contact orders and/or compliance with a 'contact activity' and report to the court if necessary. Should a contact order be breached without reasonable excuse, there is provision to enforce it by imposing an unpaid work requirement on the person in breach of the order. The court may also award financial compensation from one person to another, for example when the cost of a holiday has been lost as a result of the breach of a contact order.

5. The court will determine in which cases the new provisions are to be used. One of the roles of Cafcass/CAFCASS CYMRU is to provide advice to the court on the suitability of parties to attend activities and the availability of the activities. This includes recommending to the court, although the court will make the decision, when a contact activity condition or direction may be appropriate, and facilitating access to the relevant services, which are provided by bodies external to Cafcass/CAFCASS CYMRU. Contact activities are separate from and in addition to existing facilities such as supervised contact provision at a contact centre. The Department for Children, Schools and Families (DCSF) and the Welsh Assembly Government (WAG) have, with specific funding, commissioned the provision of the various types of contact activity.

#### *Excluded work*

6. Following changes to the Funding Code Criteria which came into force on 1 October 2007 (Criterion 1.3) it is not within the scope of the legal aid budget to meet costs in relation to treatment, therapy, training or educative or rehabilitative work with children or families who are involved in Family Proceedings. Although the change in October 2007 was made specifically to exclude residential assessments from the scope of legal aid funding it also clarified the position that had been in force since July 2005 in relation to all other work included in this definition, such as domestic violence perpetrator programmes. As Volume 1 Part D, Para 5.7 of the guidance makes clear, this criterion is widely drafted and includes not only the costs of the treatment, therapy or training itself but also any costs or expenses **relating to** this excluded work.
7. Therefore an assessment of suitability (whether called a suitability, viability, initial or other type of assessment) undertaken to ascertain whether a client should attend a domestic violence perpetrator programme falls within this definition of excluded work.
8. This criterion also excludes assessments of the need for or suitability of clients to have other treatment, therapeutic services or further interventions such as Resolution's 'Parenting After Parting' courses as well as the relevant treatment or therapeutic service itself. It is clear from the consultation responses that there was some lack of familiarity or misunderstanding in relation to this existing exclusion and costs had clearly continued to be claimed on some legal aid certificates in relation to assessments excluded from funding.
9. The legal aid funding of many assessments was already excluded by the existing Funding Code Criteria. The revised guidance highlights and

clarifies the Commission's position and does not introduce any changes in relation to these excluded costs.

#### *Contact assessments and other contact services*

10. The Commission recognises the importance and value of the work done by child contact centres and other organisations who support contact for parents and children in facilitating safe contact where it might not otherwise be possible. It also recognises the role that they play in assisting the court in making decisions as to whether contact is safe and appropriate.
11. The function of the Commission under the Access to Justice Act 1999 is to ensure the provision of legal services, and its limited funds should be used for this purpose. The funding of contact centres and the funding of contact activities and services is outside the scope of the provision of legal services.
12. The legal aid budget is under pressure and if the Commission is not able to live within budget then there will be cuts to either scope and/or eligibility for legal services. Therefore the focus of the legal aid budget must remain its main function of providing legal advice and representation. The Commission's family strategy "*Making legal rights a reality for children and families*", published in March 2007 stated that it would be refocusing the limited budget on priority clients and that funding priorities would be:
  - ◆ directing funding towards services for children and adults at risk of abuse and parents whose children are the subject of care proceedings
  - ◆ providing further incentives for parents in private law proceedings to resolve cases without going to court
  - ◆ increasing access to services for those at risk of domestic abuse
  - ◆ reviewing the operation of the Funding Code to reflect funding priorities.
13. The decision making guidance previously in place and the Unified Contract make clear that contact centre fees (ie for use of services and/or facilities) are already client expenses which cannot be claimed. The guidance stated, however, that in **exceptional** circumstances the costs of an assessment of supervised contact may **exceptionally** be met by the legal aid budget in certain specified circumstances, including in cases where a report is required to inform the decision of the court and where Cafcass/CAFCASS CYMRU could not be reasonably expected to assist.
14. In April 2008 Cafcass commissioned, for 2008-09, a range of child contact services from approximately 60 providers across England. Three tiers of services were established, with fixed fees set for each tier. Contact

assessments have been one of the types of child contact service commissioned by CAFCASS for 2008-09. Cafcass considers that it has achieved better value for money by fixing fee levels for the various types of child contact services that it has commissioned.

15. Although Cafcass/CAFCASS CYMRU have contracted provision across England and Wales for 2008-09, they will determine what services, in terms of both nature and volume, are commissioned for 2009-10. This depends on the level of budget that is available and on the needs of children and families for such services. In view of this, the Commission proposed to remove the exceptional funding of assessments for supervised contact from scope.

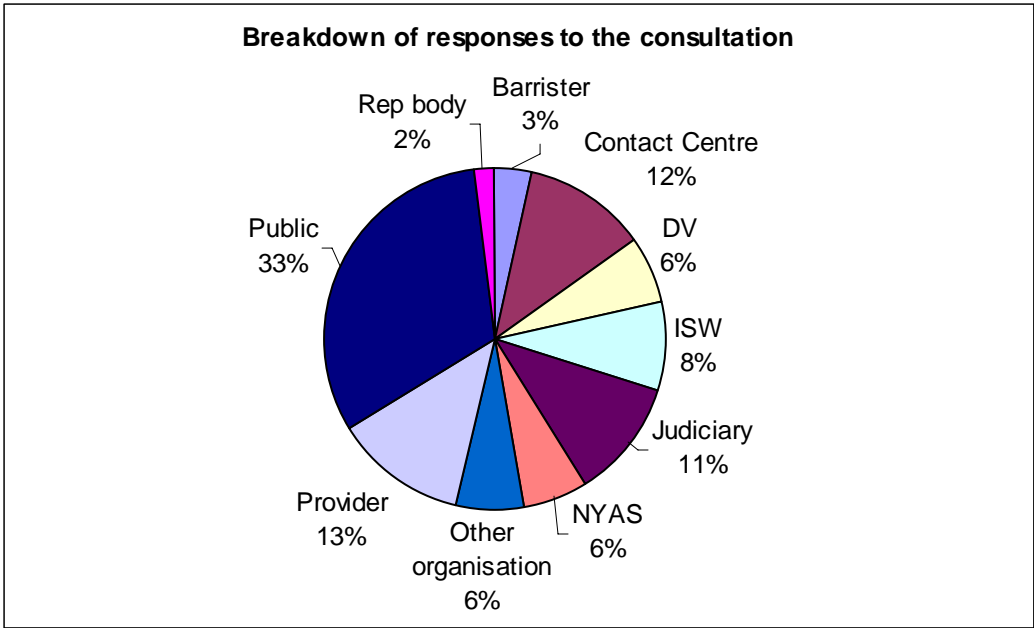
#### *Representation of children*

16. Where a child is joined as a party in private law proceedings in England the guardian will usually be provided by Cafcass and the guardian will then instruct a publicly funded solicitor to provide legal representation for the child. However, the court can appoint "some other proper person" as guardian. This may happen if Cafcass is unable to allocate a guardian within a timetable considered to be appropriate by the court or, occasionally, due to conflict issues between Cafcass and one or both parties.
17. Where a Cafcass guardian is appointed at a local level the Commission will fund the costs of the solicitor for the child. However, if some person other than Cafcass is appointed - for example a solicitor in private practice the Commission may fund both the solicitor and any necessary independent social work or other professional expertise/input (which is incurred as a solicitor's disbursement and indirectly fulfils the expert functions of the guardian as the solicitor will not have the appropriate social work expertise).
18. Concerns were raised in consultation responses that the proposed guidance appeared to indicate that Cafcass would become the sole provider of guardians for children in private law disputes. However, there were no changes proposed in this consultation to the current position in relation to public funding for children in Rule 9.5 cases.
19. The Commission currently has no intention to cease the funding of separate legal representation of children joined as parties in proceedings.

### **3. Summary of responses**

#### *Analysis of respondents*

1. There were 144 responses to the consultation received within the extended consultation timetable and a further 6 responses were received after the closing date. The chart below provides a breakdown of these by respondent type.
2. The Judiciary includes the Magistrates' Association, the Justices' Clerks' Society, Her Majesty's Council of Circuit Judges, the President of the Family Division and some individual district and circuit judges. Representative bodies included The Law Society, the Association of Lawyers for Children, the Family Law Bar Association, the National Association of Guardians ad Litem and Reporting Officers and the National Association of Child Contact Centres.
3. Domestic abuse organisations includes organisations that offer services to clients such as Women's Aid and Welsh Women's Aid and organisations that undertake risk assessments such as the Domestic Violence Intervention Project.
4. As well as considering the written responses received the Commission discussed these proposals with stakeholders, both before and during the consultation process, including Cafcass, CAFCASS CYMRU, DCSF, WAG, the Ministry of Justice, the Family Justice Council, the Association of District Judges, the Law Society, Pro-Contact, Women's Aid and Refuge. There have also been discussions at some local Family Justice Council meetings.



<b>Organisation</b>	<b>Total</b>
Barrister	5
Contact Centre	17
Domestic abuse organisation (DV)	9
Independent social worker (ISW)	12
Judiciary	16
National Youth Advocacy Service (NYAS)	9
Other organisation	9
Provider	18
Public	46
Representative body	3
<b>Grand Total</b>	<b>144</b>

5. A significant proportion of the responses were in relation to two specific organisations, the National Youth Advocacy Service (NYAS) an organisation based in the Wirral and Pro-contact, a service based in Manchester. Of the 144 responses 51 were specifically in relation to Pro-Contact and 12 were specifically in relation to NYAS.
  
6. We welcome the interest shown by the public to the consultation. There were 46 responses to the consultation by the public of which 42 were in relation to Pro-Contact.

7. There were two responses from Wales, one from Welsh Women's Aid and one from a contact centre.

#### *Analysis of responses*

8. The changes are cross referenced in the Manual between Volume 3 Part C and Volume 1 Part D. Rather than set out the analysis of responses in relation to each specifically they have been set out on the basis of areas of general concern that cover both Volume 3 Part C and Volume 1 Part D.

#### Implementation of the Children and Adoption Act 2006

9. The proposed amendment of Volume 3, part C. 2.5.4 (b) (xi) stated that any costs or expenses in relation to any activity to promote contact with a child whether directed by court as a contact activity defined in the Act, or at all are excluded from funding. The remaining provisions of Part 1 of the Act were implemented on 8 December 2008.
10. Some respondents did not distinguish between the new contact activities introduced by the Act, which the Commission has never funded, and existing contact services such as supervised contact. Many respondents expressed concerns that when the Act was implemented:
  - Insufficient numbers of contact activities, as defined by the Act would be purchased.
  - Privately paying clients would not be able to afford contact activities and would be deprived of the opportunities of attending such an activity.
11. Delivery of contact activities is new work introduced by the Act and it is the responsibility of DCSF and WAG to ensure the provision of contact activities as defined in the Act. The DCSF and WAG have commissioned the provision of these activities.
12. Where courts make a contact activity direction or condition under the Act, and parties are referred to a contact activity programme, DCSF and WAG are making provision that the activity will attract a subsidy for those who meet specified criteria. These are set out in the Financial Regulations to support the implementation of the Act itself. Where an individual is in receipt of a legal aid certificate for the proceedings in respect of which a contact order is made then the client will be fully subsidised by DCSF or WAG. If the client is not in receipt of a certificate they will have to pay for the activity unless they can prove it would cause them hardship to do so. This applies to all programmes/activities under the Act.

13. The Commission will fund, for financially eligible clients, the provision of information meetings in relation to mediation including where this is ordered as a contact activity. This is part of the Commission's on-going work to encourage a greater awareness of and use of mediation to resolve disputes where appropriate.
14. Two responses said that they were concerned that the changes to Para 20.9 in the decision making guidance which deals with Family Mediation brought in new, more restrictive funding arrangements in relation to eligibility for mediation. The changes did not propose any amendments to the funding arrangements for mediation that have been in force since 1997. The amendment continues the existing funding arrangements to section 11A(5)(b) of the Children Act 1989 as amended by the 2006 Act where a directed contact activity may be – "*sessions in which information or advice is given as regards making or operating arrangements for contact with a child, including making arrangements by means of mediation*". This has been clarified in the finalised version of the Commission's guidance published on our website.
15. One consultation response said that where parties are not eligible for mediation children should be assessed in their own right so that their feelings and wishes could be heard. Under the existing mediation arrangements there is scope for direct consultation with children within the mediation process to determine their views if the mediator deems this appropriate. This remains the case. Although children's views may be sought as part of the mediation process they are not parties to the mediation.
16. The consultation response referred to in paragraph 15 above further suggested that where there is no mediation a child should be given a certificate of funding for Legal Representation of the child. It is not the case that simply because there has been no mediation there should automatically be separate representation of the child to ascertain their views. Whether to join children as parties in proceedings is a decision for the court and will depend on a variety of factors and a Cafcass/Welsh Family Proceedings officer will be able to put the views of the child to the court in any report directed by the court.

### Risk Assessments

18. Volume 1 Part D para 5.7 sub para. 8 proposed changes to the funding of risk assessments. There were 8 responses from organisations specialising in risk assessments and/or support to victims of domestic abuse. Three of these were from Cornwall and the Isles of Scilly and one was from Wales. Many other respondents raised concerns that the Commission intended to

exclude all risk assessments from the scope of funding and referred to the detrimental impact this would have on parents, children and the courts.

19. Although respondents agreed that it was the responsibility of Cafcass/CAFCASS CYMRU to undertake risk assessments under section 16A of the Children Act 1989, fourteen responses highlighted that in some cases this would not be sufficient to assist the court in determining the ultimate outcome of the application to the court. Respondents suggested that examples of when an additional assessment would be required are where:
  - a party may challenge the assessment of the Cafcass or Welsh Family Proceedings officer,
  - there has been a significant lapse of time since any contact took place and risks have been identified,
  - a party may wish to demonstrate a reduction in risk since a previous assessment,
  - there has been no previous contact between adult and child, or
  - the court may require further expert evidence which goes beyond the professional skills of a Cafcass or Welsh Family Proceedings officer and a more comprehensive risk assessment may be directed. This could be because of a particular mental health issue, drug and alcohol abuse or alleged sexual abuse.
20. The Commission will continue to fund specialist risk assessments, required by the court to inform a decision by the court. These assessments must require professional expertise (not of a social work nature) beyond that expertise held by Cafcass officers/Welsh Family Proceedings officers, for example a report from a psychologist or a psychiatrist, and may be based on some observation of contact (supervised or not). However, the purpose of the report must be to express an expert opinion on risk and/or safety of contact in principle – rather than any assessment of supervised contact itself or suitability for a domestic violence perpetrator programme.
21. Experts' fees generally are a significant area of concern for the Commission in terms of costs and the lack of information as to value for money that is obtained on behalf of the public for expert reports. The Commission has embarked a wider reform programme that has introduced fixed fees for solicitors. The Commission's long term aim in relation to experts is to commission quality services at the best available price and introduce a system of standard fees for some areas of work. Risk assessments are an area where the Commission considers standard fees may be appropriate in the future.

22. As set out at paragraph 6 in section 2 above funding is not available for assessments of suitability to attend a therapeutic or rehabilitative programme such as a domestic violence perpetrator programme. DCFS and WAG are procuring the provision of perpetrator programmes as a contact activity and the costs of the assessment of suitability for these cannot be claimed from the legal aid fund.

#### Contact assessments and other contact work

23. Many respondents emphasised the importance of support for contact within the broader UK Government agenda of Every Child Matters and the focus on the interests of the child including their human rights, in Article 8 (right to family life) of the Human Rights Act and article 7 of the United Nations Convention on the Rights of the Child (right to know and be cared for by their parents).
24. Respondents said that wider services in relation to contact were important for courts to ensure that contact is safe, for children to have the opportunity to have relationships with both parents, for fathers to see children particularly where welfare allegations are raised and for the justice system as a whole in resolving cases involving the welfare of children. Respondents suggested that without these services there could be more protracted hearings and this could lead to an increase in court time, judicial costs and advocacy costs to the detriment of everyone involved.
25. There was a recognition in the responses that the current system of funding the whole area of contact is problematic. The two key issues raised by respondents were that in England Cafcass would not have the resources to do this work as they have long waiting lists across the country and secondly that if the Commission ceased to fund this work it would lead to the closure of many contact centres and the loss of their valuable expertise.
26. Whilst the Commission recognises the importance and value of this work it is not and has never been the responsibility of the Commission to fund contact centres or work related to contact such as supervised contact. This was recognised in the consultation responses from the Family Justice Council and the President of the Family Division. The DFES and now DCSF have allocated funds for the commissioning of services which support child contact, including those delivered by child contact centres.
27. Although the guidance already in place anticipated that the Commission would only fund assessments of supervised contact in exceptional cases it appears from consultation responses that many services have derived a significant proportion of their income from the legal aid fund ie funding was

not restricted to the exceptional circumstances within the previous guidance. One response from a provider expressed it in terms that *“If there was any possibility of Commission funding being replaced by some other source I would not be concerned but at the moment it is the sole source.”* Another response from a contact centre said that... *“[services] receive between 5%-80% of their income through LSC disbursements. It is clear that removal of this funding stream will have a detrimental effect on the level or viability of their vital services. “* Another said that *“A significant part of our business plan was to offer court ordered assessments of contact. “* and *“the grants paid for service-provision are not sufficient ...to survive without the fees for assessment”*.

28. The Commission has funded specific reports for individually funded legal aid clients. For some organisations the level of income from the Commission has constituted up to 80-100% of income. However, other services have not felt it necessary to use the mechanism of legal aid disbursements to fund their work.
29. The Commission recognised, in light of the consultation responses, the impact that the proposed change could have on some contact centres and the difficulties that clients and the judiciary could experience in any hiatus in funding as a result of the withdrawal of Commission funding. The Commission therefore delayed implementation of the revised guidance until 6 April 2009.
30. The revised guidance, in force from 6 April 2009 excludes all fees, charges and costs of child contact centres, including assessments as reports on supervised contact and of other professional assessments of contact between children and adults.
31. However specialist risk assessments, for example from a psychologist or a psychiatrist, required to inform the decision of the court may be based on some observation of contact, supervised or not (see para. 20 above). Any contact centre costs or fees must be met elsewhere. The work undertaken must also be within the scope of funding more generally.
32. Several responses said that Cafcass did not have the resources to take on additional work as there were frequently delays in allocation. Responses also said that Cafcass did not have the skills to deal with specific types of cases. However, Cafcass commissions external services because the bodies it commissions have relevant expertise to safeguard and promote children’s welfare which CAF/CASS does not possess. Commissioning also reflects its commitment to supporting a mixed economy of welfare provision.

33. One respondent raised an issue about funding in cases where Cafcass was not involved such as a Rule 9.5 case where NYAS had been appointed as the guardian and how a non-Cafcass guardian would access Cafcass-commissioned child contact services. In respect of family proceedings in which the welfare of children is or may be in question, it is a function of Cafcass and CAFCASS CYMRU, where requested by the court, to provide information, advice and other support for the children and their families. This extends to promoting appropriate access to supervised contact in cases where that is justified including by the commissioning of services. Cafcass and CAFCASS CYMRU are the conduits for accessing these specialist services which are subject to the jurisdiction and consideration of the court.

#### Separate Representation

34. Although there was no proposal in the consultation on changes to legal representation for children we received many responses on this issue. This was due to the misinterpretation of the Commission's statement of the statutory functions of Cafcass and CAFCASS CYMRU.
35. Many responses were solely on the issue of representation of children and pointed to the important role of NYAS in difficult children cases. This consultation did not propose any changes to the funding of legal representation for joined children.

#### **4. Consultation process**

1. Some respondents raised concerns that the consultation period was too short and that the consultation had not been widely disseminated. This was however, on the misunderstanding that the Commission was proposing major policy changes to the representation of children.
2. The Commission is committed to a Code of Consultation which can be found on its website. Six weeks was a reasonable consultation period because the proposals were not significant changes to the funding arrangements as set out in the previous guidance. Responses to the consultation highlighted that the previous guidance has not been followed and clarifying the guidance is not a significant policy change.
3. The consultation was on the Commission's website and providers were notified of its existence via an e-alert. In addition copies of the consultation were sent to the key organisations identified by the Commission including the National Association of Child Contact Centres, NYAS, and the judiciary. Following the consultation the Commission is now aware of a greater range of organisations from whom it has, through contracted solicitors, purchased services on behalf of individual funded clients.
4. One respondent suggested that the Commission should have undertaken a full cost saving/benefits exercise. The Commission did not undertake this exercise because many of the proposals are in relation to funding arrangements under the 2006 Act. The Commission discussed the proposals with DCFS, WAG, Cafcass and CAFCASS CYMRU before publishing them. In addition, in accordance with its previous guidance, the Commission should only have been purchasing contact services in a limited number of exceptional cases.