JUSTICE SELECT COMMITTEE PRE-LEGISLATIVE SCRUTINY OF THE CHILDREN AND FAMILIES BILL

Evidence from Nagalro
19 October 2012

SUMMARY

Our overarching concerns centre on the implications of the new provisions for safeguarding the rights and welfare of the children involved. It is from this perspective that we make the following points in relation to the questions posed by the Select Committee as part of their pre-legislative scrutiny of the Children and Families Bill:

- The efficacy of screening for domestic violence or other welfare issues about children in mediation is not certain
- Repealing provisions requiring the court in divorce proceedings to consider arrangements made for children in the family removes objective judicial scrutiny which is a protection for children
- Courts must be able to obtain suitable expert evidence where they need it to make sound decisions for children's futures
- Expert evidence can provide new and crucial information in a timely way that will enable courts to reduce delay as Oxford University research shows
- Current commissioning processes via LSC are not fit for purpose. Courts should be able to make binding orders about costs and timescales for expert evidence
- Local authorities lack capacity to reliably provide high quality assessments ready for the start of cases. It will be some time before they will be able to meet the court's requirements for this provision.
- Independent social workers have a vital role to play but need to be stitched in to the system
- There is confusion about the 26 week limit and it is being imposed without statutory basis or due regard to the needs of children
- Judges must retain the discretion to consider the local authority care plan as a whole including issues such as sibling placement
- Reducing the court's ability to scrutinise the care plan will reduce the scope of the Children's Guardian role, weakening an important statutory protective mechanism for children
- The ineffectiveness of the IRO service means reduced court scrutiny leaves children in local authority care even more vulnerable to poor outcomes
- The proposals in private law proceedings lack a coherent child centred focus and are predominantly adult driven. There has been limited Governmental focus on the impact of the provisions for the children concerned.
- Enforcement measures fail to take full cognizance of or give consideration to the likely impact on the children concerned

MEDIATION

1. **We are far from convinced that the safeguards in place to ensure that domestic violence or other welfare issues cases are filtered out from the Mediation Information and Assessment meeting (MIAM) system and whether they will be effective. We say this for the following reasons.**

2. Children are likely to have suffered physical abuse themselves in as many as 40-60% of domestic violence cases.[1] Domestic violence features in the lives of 37% of children who are receiving social work interventions and 60% of those are on the child protection register.[2]

3. There is evidence from research and from professionals involved in courts proceedings that vulnerable children in private law proceedings are not protected by the same risk-assessment procedures or indeed basic screening mechanisms that protect their counterparts in public law proceedings.

4. As private law cases are diverted away from the courts and legal aid in private law cases is largely withdrawn, mediation services will assume a frontline role in screening for domestic violence and child abuse. The majority of mediators, however, have very limited, if any, child protection background or experience and moreover they are not officers of the court.

5. The primary purpose of the MIAM is to assess separating couples' suitability for mediation and to encourage separating partners to reach agreements through mediation rather than court based processes. Part of the task is to identify and screen out of the system those cases which are unsuitable for mediation because of issues of domestic violence or child protection. This places a considerable reliance on the skills and experience of the mediator carrying out the MIAM.

6. The role of officers of the court is not sufficiently clear and the links between mediation and Cafcass services are not clearly articulated. There is no integrated national scheme of child protection linkage between mediation Cafcass and social services and in its absence there is ample scope for vulnerable children and adults at risk to slip through the wide cracks in the system.
7. Part of the inconsistencies and gaps in the system arise as a result of the disconnects of policy and funding between the extended dispute resolution being developed as part of the private law programme carried out by Cafcass officers and funded by the DfE through Cafcass and the direct consultation being developed by family mediators funded by the MOJ and commissioned through the Legal Services Commission.

8. Effective mediation services are an essential element in delivering faster family justice in private law cases but we concur with the warning notes sounded by Professor John McEldowney speaking at the Family Mediation

[1] Hernstein 'Women and mediation: a chance to speak ad to be heard' (1996) 13(3) Mediation Quarterly 229-241
[2] Children in Need Census 2001

Association's (FMA) annual conference in September 2012 that we must recognise the boundaries of the role mediation plays in the justice system as a whole. As he said bad mediation is expensive to resolve and restoring bad mediation to justice is hard to do. As yet there is no umbrella training and regulatory body for mediators and inevitably this leads to wide variations in practice skills and experience. Screening by mediators for risks of violence or abuse to children and adults is not a substitute for safety checks or for judicial findings of fact.

9. Moreover, for those cases which go to court, we do not consider that the Cafcass private law s 16 CA 1989 risk screening processes are sufficiently robust to be effective. Children are not routinely seen and the screening is carried out at arm's length via a prescribed telephone script on the basis of the necessarily subjective information supplied by the two adult partners.

10. In view of all of the above, we would ask that much greater consideration be given to the specific procedural safeguards necessary to ensure the safety and well-being of children whose parents are separating.

CHILD ARRANGEMENTS ORDERS

11. **Our view would be that the effect of the amendments to section 11A to 11P is largely a '*shift in focus'* to remove the perception of' *winners and losers'.*** In reality, arrangements for residence and contact will be different and would have to be considered separately within the proceedings. Of greater concern is the proposal in the draft legislation that would repeal provisions requiring the court in divorce proceedings to consider arrangements made for children in the family. Such a provision would considerably weaken one of the few remaining safeguards for children in private law proceedings as it would mean that there would be no possibility of any objective judicial scrutiny of the arrangements for children as even the present paper scrutiny of the proposed arrangements would go.

EXPERT EVIDENCE

12. **We are concerned that the new proposals will lead to miscarriages of justice through the pressure on courts not to use expert evidence. This is for two main reasons: because it is often inaccurately seen as a cause of delay and because curtailed timescales will militate against the court obtaining good enough information on which to base its decisions.** As the Family Justice Review said: "*Expert evidence can often be necessary to a fair and complete court process*."[3] Without suitable expert evidence there are likely to be more wrong decisions for children, more appeals and more delay.

13. The FJR's conclusions on expert evidence appear to lack a sound evidence base. Two recent pieces of research support this view: the report by Oxford University into the contribution that independent social work (ISW) expert

[3] para 3.120, *Family Justice Review Final Report* (November 2011), MoJ, DfE, Welsh Government

reports make to family proceedings[4] and a survey by Cafcass of care proceedings during three weeks in November 2011[5].

14. Dr Brophy and her team found that ISW assessments provided new evidence about parents or others who had not been assessed by local authorities, or where there was significant dispute about a local authority assessment. There was no evidence of routine duplication with a current local authority core assessment. There was no evidence that ISW reports cause delay to court hearings. This was evidence that courts needed in order to make their decisions.

15. In contrast to concerns about the local authority workforce[6] Brophy et al found that ISWs are independent, highly skilled and experienced with a median 24 years in child protection work. They were child-focussed and had 'added value' because of their high quality, timely, forensic work.

16. Cafcass Children's Guardians, surveyed in 2011, reported that the biggest reason for delay, in two-thirds of cases with delay, was local authority practice and resources. Issues relating to experts affected 10% of cases with delay. Robust case management and availability of expert witnesses were factors associated with no delay. Factors related to delay in the provision of expert evidence included delay in the letters of instruction being sent out, the lack of availability of suitable experts, and appointment of the Official Solicitor for parents who lack capacity.

17. The whole system by which expert evidence is commissioned at present is, in Nagalro's view, dysfunctional and works against the interests of the vulnerable children involved. Cases where the court considers it does need to instruct an expert have experienced lengthy delays while exchanges take place between the Legal Services Commission (LSC), courts, solicitors and experts about costs and hours for the work. Nagalro members report numerous examples where a court has ordered an assessment but LSC refuses to fund it in whole or in part. In some cases LSC has made arbitrary cuts in how many hours it will fund after an expert has set out their professional estimate of what is required for the task, causing an expert to withdraw. This results in further unjustified delay for the child. There is no indication that LSC staff has the professional knowledge on which to base such judgments.

18. Many of our members are reluctantly ceasing to undertake expert witness work for courts because they cannot be sure what they will be paid, or that they will be paid a fair amount for their work in complex cases. (ISWs face the additional hurdle that their rates are set under a separate Funding Order from all other expert witnesses and at an unjustifiably low rate.) The result is that children, families and the courts do not have the benefit of access to the highly experienced practitioners who are in such short supply and who are so vitally needed if we are to achieve the objectives of fair and faster family justice.

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[4] Brophy, J., Owen, C., Sidaway, J. and Johal, J., (2012) *The Contribution of Experts in Care Proceedings: Evaluation of the work of independent social work assessments* University of Oxford

[5] *Cafcass Care Application Study 2012* http://www.cafcass.gov.uk/publications/reports_and_strategies.aspx

[6] MacAlister, J et al, *Frontline: Improving the children's social work profession* 2012 IPPR

19. It would appear to make little sense to lock expert social work evidence out of the system. **Nagalro would recommend that the court should be given responsibility, within a robust case management culture, to commission expert evidence that it needs in order to make a just decision, and that the court should have power to set a cost limit to be met by public funds and a timescale based on the timetable for the child.** This would enable expert witnesses to take on work confident that they knew the terms of their appointment.

20. **Social work assessment must be front-loaded**. This means that for robust, accurate decisions about children at risk of abuse and neglect to be made in a timely way the most skilled, specialist-trained social workers need to be involved early in the process. Courts need high quality social work assessments about complex issues of risk, parenting and capacity to change at the start of a case. These need to assess not just parents but also any potential kinship carers. Only when the full assessment is complete are courts able to resolve cases without delay.

21. The problems are all the more pressing as there are significant current problems in the quality of local authority social work services, which means that courts cannot rely on local authority social workers to step up to an increased court role. Professor Munro's report into child protection social work makes clear that reform of the profession will take a generation. The recent IPPR report already cited sets out problems in the quality of social work. It quotes a recent survey which found that *"70 per cent of 600 social workers said that Newly Qualified Social Workers were entering the profession without sufficient skills and experience to begin practicing".*[7]

22. The continuing increase in care proceedings has combined with financial restraints to put local authorities under great pressure. Local authority performance is extremely variable. Some practice is of a very high standard. However in authorities across the country high staff turnover and difficulties in retaining experienced workers are leading to over-use of agency and inexperienced practitioners. Research studies have found that about 40% of care proceedings cases come to court without an up-to-date core assessment.[8,9] Cafcass' 2012 research again shows only 42% of cases does the local authority provide all the information to the court that it is required to do by the Public Law Outline.[10]

23. The IPPR report states there are about 1350 vacancies in frontline social work. Nagalro believes that there are some 2500-3000 independent social workers who represent an important skilled resource that is not being used. This valuable part of the workforce needs to be 'stitched in' to the system in order to stem the loss of the most experienced social work professionals and redirect their skills to enable courts to achieve better outcomes for children. Nagalro has written to the Children's and Justice Ministers to discuss how we can help enable this to happen, but to date they have been unable to meet with us.

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[7] As 6 above, page 9

[8] Masson J., Pearce and Bader K (2008) *Care Profiling Study* Ministry of Justice

[9] Jessiman P., Keogh P. and Brophy J. (2009) *An early process evaluation of the public law outline in family courts* Ministry of Justice

[10] As 5 above.

24. In addition safeguards for children have been weakened because of the reduction in quality of work that Cafcass permits guardians to undertake under its model of 'proportionate' working. Members report being allocated cases regardless of their ability to start work on them, being pressured by managers to limit the work they undertake, not to see children or parents as they see necessary. Cafcass appears to have quietly dropped its commitment to a mixed economy workforce and now scarcely uses its experienced self-employed Children's Guardians. It is a matter of continuing concern and regret that the Cafcass Key Performance Indicators have not been revised to reflect the concerns previously expressed by the Justice Select Committee in relation to the time spent in direct work with children and the fact that children are not routinely seen by Cafcass officers.

TIME LIMITS

25. **Nagalro is committed to reduce delay for children, and recommends maintaining full judicial discretion over the length of care proceedings. Simply instituting a rigid 26 week time limit when it is clear that cases cannot be resolved satisfactorily within this timeframe at present will be a recipe for unjust and arbitrary decisions.** If courts do not have sufficient time to obtain suitable evidence they will have to guess at what is the right decision for a child. Such a guillotine will be a violation of the child's rights to fair justice, as well as their parents'.

26. There is currently some confusion about the status of the proposed 26 week limit. We understand that currently only 30% of care cases finish in 26 weeks.[11] We believe that pressures on resources as well as the huge increase in care applications are causes of continuing delays. Yet across the country members report that since April 2012 courts have been operating a strict 26 week limit for cases, although this is not a statutory entity, even when this does not allow for essential work to be undertaken such as assessment of parents. It is Nagalro's understanding from senior judges that there is no Practice Direction or Statutory Instrument in place at present to this effect and that the 26 week limit is not 'set in stone'. We understand that this requirement will only be introduced with the second piece of legislation to implement faster family justice.

27. The consistent availability of reliable, high-quality social work assessments at the start of proceedings will be a key factor in achieving the 26 week aim.

CARE PLANS

28. **We believe strongly that the judge's role should not be limited to only the permanence options of care plans. The distinction between what is 'core' and what is 'detail' in a care plan is not easily defined, as the Family Justice Review report itself acknowledged. This needs to remain within the court's discretion and Nagalro sees the House of Lords judgment in Re S; Re W as setting out what is still the correct approach:**
"…*when deciding to make a care order the court should normally have before it a care plan which is sufficiently firm and particularised for all*

[11] Speech of Ryder J to Nagalro Autumn Conference 15 October 2012

concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future."[12]

29. The experience of our members is that decisions about whether siblings are placed together or separately, what therapeutic, health and educational provision they need, the particular type of placement, and the other matters indicatedin the Family Justice Review[13] can be crucial issues for children's welfare, and not neatly separated off from permanence options.

30. These matters cannot always be safely delegated to local authorities. It is already too easy for local authorities to make decisions about children for administrative or other reasons that are not child-centred.

31. A reduction in the scope of courts to consider the local authority care plan for a child will also serve to limit the Children's Guardian's ability to address these issues in their investigation in tandem with the solicitor as part of their role to safeguard the welfare and best interests of the child.

32. There has already been a reduction in the amount of time and quality of work that Cafcass permits guardians to undertake and the Cafcass Operating Framework introduced on 1 April 2012 legitimises a restricted model of proportionate working which is at odds with the legislative framework. This is leading to a loss of quality in the ability of children's guardians to scrutinise local authority care plans in court proceedings.

33. The provisions for the representation of children by children's guardians are legislatively sound but as the Chief Executive of Cafcass said in his oral evidence to the Justice Select Committee on 17 July 2012, although cases may be nominally allocated, the time that guardians can spend on each case is limited and the quality of the Cafcass case analysis needs to be improved.[14]

34. It is very important that children have the opportunity, through their representatives, to interrogate the plans for their lives at a stage where they can still be changed. We would be alarmed if such a fundamental change in children's rights was put in place as it would have the capacity to undermine the principles of the Children Act 1989 as well as the rights of children embodied in the UN Convention for the Rights of the Child and the European Human Rights Convention. We fear that this proposal will constitute a significant weakening of another core safeguard for children.

35. There are also continuing concerns about the ineffectiveness of the Independent Reviewing Officer (IRO) service in holding local authorities to account. A reduction in the level of court scrutiny of care plans will place an additional burden of responsibility on the Independent Reviewing Officer service (IRO) at a time when there are serious questions about its functioning and the conflicts of interest involved in the employment of IROs by the same local authority who has parental responsibility for the child. Many IROs carry unacceptably large caseloads - often in excess of 100.

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[12] http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020314/inres-1.htm.
[13] Family Justice Review, Interim Report, March 2011, Executive Summary para 78.
[14] *O guardian, where art thou?* Martha Cover, article in Seen & Heard, Vol 22 Issue 2

The problems were starkly illustrated by the case of A and S v Lancs CC [2012] EWHC 1689 (Fam)[15]. In this case the IRO had a caseload of over 200. It is very worrying that the National Association of Independent Reviewing Officers (NAIRO) had to write to the Minister for Children on 14 May 2012 to complain that a significant number of their members were being threatened and intimidated by local authority managers to prevent them from making challenges to care plans for children.

DIVORCE

36. **The Family Justice Review recommendations in relation to the voice and position of children in private law proceedings were particularly weak and subsequently there has been limited Governmental focus on the impact of the provisions for the children concerned. The proposals lack a coherent child centred focus and are predominantly adult driven**.

37. A recommendation that Judges should always hold findings of fact hearings to establish the realities of risk has now been superseded by 2010 guidance[16] that such hearings are' *taking up a disproportionate amount of court's time and resources'*. There has however, been no thorough interdisciplinary discussion of how the sum of the parts of the faster family justice system will add up for the children who should arguably be the state's prime concern.

38. There is ample evidence from research and practice that illustrates how powerless and bereft children feel in the face of the new and disturbing events triggered by their parent's separation. Once their residence and contact arrangements have been agreed, children can be effectively locked into arrangements which may be unsafe, inappropriate or which no longer meet their developing needs. The historic differentiation of children in public and private law proceedings has not served children well, as it has masked the harm arising from exposure to domestic violence and abuse. The links are now much more clearly understood but the paucity of direct support services leaves many children extremely vulnerable.

39. The question we would ask the committee to consider is where the accessible safeguards for safeguards for children at risk will be within the system as envisaged by the Bill?

40. Research indicates that children are not aware of anything they themselves can do to initiate a change or review of their situation.[17] The FJR considered removing the requirement for grandparents to apply for the leave of the court under s10 CA 1989 before making a s8 CA 1989 contact application. It did not, however, consider removing the same leave requirement for competent children. The CA 1989 envisaged that in certain situations children and young people would need to seek leave to make their own applications to the court.

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[15] http://www.bailii.org/ew/cases/EWHC/Fam/2012/1689.html
[16] President's Guidance in relation to split hearings [2010] Family Law 752
[17] Timms Bailey and Thoburn. Your Shout Too! A survey of the views of children and young people involved in court proceedings when their parents' divorce or separate.

Theoretically, this provides a route for children to bring cases back to court if necessary and this was intended to constitute a safeguard provision.

41. In practice, the process presents children with a virtually impassable obstacle course of procedures, which includes testing the competence of the solicitor who is testing the competence of the child and the requirement to obtain permission from a high court judge. This means that what should be a potential safety net route to review for children is effectively blocked. In practice it happens so rarely that the LSC do not keep any statistics. A provision to relax the leave requirements as originally recommended by Dame Margaret Booth when Chair of the Children Act Advisory Committee, would be a positive backstop safeguarding provision.

ENFORCEMENT AND SHARED PARENTING.

42. **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. 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**.

43. The Government's consultation on Co-operative Parenting Following Family Separation fails to address the issue of how a potential conflict of interest between a child and one or both parents is to be established or 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, for example, the child may very well suffer as this 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.

44. As indicated earlier, 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.[18]

45. 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.

46. All of the four legislative 'steers' proposed in the Government's Co-operative Parenting consultation carry the risk that they will be interpreted by parents as a potential 'right' or green light to equal parenting time. For this reason we cannot support any of them. 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

[18] See Cafcass Operating Framework 1 April 2012.

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.

47. 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.
    - **The implementation of s122 Adoption and Children Act 2002 - using the President's Direction of 2004 as guidance - would add s8 residence and contact proceedings (or the new Child Arrangements order) to the list of specified proceedings in which a child may have party status and separate representation.**
    - **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 (or Child Arrangements) order.**

Judith Timms and Alison Paddle
on behalf of Nagalro Council

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 and adoption agencies, as trainers and educators, and in clinical practice as therapists. Members have significant experience as managers, chairs of Adoption Panels and other specialist social work practitioner roles.

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