

# NAGALRO'S RESPONSE TO THE LSC'S CONSULTATION ON FAMILY LEGAL AID FUNDING FROM 2010

## INTRODUCTION

NAGALRO is the professional association for over 600 Children's Guardians, Family Court Advisors and Independent Social Work Practitioners and Consultants. Many of our members are appointed to provide expert reports in Family Courts and appear in family cases alongside medical experts. A proportion of them also work as employed or self employed practitioners of CAF/CASS appointed in public and private law cases, as caseworkers for the National Youth Advocacy Service and act as independent social work experts in public and private law matters. They have substantial experience in safeguarding children's interests in family proceedings, especially in those cases where children are parties.

NAGALRO does not contract with the LSC to provide services to clients but most of our members work with solicitors who do and the proposed changes would have a significant effect on the way in which our members are able to carry out their work. Many members are actively involved in representing children in court proceedings, either in public law or as 9.5 guardians for CAF/CASS or for NYAS. Given the central involvement of our members with children, families and the courts we were surprised not to be named in the list of stakeholder organisations set out in the consultation document.

NAGALRO members have first hand knowledge of practice across the country and from this perspective the consultation gives rise to a number of issues of principle and practice which we will address in the first part of our response. These will be followed by our answers to some of the specific questions posed by the consultation document.

**Whilst appreciating the need to use all public funds in an efficient and responsible manner, NAGALRO is alarmed and dismayed by proposals which we believe will have a profoundly deleterious and disproportionate effect on vulnerable children and their families. There is nothing in the consultation document to suggest that proper consideration has been given to the impact of the changes on the long term welfare of children involved in private law proceedings. There is no evidence base for the assumptions in the document nor is there a proper risk analysis of the likely impact of the proposals on children and young people as a stake holder group. We would strongly counsel against subjecting children's legal services to the 'move towards market principles'. It must surely be the case that this is not the appropriate approach and that the proposals cannot be considered in isolation from the wider safeguarding agenda in relation to children. It is from their perspective and from the perspective of the many years accumulated experience of our members that we make our response.**

**In view of the above, the submission of this response does not entail our acceptance of the accuracy of the data contained within the Legal Services Commission's consultation paper. This consultation should not have been launched in the absence of transparently reliable data underpinning its proposals and also of the fundamental market research that it has since commissioned. This response is submitted without prejudice to that contention. We reserve the right to respond further if and when that information is produced.**

## **1. Disconnection with Other Government Strategy and Policy in Relation to Children and Young People**

The proposals appear to have been drafted within a particularly narrow context sadly lacking in either joined up thinking or the evidence base needed to support them. In spite of the statement in the foreword that *'this is not about cuts'* it is hard to escape the conclusion that these are ill considered, short term, cost driven imperatives with scant regard, or respect, for the disproportionately adverse impact the proposed changes would have on children and young people who are dependent on the family courts and its practitioners for their access to justice. The fact that children and young people are not even identified in the consultation as a key stakeholder group is particularly disappointing given the over arching responsibility of every government department in relation to the wider safeguarding agenda as set out in *'Every Child Matters'*.

The Ministry of Justice has recognised this responsibility by acknowledging the importance of making *'a reality of children's rights by setting an ambition of wellbeing for every child, described in terms of the five outcomes, and by setting an expectation that services should work together to promote this.'*<sup>1</sup> The consultation document completely fails to do this and there is no room for complacency at a time when Lord Laming has warned that *'recent events have shown that very much more needs to be done to ensure that services are as affective as possible at working together to achieve positive outcomes for children'*.<sup>2</sup>

We also seriously question the wisdom of removing expert independent social work expert witness evidence from scope at a time when Government policy in response to the Laming Report is allegedly *'to strengthen the social care workforce'*<sup>3</sup>

**It is precisely this inconsistent disconnect between departmental policies which leaves children tragically vulnerable.**

## **2. Limitation of Sustainable Access to Justice for Children and Young People**

In September 2008 the UN Committee on the rights of the child formally examined the UK Government's implementation of the UN Convention on the Rights of the Child (UNCRC) following up the examination with 124 recommendations showing where the UK government is falling short of its obligations under the widely ratified international human rights treaty for children. There is mounting evidence that children cannot get the advice they need from the civil justice system to claim their rights. Research by Youth Access with the Legal Services Research Centre reveals that the majority of children and young people who have complex problems are far more likely to have tried and failed to get advice than adults.<sup>4</sup> Many experience health problems or become homeless as a result of their unmet needs. The ongoing reforms to the legal aid system is making working with vulnerable children uneconomic and forcing many of the specialist lawyers and advisors to abandon legal aid work.<sup>5</sup> Taken together the proposals contained in the LSC consultation documents *'Civil and Family Legal Aid funding from 2010'* further erode the infrastructure of experienced child care law professionals carefully built up over the last thirty years to protect vulnerable children and young people.

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<sup>1</sup> 'Rights and Responsibilities: developing our constitutional framework' Ministry of Justice. March 2009. Cm 7577. para 3.71

<sup>2</sup> The Protection of Children in England-A progress report. Lord Laming. TSO March 2009. para.1.1

<sup>3</sup> See The Protection of Children in England; A Progress Report. Lord Laming. TSO March 2009

<sup>4</sup> Balmer NJ, Tam T, Pleasence P (2007). *Young People and Civil Justice: Findings from the 2004 English and Welsh civil and social justice survey*. Youth Access

<sup>5</sup> The Guardian (7 January 2008) *Solicitors shunning legal aid work as pay rates fall, survey reveals exodus of experts is acute in child cases*.

This is a particularly dangerous and ill advised strategy at a time when the global recession and the attendant social fall out and upheaval caused by widespread unemployment, rising poverty levels and the consequent stress on families, mean that children and young people are even more in need of a coherent network of services including legal services of advice and representation.

The requirements of the Human Rights Act 1998 which incorporated the European Convention on Human Rights into our domestic legislation gives children and young people equal rights to be represented in proceedings which affect them as all other parties. (Article 6 ECHR) There is no explanation in the consultation document of how the proposals will impact on the Governments wider obligation to hear the voice of the child in the proceedings and ensure that they have the same representational rights as other parties. Similarly, the impact of the proposals on Article 8 ECHR – rights to respect for a private family life - Article 10 ECHR - rights to freedom of expression - and Article 13 ECHR - rights to redress - are not considered in a consultation document which does not demonstrate convention compliance.

Children’s human rights are free standing and not within the gift of any person or organisation. It follows from this that children’s rights to representation should not be ‘gate kept’ (para.8.27) by CAF/CASS or indeed by any other body, whose priorities in relation to an individual child may be skewed by organisational or resource driven imperatives, rather than giving paramount consideration to the welfare of each child. The LSC itself acknowledges that the welfare of the child will not be the paramount consideration when it states at para 8.27 that ‘*The requirement of consent allows CAF/CASS to gate-keep the cases which it takes on and deals with entirely in-house and also to ensure the caseload reflects its High Court caseworker headcount and resources*’

It is for the courts to decide which children need separate representation, based on their hearing of the evidence, their duties under s1 CA 1989 and guided by the excellent Presidents Practice Direction of April 2005 – which has proved very effective in its implementation, not CAF/CASS however well intentioned.

**The proposal constitutes a dangerous undermining of judicial discretion, a breach of the Article 6 rights of children and a clear admission that the welfare of the child is an expendable commodity in the drive to cut costs.**

**On the basis of the evidence presented to the UNCRC, Children’s Rights Alliance for England (CRAE) has in its general recommendations stated that ‘*the Legal Services Commission should conduct an urgent assessment of the impact on children of the current reforms to the legal aid system. Legal aid policy and planning should recognize and take far greater account of the specific needs for information, advice and representation of vulnerable children, including separated asylum seekers, care leavers, children in conflict with the law and children who are homeless and in housing need. This should involve meaningful consultation with children about their access to justice.*’<sup>6</sup>**

### **3. The Need for Specialist Services for Children and Young People.**

Both of the consultation document’s key proposals which deal respectively with the creation of a Private Law Representation Scheme and a Family Advocacy Scheme have considerable implications for children and young people and in our view, actively discriminate against them. NAGALRO is concerned that the LSC should not seek to make changes to family funding which affect the fragile fabric of children’s services in isolation from other government

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<sup>6</sup> State of Children’s Rights in England-Review of UK Government’s implementation of the Convention on the Rights of the Child-2008.Annex C Full list of Recommendations. Rec.10. P55

departments and in defiance of the wider interdepartmental government policy for children and young people.

The prime purpose of state intervention into family life is to limit the collateral damage to children and yet there are very few socio-legal services, which are either visible or accessible to children. There is an urgent need for a nationally co-ordinated range of direct support services for children and young people experiencing parental separation, familial conflict and domestic violence. (See further the NSPCC Policy recommendations arising from the findings of the Your Shout Too! research)<sup>7</sup>

The models being proposed with a greater reliance on telephone and internet advice rather than face to face meetings are clearly inappropriate for children and young people who may be seeking help with acrimonious situations of family conflict in which the safety of the children concerned is the major factor. This cannot be assessed over the phone. Yet the LSC proposes at para 5.32 that *'In order to ensure that advice is suitably accessible for clients, providers will be required to have a permanent presence in each procurement area they bid in'*

This would mean that NYAS, who offer a national range of well established high quality, face to face services to children and young people, would no longer be able to offer those services except in a small area of the NW. There is a strong case to support the development of niche specialist services to children and young people. High quality interdisciplinary services of consultation, casework and representation specifically developed to be both visible and accessible to children and young people such as those provided by NYAS are a rare commodity. They are highly valued by courts and practitioners as being both effective and cost effective for the children who use them. It seems extraordinary that they are apparently seen as of such little value that they can be completely swept away by the proposals.

NAGALRO members have many years experience of safeguarding the rights and welfare of children and young people in the full range of both public and private law proceedings. The rigorous independent investigation and scrutiny that they provide is, above all else, a central plank in the quality control which is essential to ensure that vulnerable children do not slip through an increasingly overstretched net of statutory services. NAGALRO has recently given evidence to Lord Laming's Review into the death of baby P. Our evidence highlights the inconsistency of services available. In relation to the proposals for the Private Law Representation Scheme, children in private law proceedings are not separate beings from children in public law - they are part of the wider population of children who may also, as HIMICA highlighted in its inspection of Private Law front line service in CAFCASS in 2006, may also be children in need or at risk of significant harm.<sup>8</sup> There are, for example, currently 200,000 children who live in households where there is a known high risk case of domestic abuse and violence.<sup>9</sup>

**There is a marked variance between the LSC's stated objectives in relation to children and what is being proposed. Two years ago the LSC stated that *'Children are particularly***

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<sup>7</sup> Your Shout Too! A survey of the views of children and young people involved in court proceedings when their parents divorce or separate. Judith E Timms, Sue Bailey and June Thoburn, NSPCC 2007. P.71

<sup>8</sup> Her Majesty's Inspectorate of Court Administration (HMICA) August 2006. Private law front line practice in CAFCASS. Inspection Report. London. HMICA.

<sup>9</sup> Co-ordinated Action against Domestic Abuse based on their work to date on Multi Agency Risk Assessment Conferences.

*at risk from high conflict relationship breakdown ‘and promised that ‘access to specialist legal advice will be a priority over the next five years’<sup>10</sup>*

**How do the proposals in the consultation document fulfil this promise?**

#### **4. Lack of Evidence to Support the Proposal to Limit Separate Representation under r9.5 FPR 1991 to CAFCASS.**

There is no evidence in the consultation document to support the LSC’s underlying assumption that too many children and young people are being granted party status under the provisions of r9.5 FPR 1991. In fact all the evidence that exists suggest otherwise. It is assumed that the increase in the percentage of children represented is a bad thing although as a proportion of the total numbers of the approximately 250,000 children whose parent’s divorce or separate each year it is infinitesimal. In 2007/8 CAFCASS acted in a total of 1,269 r9.5 cases compared with 1,206 in 2006/7, an increase of only 63 cases. Over the same period requests for s7 welfare reports fell by 15.3%.<sup>11</sup> This is not mentioned in the consultation document in which statistics are used selectively. The numbers of cases in which NYAS represents children or in which a Solicitor guardian is appointed who appoints an ISW, do not appear to be included in the data set underpinning this consultation.

In fact, the need for more private law representation for children has twice been debated and acknowledged by parliament. S 64 Family Law Act 1996 and S122 Adoption and Children Act 2002 both extended the right to the tandem representation afforded by a children’s panel solicitor and a children’s guardian to children involved in s8 residence and contact proceedings. In introducing the government amendments which became s122 Adoption and Children 2002 the then minister for families, Rosie Winterton, stated that:

*There is too stark a distinction between public and private law cases*

*The power to provide for the separate representation of children should be referred to in primary legislation and*

*Children should have access to separate representation more frequently than they do at present.*<sup>12</sup>

No explanation has ever been given as to why this section still lacks the court rules to introduce it. In the meantime r 9.5 FPR 1991 remains the only route to the separate representation needed to remove children from the revolving doors of repeated proceedings and the LSC are now seeking to impose restrictions on it.

Further, the LSC has already consulted on the limitation of separate representation for children under the provisions of r9.5 and conceded in July 2007 that *‘The majority of respondents...felt that the President’s Practice Direction was a ‘robust enough framework’ taking proper account of a range of critical factors in the child’s life and the ‘judiciary’s discretion to order separate representation based upon particular facts of the case’<sup>13</sup>*

There is also substantial case law which supports the benefits of r9.5<sup>14</sup>. The proposals directly undermine the discretion of the judiciary to decide which children need representation in their courts as set out in the President of the Family Division’s practice Direction of April 5 2004.

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<sup>10</sup> Making Legal Rights a Reality for Children and Families-The Legal Services Commission’s Strategy for Family Legal Aid, Volume 1. para 1.18

<sup>11</sup> CAFCASS Annual Report 2007/8

<sup>12</sup> Hansard. HL November 4 2002.

<sup>13</sup> Separate Representation of Children –Summary of Responses to a Consultation Paper- Code No CP(R)20/06,published 26 July 2007

<sup>14</sup> See discussion of cases set out in HHH Clifford Bellamy’s paper to NAGALRO conference Oxford March 16 2009. ‘Representation and Participation of Children and Young People in High Conflict Contact Cases’

This direction specifically allows for the appointment of NYAS or ‘*other proper person*’ to act as guardian ad litem for the child under the provisions of r 9.5 Family Proceedings Rules 1991. As Lord Justice Wall has said-

*‘I have to say quite bluntly that if I, as a judge charged with the duty to resolve an intractable contact dispute, take the view that the children involved need separate representation and the Family Proceedings Rules and s122 give me the power to order that representation, then I will expect the children to be provided with the service I think they need’<sup>15</sup>.*

This leads directly to the issue of practice. CAFCASS and NYAS have a well-established protocol for the allocation of r 9.5 cases. The protocol which is working well on the ground, enables both CAFCASS and NYAS to work together to ensure that children have the representation ordered for them by the courts and makes good use of all available professional skills. The proposal to limit r9.5 representation to CAFCASS will impose considerable additional stresses on a service which is already fully stretched in dealing with a complex raft of new statutory responsibilities introduced by the Private Law programme, the Adoption and Children Act 2006 and as a consequence of the proposed changes in LSC funding of contact centres. Pressures on the service - which our members are in a position to report on first hand in terms of their impact on day to day decisions made in relation to children and young people - have been further exacerbated by the rise in the number of public law care proceedings following the death of Baby P and the Lord Laming’s subsequent review of the Care Proceedings system in England and Wales. All of these factors have increased pressure on practitioners and have led to a sharp increase in demand and unacceptably long waiting lists in both public and private law proceedings in many parts of the country.

**What will the position of the child be when the court orders separate representation in disputed s8 CA contact proceedings, appoints some ‘*other proper person*’ to act as guardian and the LSC refuse to provide the necessary funding?**

Research and practice in the past decade has consistently demonstrated and endorsed that need and it is hard to follow either the thinking or see any evidential base to justify the restriction of children’s access to the separate representation afforded by r 9.5 FPR 1991 to cases undertaken by CAFCASS. Neither is there any mention of the now substantial research and practice evidence from CAFCASS, NYAS and others to demonstrate that separate representation is both effective and cost effective in the resolution of intractable and long running disputes involving children’s residence and contact arrangements and is, itself, a key factor in safeguarding the welfare of the child.

The CAFCASS Annual Report 2005/6 stated that

*‘A sample analysis (of 100 cases in which children had been represented under r 9.5, all of whom had been trapped in the revolving door of repeated proceeding) suggests the use of r9.5 is proving an effective measure in resolving disputes and supporting children in some of our most complex private law cases’*

CAFCASS’s findings replicated earlier findings by NYAS in their review of 95 r 9.5 cases. None of the cases had returned to court at the time of the review.<sup>16</sup>

Research by Douglas et al commissioned by the DCA in 2006 also highlighted the fact that- *‘the development of separate representation in private law proceedings has been prompted at least as much by concern that the welfare of the child is properly safeguarded and is not lost sight of underneath the parents own priorities and concerns’<sup>17</sup>*

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<sup>15</sup> Lord Justice Wall. Making Contact Work. 15 February 2003

<sup>16</sup> Rule 9.5. Separate Representation and NYAS. Family Law Jan 2005. (35) pp 49-52. Fowler E and Stewart S.

<sup>17</sup> Research into the Operation of r 9.5 of the Family Proceedings Rules 1991. Final Report to the Department of Constitutional Affairs. Douglas G, Murch M, Miles C and Scanlon L. 2006.

The researchers also recommended that all children who had a parent who was the subject of endorsement proceedings should be separately represented in order to safeguard their welfare. The consultation document fails to address the fact that representing children with the significant welfare issues involved is very different from representing other adult parties. Given this complexity and the vulnerability of the children involved, separate representation of children under r9.5 and 9.2 FPR 1991 should not be included in the proposals for the Family Law Representation scheme.

There are a small number of very high conflict cases such as those set out in the CAFCASS/NYAS protocol, in which it is either not possible or not advisable for CAFCASS to be appointed. It would be false economy to limit funding in these cases as they are amongst the most intractable and expensive in the system.

It would also be dangerous to assume that an expansion of extended dispute resolution and conciliation procedures eventually obviate the need for court proceedings. They are not mutually exclusive but equally important parts of a range of the interventions needed. Recent research by Trinder and Kellet commissioned by the Ministry of Justice warns that *'conciliation is an effective way of reaching agreements and restoring contact over the short term but it is often followed by further litigation and has very limited impact on making contact actually work well for children'*<sup>18</sup>

What conciliation can do is to assist in the early identification of those cases which will later prove intractable and damaging and facilitate the separate representation of the child at a much earlier stage thus preventing a childhood punctuated by repeated and costly court proceedings. There will however always, in our view and experience, be a small number of children whose high conflict cases can only be resolved through the expertise of a skilled children's solicitor and independent social worker working 'in tandem' to ensure that the rights and welfare of that particularly vulnerable child receive the careful assessment and separate representation that only full party status can give.

**A more constructive approach would be for the LSC to work with NAGALRO, CAFCASS, NYAS and others, towards early identification of those children who are suffering significant emotional harm through repeated involvement in highly conflicted cases concerning their residence and contact arrangements. The fact that the LSC data base is not capable of identifying the number of proceedings in which an individual child has been involved demonstrates the weakness of the LSC evidence base and how little thought has been given to the position of the child at the centre of the proceedings.**

##### **5. Proposal to Limit Funding for Independent Social Work Expert reports.**

NAGALRO is particularly concerned at the linking of the role of an independent social work expert and that of the guardian representing a child in tandem with a solicitor, when the remit is to represent the child in the court setting and to provide information about the child's welfare needs. These tasks are very different and should be addressed entirely separately.

An independent social work expert is instructed in a case to provide an expert opinion on a specific aspect. This does not involve an ongoing role in the case, and it is the individual has been asked because their expertise meets the needs of the case. This is the same as all other expert witnesses who provide services in family proceedings.

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<sup>18</sup> The longer term outcome of in-court conciliation Trinder and Kellet. Ministry of Justice Research Series 15/07 p. iv

We are concerned that independent social work and other expert witnesses are apparently being treated in very different ways and in a way which again, impacts adversely and disproportionately on children. We are not aware of any proposals to limit independent social work reports in proceedings affecting other particularly vulnerable groups - adults with mental incapacity for example. Similarly, independent social workers operate within a framework of multi disciplinary expert witness reports. Are there similar proposals to limit funding for expert witnesses from other related professions? If not, then why it is that the availability of social work expertise for children that is being limited at a time when it is so badly needed? Additionally, properly trained and experienced expert social work opinion is not a commodity that is in over supply. In fact CAFCASS and the Children's Workforce Development Council have consistently expressed concern at the diminishing pool of experienced practitioners.

Whilst we are aware of the difficulties caused by the proliferation of expert witness evidence with its attendant increase in costs, it seems premature to propose changes ahead of the results of the LSC's pilot arrangements with the Department of Health to commission multi-disciplinary teams of health professionals to provide jointly instructed health expert witness services to family courts in public care proceedings. (Para 8.60) Could this pilot not be expanded to include independent social work experts and to encompass private law proceedings also rather than perpetuating a historically dichotomised approach to children involved in public and private law proceedings, some of whom are the same children moving through a range of care and related proceedings over a number of years?

NAGALRO's membership is shared approximately equally between independent social workers who do no work for CAFCASS, those who are employed by CAFCASS and those who undertake work for CAFCASS on a self-employed basis. Our independent social work membership is growing. Many of these members undertake expert assessments for family courts, but alongside this they also carry out work in a wide range of spheres. This adds to the value of the skills they bring to the court setting, and is the reason often why they are asked to undertake the assessment.

The cases in which independent social work experts are instructed are usually the more complex cases which do not have an easy resolution. The court has identified an area where additional information is required without which a resolution is likely to be more problematic. By contributing their specialist knowledge it is often the case that the report of the independent social work expert has the effect of 'un-sticking' a case. This leads to a resolution, often without a contested hearing. Independent social work experts are not often called to court to give evidence; for example one member has estimated that she has attended court in less than 5% of those cases where an assessment has been prepared in family cases. A well argued conclusion based on sound experience and knowledge is very effective in enabling an agreement to be reached thereby reducing the cost of the case.

An example of a situation where this was the outcome is a case where the child had a significant relationship with a person who was not a blood relative, and the local authority had determined that adoption was the best plan. The independent social work assessment of this person was very positive, the parents accepted that the child would remain within the extended network and were able to accept that the child would not be returning to their care. If the outcome had continued to be adoption it is likely there would have been an extended contest. Independent social workers are able and willing to work more flexibly and often more quickly than other resources and are therefore able to contribute to a reduction in the length of proceedings, which results in fewer court costs and court hearings.

In some circumstances a local authority is not always in a position to carry out the work of assessing a family member, perhaps because of its involvement with these family members at an early point in proceedings, because they have taken an initial negative view at a stage where not all the information was available or because the structures of the local authority militate against an early resolution of the choices available.

If a local authority has reached an early decision not to consider extended family members then the court is faced with a potential failure to address the human rights issue if it does not consider fully the question of whether a child can remain within its extended family. In these circumstances it is vital that there is an alternative source of expertise available.

A further positive factor in instructing an independent social work expert to provide the work is that the person involved in the assessment is someone who does not have any other role within the court proceedings, either in terms of making a recommendation to the court, implementing any plans agreed at court or representing the child's views. This aspect can assist parents in accepting the view of the expert more easily – and therefore reduce the prospect of contested hearings.

An ISW takes full responsibility for maintaining his or her professional skills and expertise. This expertise has built up over many years, and contributes to the quality of the information placed before the court. An independent social work expert carries full responsibility for the work done on any case. He or she carries the professional risk, has to be able to be challenged in court on the work undertaken and has to maintain credibility for his or her expertise. This should be remunerated at a rate which is commensurate with the skills, knowledge and experience that they have developed. NAGALRO strongly opposes the recommendation that the fees of independent ISW experts should be capped at the CAF/CASS/CAF/CASS CYMRU level.

NAGALRO's view is that the fee which CAF/CASS pays currently is grossly below the rate which should be paid; it is not equivalent to the rate that the employed workforce is paid because it does not take into account all the additional costs that are carried by the independent practitioner. CAF/CASS has recently offered an increase to its self-employed FCAs, the first one for four years. A consequence of the low fee level has been that a number of highly experienced independent social workers no longer take work from CAF/CASS. If the LSC chose to use this level then many of those who at present are available to provide expert services for the court will cease to do this.

The consultation suggests that 'there appears to be a buoyant market' for social workers. NAGALRO does not accept this. As mentioned above CAF/CASS and the Children's Workforce Development Council have consistently expressed concern at the diminishing pool of experienced practitioners. Many of those who provide expert reports for the courts have a broad portfolio. Their work extends to teaching, managing teams, research, contributing to the work of fostering and adoption agencies, therapeutic work with children. These people, who can provide the most valuable information for the courts, are going to stop doing this work if it does not provide an income which meets the costs of the work. Implementing the proposals in the consultation paper will reduce the number of experts available at a time when they are already not in plentiful supply.

Inevitably, the proposals to remove all independent social work expertise from scope in Rule 9.5 cases will further diminish the pool of suitably trained and experienced practitioners to represent children and to provide expert reports in family law cases.

**The courts will not be best served if the only persons who are willing to provide the service to the courts are those who have not had the time to build up the expertise which contributes so constructively to assisting and resolving cases.**

**ANSWERS TO SPECIFIC QUESTIONS.**

Q10. *Do you agree those r9.5 cases should be included in the fee scheme. If not please provide evidence as to why they should not.*

No we do not agree. Representing children and young people is not the same as representing adult parties. It involves a programme of direct work with the child and requires a more flexible hourly approach than the fee scheme envisaged.

Q11. *Do you agree with our proposals on multiple parties? -Domestic violence*

We are concerned that the question takes a narrow focus on fees and does not take into account the situation of the children involved. In general we are concerned to the lack of attention paid in the consultation document to the existing protocols, practice directions and judicial guidance in relation to domestic violence.

Q49. *Do you agree with the proposal of paying a 'per hearing' fee and if not would it be more appropriate to pay a standard fee for all hearings up to one day with additional payments for hearings going over one day?*

NAGALRO is concerned that such a scheme might offer perverse incentives to finish cases within a certain timeframe for financial reasons rather than taking the time needed to give appropriate consideration to the complex issues involved in determining the welfare of the child or children concerned, which should be the paramount concern.

Q52. *Do you agree with the proposed approach of paying a per hearing fee for the final hearing?*

Again, we would be concerned that these extremely complex hearings should take the time needed to examine all the evidence thoroughly. Clearly this must not be allowed to take up more court time than is necessary but we feel that it is better to leave the time tabling and conduct of cases to the judges involved rather than seek to control the management of proceedings through financial considerations.

Q53. *Do you agree that in private law cases the exceptional threshold should be when a final hearing exceeds two days?*

No. There appears to be a lack of clarity around definitions of complexity and it seems a fairly crude approach to draw a line around two days as an indicator of the exceptional threshold.

Q57. *Do you think there should be an early resolution fee in private law children and/or finance cases?*

No, definitely not. How can it be in a child's interest to have their case hurried through so that the solicitor can pass go and collect the early resolution fee? Has the LSC really considered the implications for the child of this proposal? There appears to be a cynical assumption here that there are some members of the legal profession who will 'string cases out' for extra fees. Is there evidence to support this?

Q65. *Do you agree that the funding of solicitors and others as Guardians in r9.5 cases should be removed from scope?*

No. How does this sit with the responsibility of the court under s1 (1) CA 1989 to ensure that the welfare of the child is the paramount consideration? Removing from scope funding for Guardians and independent social work enquiries would mean that CAFCASS was the only

body who could represent children and we have fundamental objections to this for the reasons set out fully in points 2 and 4 above. The effect of this would be to shift all responsibility for funding children's representation in private law from the MOJ to DCSF. Even if CAFCASS is prepared to accept this, is it statutorily possible and/or desirable in the longer-term interests of children? Should this not form part of a wider strategic discussion? The consultation document states that if '*CAFCASS fails in their duties then this should be challenged appropriately*' **Who does the LSC envisage acting for the children and their families in mounting such a challenge given that there will be no independent agencies or practitioners left to assist them?**

Q66. *Do you agree that where CAFCASS does not fulfil its statutory obligations to appoint a guardian the legal aid fund should pay for independent social work expertise in r 9.5 cases? If yes, in what circumstances and why?*

Yes. The legal aid fund should pay for independent social work expertise in r9.5 cases in all cases in which the court exercises its discretion to appoint some '*other proper person*' in the circumstances set out in the Presidents practice direction of April 5 2004 and the CAFCASS/NYAS protocol. The Consultation document seeks to achieve an oversimplified funding split between LSC sponsored by MOJ and responsible for legal representation and CAFCASS sponsored by DCSF responsible for all social work input. We seriously question both the feasibility and the desirability of this. What is the legal mechanism that will allow LSC to pass its statutory responsibilities for funding necessary expert witness reports in publicly funded cases to another Government department?

Q69. *Do you agree with the proposal to remove from scope the costs and expenses of Cafcass officers and guardians and all other independent social work enquiries and expertise outside of England and Wales.*

NAGALRO does not support this proposal. The LSC has not provided an analysis of the costs involved in comparison to the benefits. Obtaining an assessment or information from significant people abroad can change the progress of a case, and lead to its resolution. It is important that the person undertaking the work has a full grasp of the situation in the UK, both the broader legal setting, and the particulars of the case, including the opportunity to interview relevant personnel. There is otherwise a risk that any assessment carried out by an agency outside the UK will not address the issues in an appropriate way, this adding to delay or in some cases a failure to provide the court with adequate information. In addition using agencies from outside the UK creates difficulties for challenge if that becomes necessary, and removes an element of control, for example around timescales, which are essential to ensure the smooth running of a case.

Q71. *Do you consider the impact on NFP's are justifiable in ensuring sustainable access to legal services to clients?*

No, certainly not. It means that the few independent agencies like NYAS will be forced to cease operating and many independent social workers will simply cease to practice and this will be a gross squandering of scarce resources that will further diminish the supply of skilled and experienced practitioners and this cannot fail to be detrimental to children and families seeking access to justice. **How can this possibly be justifiable in terms of sustainable access to legal services for clients?**

Q73 *What will be the impact on your organisation if the proposed capped rates are implemented?*

**There would be a significant impact on members of NAGALRO if proposals for the funding of independent social workers are implemented. Many members would have to seek other work in order to continue their business, and their expertise would be lost to**

**the family courts. The rates which Cafcass pay to its self employed contractors, including the proposed rates from April 2009, do not provide sufficient income to meet all the costs of independent working. NAGALRO would be able to provide relevant figures for the LSC if this would be of assistance.**

**Q74. *Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients.***

No. The impact on children and young people as clients and the potential negative impact to the court's ability to give proper consideration to their welfare have been completely overlooked.

**Q75. *What will be the impacts on your organization if these proposals are implemented?***

A diminishing pool of highly trained and experienced child care practitioners will be further diminished and undermined and the ability of our members to represent children and interests before the courts will be significantly curtailed to the detriment of the children concerned.

Many of our members are self employed practitioners whose capacity to work as ISW's will be substantially reduced. We believe it is the interests of children and of CAF/CASS to retain a body of self employed practitioners who can be flexibly deployed to reduce waiting lists and provide the independent expert witness evidence which is greatly valued by the court.

**Q76. *Do you think there will be any negative equalities impacts on clients and providers as a result of the proposals to remove certain disbursements from scope?***

Yes. The proposals discriminate against children and young people and particularly against children from black and ethnic minorities whose access to services will be even more limited by the proposals. Under the Single equality Scheme (para. 6.7) children should be identified as a vulnerable and excluded group.

The proposals also have negative equalities impacts on NFP providers like NYAS as they place unreasonable restrictions on their ability to compete in the market.

**Q79. *Do you have any comments on any prospective impact on small firms and self employed advocate?***

The LSC's assertion that there will be 'no disproportionate impact on small providers' is disingenuous in the extreme. The impact will be devastating in that many they will simply not be able to survive. The proposals are draconian, ruthless, completely lacking in evidence base and take no account of the impact on clients particularly children. The LSC's direct attack on the work of NYAS a National Children's Charity is ill advised and nothing short of disgraceful.

**Q81. *Do you have any comments on the draft specification?***

Why are we being asked to comment on a draft specification before the consultation is concluded? Doesn't that pre-empt the results and cast doubt on the credibility of the consultation process?

**Judith Timms, policy advisor  
Judy Tomlinson, secretary  
NAGALRO**

**2 April 2009**