



Department  
for Education

# **Cooperative parenting following family separation: proposed legislation on the involvement of parents in a child's life**

**Summary of consultation responses and the Government's response**

**November 2012**

# Contents

Introduction	3
Background	4
Legislative options	6
Summary of respondents and results	7
Overview of results by question	10
Conclusion and next steps	16

## Introduction

The public consultation *Co-operative Parenting Following Family Separation: Proposed Legislation on the Involvement of Both Parents in a Child's Life* was published on 13 June 2012 and closed on 5 September 2012 (21 September for responses in Welsh). It was commissioned jointly by the Department for Education and the Ministry of Justice. The consultation invited views on the Government's plans to introduce legislation to reinforce the principle that most children benefit from the ongoing involvement of both parents after separation, and on options for strengthening the enforcement measures available to courts to deal with breaches of court-ordered arrangements for contact.

Respondents were asked to consider the potential of four different approaches to promote post-separation shared parenting, and sought views on the impact of this legislation. The consultation also set out six questions in relation to the proposals for strengthening enforcement measures.

The Government would like to thank all those who took the time to respond to this consultation.

This response focuses on the shared parenting elements of the consultation only. On the issue of how to ensure more effective enforcement of court orders relating to arrangements for children, the Government has listened to various concerns raised by a number of respondents and wishes to take the opportunity to reflect further on these before making final decisions. The Government will publish its response to that aspect of the consultation shortly.

## Background

The Family Justice Review Panel conducted an independent review of the family justice system in 2010-11. The Review Panel published its final report in November 2011, making numerous recommendations for the reform of both the private and public law systems. The majority of these were accepted by the Government in its response to the Review in February 2012.

When parents go to the courts to resolve disputes about their children, decisions are based on the principle that the child's welfare is the paramount consideration. The benefit of continuing involvement with both parents is factored into these decisions, but it is not explicitly stated in the legislation that guides this process (the Children Act 1989).

The Family Justice Review Panel recommended against introducing any legislation to promote shared parenting on the grounds that it risked creating a perception of a parental right to shared or equal care. The Government believes, however, that more can and should be done to ensure that children are able to maintain a relationship with both of their parents following family separation, when disputes arise about children's care arrangements. We made clear our intention to amend the Children Act 1989 to place an explicit requirement on courts to consider the benefits of a child having a continuing relationship with both parents, alongside the other factors affecting their welfare. Such legislation will send a clear signal to separated parents that courts will take account of the principle that both should continue to be actively involved in their children's lives where appropriate. In doing so, it will help to dispel the perception that there is an in-built legal bias towards one parent. The Government has been very clear throughout its consideration of this issue that the child's welfare will remain the court's paramount consideration when making decisions in private law cases. We have also been clear that, whatever legislative approach we take, we must be very careful to avoid any implication that a child's time should be split equally between parents.

The proposed legislative amendment to promote 'shared parenting' is part of a wider package of measures to help parents resolve disputes about their children following family separation. Other proposed provisions include compulsory attendance at a Mediation Information Assessment Meeting (MIAM) before a private family law case can progress to court, and the introduction of a new Child Arrangements Orders to replace existing 'contact' and 'residence' orders. The aim of this new order is to establish a clearer focus on the child's welfare and needs, rather than on parent's perceived 'entitlements' in respect of the child.

Family court proceedings are emotionally and financially draining for family members and can be particularly damaging for children. Evidence suggests that arrangements for children when families separate are more likely to work when they are made by parents outside of the courts and in a co-operative manner.

To support parents to do this, the Government is also planning to:

- Launch an online 'hub' which will contain improved advice and guidance for separated parents and others, and signposting to other relevant support services. The hub will include diagnosis and dynamic content to gain skills in conflict management and practical tools to help parents make collaborative arrangements for their children.
- Improve access to parenting programmes, supporting parents in focusing on the needs of their child and helping them to reach agreement;
- Introduce Parenting Agreements which will set out the arrangements for the child's care following family separation, including the importance of the child's relationships with other family members (such as grandparents). Parenting Agreements will be easy to follow and will help parents to set out arrangements that are practical, realistic, and in the best interests of their children.

This consultation relates to the law of England and Wales, and these proposals do not therefore extend to Scotland or Northern Ireland.

## Legislative options

Below are the four legislative options which respondents were asked to consider. The options were presented in the form of draft clauses which would amend the Children Act 1989.

### Option 1 - the Presumption approach

This option would insert the following text as a new subsection after section 1(2) of the Children Act 1989 and before the 'welfare checklist':

*"In the circumstances mentioned in subsection (4)(a) or (4A) the court is to presume, unless the contrary is shown, that the welfare of the child concerned will be furthered by involvement in the child's upbringing of each parent of the child who can be involved in a way not adverse to the child's safety"*

### Option 2 - the Principle approach

This option would insert a new subsection into section 1 of the Children Act 1989, after existing subsection (2) and before the 'welfare checklist', as follows:

"In the circumstances mentioned in subsection (4)(a) or (4A), the court shall have regard to the general principle that, irrespective of the amount of contact a child may have with any parent, the child's welfare is likely to be furthered by the fullest possible involvement of each parent of the child in the child's life".

### Option 3 - The 'Starting Point' approach

This option would insert a new subsection into section 1 of the Children Act 1989, after existing subsection (2) and before the 'welfare checklist', as follows:

"In the circumstances mentioned in subsection (4)(a) or (4A), the court's starting point is to be that the welfare of the child concerned is likely to be furthered if each parent of the child is involved in the child's upbringing."

### Option 4 – 'Welfare Checklist' approach

This option would insert a new subsection immediately after section 1(3) - the welfare checklist - setting out an additional factor which the court would need to consider, as follows:

"In the circumstances mentioned in subsection (4)(a) a court shall also, and in the circumstances mentioned in subsection (4A) a court shall, have regard in particular to enabling the child concerned to have the best relationship possible with each parent of the child".

## Summary of respondents and results

The results analysis is based on 214 responses to the consultation document. As some respondents may have offered a number of options for questions, total percentages listed under any one question may exceed 100 per cent. Throughout the analysis percentages are expressed as a measure of those answering each question, not as a measure of all respondents.

### The organisational breakdown of respondents is as follows:

Father	67
Voluntary and community sector	35
Academic / researcher	22
Mother	18
Grandparent / other family member	17
Judge / Magistrate	11
Mediator	11
Barrister	5
Solicitor	8
Other	20

### Responses on the legislative approach

As expected, the responses highlighted the widely differing views on the need for this legislation. Although respondents were not asked whether they agreed with the Government's plans, 66 per cent indicated their support for this change, or simply selected a preferred legislative option. 25 per cent stated that they did not agree with any form of legislation to promote post-separation shared parenting.

### **Option 1 (the ‘presumption’ approach) was the most popular legislative approach**

52 per cent of respondents who selected a preferred approach chose this option. Supporting comments focused on the potential for this approach to ‘level the playing field’, and be a fairer, more robust way to bring about speedier solutions. Fathers in particular preferred this option, although some felt it should go further and require courts to start from a presumption of equal care. Many respondents, however, expressed concern about negative impact of implementing a presumption – further information is provided below.

### **Option 4 (the welfare checklist approach) was seen as the least risky by those opposed to legislation**

24 per cent of respondents indicated that this was their preferred option; the majority of these (32 out of 44) were against any form of legislation but viewed an amendment to the welfare checklist as the least likely to undermine the paramountcy principle and present additional risk to children and vulnerable parents.

### **There was little support for option 2 (the ‘principle’ approach) and option 3 (the ‘starting point approach’)**

Only 22 respondents (12 per cent of those who selected a preferred approach) felt that one of these approaches would be the most effective in meeting the Government’s objectives.

### **Reasons given for supporting legislation**

Those in favour of legislative change highlighted a range of benefits, including the following.

- The policy will increase children’s wellbeing and support improved outcomes by enabling them to maintain a relationship with both parents.
- The proposals address perceived bias (normally perceived as being against fathers) in the family courts;
- The proposals will increase public confidence in the legal system;
- There will be lower levels of conflict between parents; parents will be encouraged to reach agreement without court proceedings and “resident parents” will be less likely to obstruct contact;
- There is likely to be a consequent decrease (over time) in the number of court applications;
- Court hearings are likely to be speedier, with parties’ positions being less “polarised”;
- The proposed change highlights in law that both parents are responsible for their children

### **Reasons given for opposing legislation**

Respondents expressed a range of concerns about the impact of shared parenting legislation. The most frequently stated concerns are set out here below – these were cited as reasons against legislation of any kind, but were applied most strongly to options 1-3.

- The legislative change will undermine principle that the child’s welfare is the court’s paramount consideration, and risks shifting the focus towards parents’ rights.



- Any perception of a shift in focus towards parents' rights will lead to an increase in litigation.
- The existing legal framework is adequate and works well – courts already factor in the benefits of ongoing involvement with both parents.
- The legislative change could lead to unrealistic expectations (and increased conflict) among parents who think the change is a presumption for equal time.
- The draft clauses do not include strong enough safeguards to protect children from harm.
- The clauses are complex, confusing and open to misinterpretation.

## Overview of results by question

**Q1.** Which legislative approach will be most effective in meeting the Government's stated objectives? Please explain your reasons, including any preference for / objection to particular phrases in the clauses (or possible variations described in the explanatory notes)?

**There were 181 responses to this question.**

Option 1	Option 2	Option 3	Option 4	No selection
93 (52%)	13 (7%)	9 (5%)	44 (24%)	22 (12%)

- Over half of respondents who answered this question supported **option 1**. Fathers in particular preferred this option and said there should be a presumption of shared care for children unless proven otherwise.
- Respondents who selected **option 2** suggested that it aligned more closely with the ethos of the Children's Act 1989.
- Respondents choosing **option 3** thought it most closely reflected the approach taken currently by the courts. However, option 3 was the least favoured overall.
- Option 4** was generally perceived as being the least prescriptive and disruptive of the four approaches, offering a statement that shared parenting is important, but also allowing the courts to prioritise the best interests of the child.

A number of respondents commented on issues relating to safety in their answers to this question. A particular concern was that the use of the word 'safety' is too narrow a term to cover the range of types of harm that a child may be suffering, or at risk of suffering. Some respondents felt it could be misinterpreted as an expectation to focus only on the child's *physical* safety. Those making this point suggested that referring to harm or the risk of harm would fit better with the existing terminology of the Children Act 1989.

Whilst recognising that safety and the best interests of the child should be a clear consideration, a number of respondents were concerned that the use of the word 'safety' could leave the system vulnerable to false allegations of abuse.

**Q2.** Will any of these options change the way that courts apply the principle that the welfare of the child is of paramount consideration? Please explain which one(s) you think might do this and why.

**There were 171 responses to this question.**

YES	NO	NOT SURE
81 (47%)	59 (35%)	31 (18%)

There was a mixed response to this question. Respondents, regardless of which answer they selected, expressed both positive and negative comments against their selections on the issue of the paramountcy principle.

**Q3.** Do you think that any of these options will change the court's final decision in certain cases? Please explain your answer.

**There were 166 responses to this question.**

YES	NO	NOT SURE
94 (57%)	33 (20%)	39 (23%)

A majority of respondents thought that the court's final decision would be affected as a result of the changes although opinions on whether this might be in a negative or positive way were divided. On the positive side it was felt that decisions would be more child-centred with courts starting from the position that children's best interests are served by the involvement of both parents in their life; but concerns were raised that legislation to promote shared parenting could make it more complicated when attempting to prevent a child having contact with an abusive parent.

**Q4.** Do you think that any of the options proposed give rise to particular risks (other than any you have already mentioned)?

**There were 167 responses to this question.**

YES	NO	NOT SURE
94 (56%)	58 (35%)	15 (9%)

Over half of respondents were concerned that legislative change could lead to an expectation of a 50/50 share of the child's time between parents – which could potentially put a child at risk of emotional or physical abuse where there was ongoing conflict. Respondents highlighted the risk that the fear of being perceived as uncooperative, or being penalised, could force resident parents to agree to arrangements out of court even when they had concerns for a child's welfare.

Those respondents who selected 'no' believed that none of the options would give rise to any particular risks and that the safety of the child would still be the main factor in decision making. They were of the opinion that all the options would help in some way to reduce risk.

**Q5.** How will this legislation impact on the numbers of separated parents applying for a court order to determine contact arrangements for their child? Please state whether you think there will be an increase in applications, decrease in applications or no change and explain your answer.

**There were 175 responses to this question.**

INCREASE	DECREASE	NOT SURE	NO CHANGE
70 (40%)	51 (29%)	30 (17%)	24 (14%)

A number of respondents thought that legislation could lead to a rise in litigation rates, at least initially, due to misunderstanding what the changes meant; particularly if there were an expectation of 'equal rights' for parents to spend time with the child. Of those who thought there could be a drop in cases, there was a feeling that parents would accept the fact that the child would have contact with the applicant, so would be more likely to come to an agreement; during mediation, for example.

**Q6.** Do you think this legislation will encourage parents to resolve disputes out of court, either of their own accord or through services such as family mediation?

**There were 169 responses to this question.**

YES	NO	NOT SURE
72 (43%)	65 (38%)	32 (19%)

Views on whether the legislation would encourage parents to resolve disputes out of court were also divided. A number felt that the change would provide an incentive to parents to agree a parenting plan, particularly over time as perceptions and expectations evolved. However, it was acknowledged that court action would always remain the right option for some families.

**Q7.** How can children's views be taken into account more fully in the court process in a way that is in keeping with the focus on the best interests of the child?

**There were 149 responses to this question.** The table below describes the most frequent suggestions; some respondents made more than one suggestion.

<b>71 (48%)</b>	Thought that children's views could be taken into account more fully in the court process if their views were sought by adults who were appropriately trained and trusted by the children concerned.
<b>49 (33%)</b>	Stated that they thought Cafcass were not able to represent children's views fully in the court process because they were not appropriately resourced or equipped to do so. A number of respondents felt that Cafcass officers sometimes showed bias towards the resident parent, usually the mother, and this should be addressed.
<b>47 (32%)</b>	Said that it was possible that the child could be influenced by the resident parent or that the child's views were difficult to gauge in the court process in a way that was in keeping with their best interests. Some felt that a presumption of shared parenting would prevent the child from having to choose between parents so they would not risk being unduly influenced by the resident parent.
<b>32 (21%)</b>	Thought that how children's views could be taken into account more fully in the court process depended on the age and maturity of the child.
<b>25 (17%)</b>	Felt that there were dangers relating to taking children's views more fully into account in the court process i.e. that they should not be involved in the conflict.

In summary, respondents felt that children's views could be taken more fully into account in a number of ways, including through trained/trusted adults. A number of respondents felt that Cafcass could do better in terms of training and increasing the numbers of officers; for which increased funding would be needed. There were concerns that it was difficult to ensure that a child had not been influenced by a parents and that much depended on the age and maturity of the child.

**Q8.** What further non-legislative action should Government take to support the objective of encouraging both parents to remain involved in their child's life after separation?

**There were 127 responses to this question.** The table below describes the most frequent suggestions; some respondents made more than one suggestion.

<b>66 (52%)</b>	Thought that better education about parenting and relationships was a useful non-legislative action that the government could take to support the objective of encouraging both parents to remain involved in their child's life.
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<p><b>51 (40%)</b></p>	<p>Felt that promoting and providing services such as mediation, counselling and advice services would support the objective of encouraging both parents to remain involved in their child's life after separation.</p> <p>Other suggestions included a publicity campaign to raise awareness amongst parents of the benefits to children of making early/amicable arrangements for their children's care. More emphasis on relationship support would be helpful from the start, i.e. when couples and families are formed.</p>
<p><b>17 (13%)</b></p>	<p>Felt reviewing the child support system would support the objective of encouraging both parents to remain involved in their child's life after separation. A number of respondents provided detailed comments about how they felt the child support system could be reformed. It should, however, be noted that the child support system is not in scope of this consultation.</p>
<p><b>14 (11%)</b></p>	<p>Thought that changes to the employment, tax and benefits system could support this objective. Some respondents stated that mothers tend to carry out the lion's share of childcare and better parental leave and flexible working would allow fathers to spend more time with their children while families are still together; so that they are sharing parenting from an early stage. This would help to enable shared parenting after family separation, and care arrangements for children will be easier to make.</p>
<p><b>10 (8%)</b></p>	<p>Felt that putting clear procedures in place for non-residents parents to obtain information about their children from organisations, such as their children's school and GP would be useful in helping non-resident parents to stay involved in their child's life.</p>

There were a number of suggestions for non-legislative action the Government should take to support parents to remain involved in their child's life. The most popular of these was education around parenting and relationships. The promotion and an increase in the availability of provision of services such as mediation, counselling and advice was one of the most popular suggestions. This supports the Government's wider, non-legislative plans to support separated parents in reaching agreement for their children through parenting programmes, mediation, and parenting agreements.

Other suggestions included the promotion of 'shared parenting' within families from the very beginning; not just when parents separate. Respondents who put forward this suggestion highlighted the clear gender roles within families, with women generally taking on the role as primary care-giver. Respondents felt that changes to employment and tax laws which provide for increased parental leave and flexible working for fathers will

enable them to spend more time with their children, helping to promote co-operative parenting. This in turn would be likely to mean that parents would find it easier to agree arrangements for their children post-separation.

## Conclusion and next steps

The questions posed in this consultation have provoked strong debate about the issues surrounding child contact and the concept of post-separation shared parenting. The Government's overarching aim in making legislative change in this area is to ensure that children are able to benefit from a continuing relationship with both parents following family separation, where it is consistent with their welfare, and safe. There is widespread consensus that in most cases it will be appropriate and beneficial for children to maintain a relationship with both parents and this was supported by those who responded to the consultation.

Analysis of the responses shows a clear preference among those who responded for legislative change to reinforce this expectation, and for option 1 (the 'presumption' approach) in particular. Over half of all respondents who responded to this consultation supported the Government's view that this option is the most appropriate legislative approach. The Government has considered all of the points raised during this consultation and remains of the view that option 1 will best meet its objectives to ensure that children can benefit from the involvement of both parents in their lives following family separation; it will be seeking to amend the Children Act 1989 to achieve this.

However, the Government acknowledges the need, highlighted by many respondents, to ensure that proper safeguards are in place to protect children and vulnerable parents. The Children Act 1989 already makes clear that the welfare of the child must be the court's paramount consideration in making decisions about the child's upbringing; this will remain the case. But following consideration of consultation responses, the Government intends to amend its proposed approach to include stronger wording around safety, with the aim of addressing the concerns raised by respondents.

The Government plans to include the amendment in forthcoming legislation, at the earliest opportunity.

The draft clauses will be subject to pre-legislative scrutiny in advance of the Bill's introduction; they are being published, along with associated documents, in parallel with this response.





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