Submission by Nagalro

GOVERNMENT CONSULTATION ON CO-OPERATIVE PARENTING FOLLOWING FAMILY SEPARATION

3 September 2012

About Nagalro
Nagalro is the professional association for Family Court Advisers, Children's Guardians and Independent Social Workers.

It has approximately 700 full members in England and Wales who represent the interests of children in a range of public and private law proceedings. About half work for the Children and Family Courts Advisory and Support Service (Cafcass). Many also act as Independent Social Workers providing expert witness reports in a wide range of complex cases coming before the courts.

Members also undertake work in a variety of roles for example with fostering agencies and in independent therapeutic practice. Members have significant experience as managers, chairs of Adoption Panels and other specialist social work practitioner roles and as therapists.

Nagalro
PO Box 264
Esher
Surrey
KT10 0WA
Tel: 01372 818504
Fax: 01372 818505

Email: nagalro@globalnet.co.uk

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Nagalro response

Nagalro welcomes and supports the Government's commitment to encouraging both parents to play a part in the child's life following separation. We do not however, believe that this is best achieved by any of the four legislative options being proposed and we are profoundly concerned that changing the current legislation will be counterproductive in undermining the central principle of the Children Act 1989 (CA1989) as set out in s1, that the welfare of the child is paramount. We say this because we believe that the proposals constitute a potential erosion of that core principle which would leave children with insufficient protection from harmful or unsafe contact arrangements. The problems associated with high conflict and domestic violence are not sufficiently recognised and explored in the consultation document. These problems require a range of overarching social policy reforms and initiatives as part of a co-ordinated cross departmental strategic approach, especially when they are likely to be exacerbated by the restrictions to the availability of legal aid in domestic violence cases introduced by the Legal Aid and Punishment of Offenders Act 2012.

Research consistently demonstrates that the best interests of children are closely connected to parenting capacity and skills and to practical resources such as adequate housing and income. The present approach is therefore, over simplistic in seeking to improve the quality of human relationships between parents and their children through legislative provisions. Moreover there are significant dangers in espousing an approach which is fundamentally one dimensional and which is not evidence based.[1]

Our reasons for taking this view are set out below.

- Both the Family Justice Review Panel and the Justice Select Committee have considered an extensive body of evidence and both concluded that that the idea of promoting shared parenting through changing the wording of the CA1989 was seriously flawed. In their final report, the Family Justice Review concluded that no legislative statement promoting meaningful relationships should be introduced because *'the core principle of the paramountcy of the*

[1] See *Caring for Children after Parental Separation: would legislation for shared parenting time help children?* Family Policy Briefing 7. Department of Social Policy and Intervention. University of Oxford, May 2011

welfare of the child is sufficient and that to insert any additional statements brings with it unnecessary risks for little gain'.

- There is no evidence to suggest that Judges are not starting from a position in favour of both parents having a meaningful involvement in their children's lives.
- Contact with the child most often lapses not because involvement has not been encouraged but because the non - resident parent fails to take up the agreed arrangements.
- The Justice Select Committee noted that the majority of applications which result in no contact following the making of the order, were abandoned by the applicant parent.
- The assumption that both parents should continue to have a meaningful relationship with their child after separation, provided that that it is safe, is already well established.[2]
- It would be both wrong and counterproductive to imply that parents have rights over, rather than responsibilities for, their children.
- We agree that the focus of shared parenting decisions must be what will work best for the child and not how much time each parent should be allocated. However all or any of the four legislative 'steers' proposed carry the risk that they will be interpreted by parents as a potential 'right' or green light to equal parenting time, which may well not be in the best interests of their child.
- There is compelling evidence from research and from other jurisdictions that should deter Government from taking this step.[3] Denmark has recently repealed a law which operates a presumption of shared care and the Australian research and experience is salutary in indicating that there are no consistent patterns for outcomes regarding shared care and primary care.
- Research about the shared care of children in conflicted parental situations sounds warning notes of the long term emotional impact on the children concerned. '*Such findings suggest that a significant proportion of these children emerged from family court proceedings with substantially shared care arrangements that occurred in an atmosphere that placed psychological strain on the child'*[4]*.* There are particular grounds for concern about children under the age of four who are especially vulnerable to shared care arrangements and can be regarded as a risk group regardless of whether the arrangements are amicable or not.

Dr McIntosh's research suggests that children are particularly at risk when certain factors are present, such as parents having low levels of maturity and

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[2] *'Parental Separation. Children's Needs and Parent's Responsibilities'* 2004. DCA and DfES 2004 Crown Copyright Cm 6273 and *'Parental Separation; Children's Needs and Parent's Responsibilities: Next Steps'* .DfES 2005. Crown Copyright: Cm 6452

[3] *Caring for children after parental separation: would legislation for shared parenting time help children*? Family Policy Briefing 7. University of Oxford May 2011

[4] *'Cautionary notes on the shared care of children in conflicted parental separations'* McIntosh and Chisholm.2008 Australian Institute of Family Studies.

insight; poor emotional availability of the parent to the child; on-going high levels of inter-parental conflict: on-going significant psychological acrimony between parents; and when one or both parents are seeing the child as being at risk when in the care of the other.

- The proposal fails to take account of the fact that 90% of separating parents do not use the courts and the remaining 10% are those with multiple problems as indicated above. The Australian evidence shows that cases where the child's or parents' safety was at risk were not being effectively filtered out of the shared parenting scheme by the courts. Attempting to increase parental involvement in this 10% of cases further parental involvement by broad brush legislative assumptions which may be misunderstood by both parents and courts would be misguided and would represent a fundamental and damaging misunderstanding the nature of the problems.
- Legislative amendment as proposed could lead to increased litigation and be counterproductive in leading to conflict between the courts' duty to give paramount consideration to the best interests of the child and a duty to promote shared parenting. The Australian experience shows that it is extremely difficult to draft clauses which highlight the importance of appropriately involving fathers without skewing the clarity of purpose of the CA1989.
- We are concerned that much of the impetus for change is being driven by a focus on parental rights rather than children's welfare. Research has consistently indicated that mothers have felt discouraged from disclosing family violence and child abuse concerns because of their belief that there is a legal starting point for shared time, so there is no point in disclosing violence. These two legislative objectives often compete for priority in litigated cases
- There is a notable lack of research looking at children's own experiences of shared care and their involvement in legal disputes about their residence and contact.[5]

SPECIFIC POINTS IN RELATION TO THE FOUR OPTIONS PROPOSED.

The four options do not in our view offer any additional benefit for the child beyond the existing welfare paramountcy principle, which is based on the assessment of the needs of the individual child at the time of the court's intervention.

Option 1.

There is no clear definition of what is meant by '*a presumption'* and the consultation document does not address the ways in which conflicts of interests between one or both parents and the child will be dealt with by the courts dealing with a small minority of highly conflicted parents, who are likely to find it hard to

[5] See further the recommendations in-Your Shout! A survey of the views of children and young people involved in court proceedings when their parents' divorce or separate. Timms, Bailey and Thoburn. NSPCC 2007

provide the necessary parenting structure. Much depends on definitions of what is safe and how that safety will be assured. The fact that '*safety'* is the only exemption is inadequate as under this narrow definition it implies only physical harm. It is a matter of regret that there is no mention of children's article 12 UNCRC rights and of how children's rights and welfare are to be protected.

Option 2.
There is no explanation or definition of what is meant by '*fullest possible involvement'* which means that this may be subjectively interpreted by parents in ways which risk conflict with the welfare principle. There is a fundamental confusion between quantity and quality of contact time and there is overwhelming research evidence to demonstrate that the quality of the parental relationship does not improve as a proportion of contact time. In practice this option would mean that we have a potentially damaging conflict of principle which would be extremely tricky for courts and family court professionals to negotiate as well as potentially posing additional risks for children.

Option 3.
There is no definition of what is meant by the '*starting point'* and this option constitutes a de facto presumption that shared parenting will be starting point for decision making. In practice this will not be different from option 1 and the same problems apply.

Option 4.
It is unnecessary. There is no evidence that the court does not already consider the need for children to have a meaningful relationship with both parents within the overarching context of the child's best interest. The proposed amendment to the welfare checklist risks skewing the focus of the court's decision making by introducing a potentially conflicting imperative which may risk undermining both the paramountcy principle and the safeguards for the child.
Clearly, increased parental involvement is greatly to be desired in the majority of cases. What is not desirable and may be extremely dangerous is any legislative amendment which leads to an expectation or presumption of shared parenting as a default position.

ENFORCEMENT PROPOSALS AND THE RIGHTS AND WELFARE OF CHILDREN.

Whilst accepting that some parents may deliberately breach, frustrate or undermine court-agreed contact arrangements, we would be deeply concerned about enforcement measures that fail to take full cognizance of or give consideration to the likely impact on the children concerned. The consultation document fails to address the issue of how children's rights and welfare are to be protected in the event of the court ordering a change of resident parent, in the

absence of any independent representation of their position and views. If the resident parent's driving licence is confiscated, the child may very well suffer as well for it could impact of the parent's ability to get the child to school on time and to participate in the entire social and out of school activities that children enjoy.

The Family Justice Review expressed substantive concerns about how the voice of the child is to be heard in private law proceedings but the government has failed to explore options for progress in this area. Clearly not all children involved in s8 CA1989 disputes about their residence and contact arrangements will need separate party status. However, research and practice have consistently indicated that children need separate representation in more cases than this and Parliament has twice passed legislation to achieve it - namely s64 Family Law 1996 and s122 Adoption and Children Act 2002. Neither piece of legislation has been implemented, leaving the safeguards for the child in the proceedings much too weak.

Of the 98,000 children involved in s8 residence and contact proceedings in 2009, only 1% were separately represented in the proceedings by a children's guardian and a children's solicitor under the provision of r9.5 Family Proceedings Rules 1991 (now r16.4 FPR 2011). Cafcass figures show that the numbers have fallen in the last two years from 1,803 in 2008/9 to 1,449 in 2010/11.

In addition, we are concerned that s16 CA 1989 risk assessment procedures are carried out by Cafcass, using a telephone arm's length '*risk assessment script* ' which does not involve any direct contact with the child or any objective assessment of their situation.[6]

Our core concern is that unless we ensure that children's best interests are protected, we will have prioritised parental rights and effectively undermined the paramountcy principle, whilst confusing parents, courts and practitioners with some very mixed messages. The consultation fails to address the key questions of how the proposals will impact on the children concerned and how their interests are to be protected in the event of the law being amended in the way envisaged by the proposals. If the Government is still minded to make legislative changes, then we would urge them not to do so without also putting in place the two key legislative safeguards below.

1. The implementation of s122 Adoption and Children Act 2002 - using the President's Direction of 2004 as guidance - would add s8 contact proceedings to the list of specified proceedings in which a child may have party status and separate representation.

[6] See Cafcass Operating Framework

2. The relaxation of the rules around the leave requirement in s10 CA1989 for children seeking leave to initiate or vary their own s8 CA1989 Residence and Contact orders.

What is needed, in addition, is a range of provisions designed to support children and their parents who are separating. These could include the further development of a range of services designed to assist parents in moving from co-partnering to effective co-parenting. It is a matter of regret that the consultation paper misses an opportunity to explore some of the innovative possibilities which already exist. Programmes of Parenting Information and Parenting after Parting have demonstrated some positive and encouraging results but we also need to consider the development of a range of direct support services to children and young people affected by family breakdown. These services should be directly accessible by children and young people and should be available to them, not just at the time of the separation or divorce, but also afterwards when judicial and professional attention has waned.

Finally, we would urge the Government to consider what checks, balances and resources would need to be put in place to ensure that any legislative change does not result in increased exposure to the risks associated with domestic violence and abuse.

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