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children seen and heard

Submission by Nagalro

to

The All Party Parliamentary Group (APPG) on Child Protection

Inquiry into the Family Justice Reforms

Part 1 (Q I): 3 September 2012
Part 2 (Qs II & III): 24 September 2012

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 roles as well as practitioners and therapists.

Contact details:

Nagalro
PO Box 264
Esher
Surrey
KT10 0WA

Tel: 01372 818504
Fax: 01372 818505
Email: nagalro@globalnet.co.uk

This submission is Nagalro's response to the questions posed by the All Party Parliamentary Group (APPG) in their Inquiry into the Family Justice Reforms.

I. The Family Justice Review recommended that courts should refocus their scrutiny of the care plans on the core issues of whether the child is to live with parents, other family or friends, or be removed to the care of the local authority.

- **How can we ensure that care plans are of sufficient quality?**

- **If the court role of scrutinising care plans is to be rolled back, how can we ensure sufficient scrutiny of care plans?**

- **How can existing structures in the courts and local authority be used to support the development of the care plan and ensure that the child has the best experience possible?**

Introduction

1. Children are particularly vulnerable when removed from their parents because of worries about abuse and neglect, and it is vital that public care does not cause them yet further abuse or neglect. There is a lengthy history of attempts to find a satisfactory balance between the respective roles of the court and the local authority in planning for children's futures, with the aim of ensuring that children receive care that meets their needs. Local authorities have many conflicting priorities and calls on their limited resources. They are not able to give paramount consideration to the best interests of an individual child in the way that a court is required to do, one source of the tension between them.

2. Since the Children Act 1989 this history can be traced through from the development of 'starred care plans' - the creative attempt by courts to ensure that key parts of care plans agreed in court proceedings were followed through, because of concerns that the plans were not being adhered to either through poor practice or design – to the House of Lords judgment in Re S; Re W, which ended starred care plans and led on to the creation of the Independent Reviewing Officer service in 2004. The perceived failures of the IRO service led to attempts to strengthen it by provisions in the 2008 Children and Young Persons Act, which have themselves, in Nagalro's view, been unsuccessful.

3. The Family Justice Review (FJR), in its final report in November 2011, recommended that the court's role in scrutiny of children's care plans should be reduced. Nagalro viewed the FJR's assertion that local authorities 'will of course continue to be expected to develop and implement high quality care plans' as dangerously overoptimistic, appearing to be resource led rather than evidence based. Such a significant change to the court's role should only be made on the basis of sound evidence and this does not appear to be the case in relation to reducing the scrutiny of care plans.

Nagalro's position

4. Nagalro's evidence to the Family Justice Review (FJR) focussed on the position of children who, when they are the subjects of care proceedings, are '*uniquely vulnerable because of the far-reaching consequences of the decisions made at this time that affect their identity, physical safety and emotional wellbeing*.' (para. 6) [1] The independent representation of a particular child's interests is an essential part of mainstream child protection in cases.

5. There is a potential conflict of interest between children in public law proceedings and their parents and/or the local authority who brings the case to court. This is why a key principle in any proceedings where a child is a party is that '*the child should be afforded the protection of independent representation and should not be disadvantaged in relation to other parties to the proceedings. (Article 6, European Convention on Human Rights, incorporated into our domestic legislation by the Human Rights Act 1998).'* (para. 49).

6. Before the Children Act 1989 local authorities assumed parental rights and terminated parental contact through purely internal administrative procedures. This led to clear evidence of human rights breaches that the Children Act sought to address. Reducing the court's scrutiny of children's care plans would therefore be a regressive step, which would be open to multiple challenges and these could be both costly and time consuming.

7. All legislation and government policy is required to be compliant with human rights legislation: the Human Rights Act 1998, UN Convention on the Rights of the Child, and the European Convention on Human Rights. We are concerned that the FJR did not consider how its proposals about care plans would comply with this legislation, affect children's rights to family life (Articles 6 and 8), nor address how the voice of child will be heard in decision-making about these fundamental issues (Article 12 UNCRC).

8. Nagalro considers that the Family Justice Review failed to take proper account of the position of children within proceedings: there was no acknowledgement or discussion in the report of the constitutional position of the child as a party to the proceedings, with the same rights of representation as the other parties.

9. The details of the care plan have very significant consequences for children's lives. There are many issues where scrutiny by the court is necessary for children's interests to be safeguarded. As one example a 'plan to explore placement with family and friends' carers may well be insufficient for a court to be assured that a choate plan that will safeguard a child's welfare effectively is in place. Local authority use of

[1] Available to download from website: http://www.nagalro.com/activities/publications.aspx

placements under Children Act sec 20 already arouses considerable disquiet because of those cases that arrive at court where there has already been inordinate delay for children who have drifted in sec 20 care for months or years. There are also cases where parents report being put under considerable pressure from social workers to agree to their children being accommodated.

10. Our position remains, as we responded to the Interim Report of the Family Justice Review, that the child who is a party to proceedings should not be disadvantaged by losing the ability to challenge local authority decisionmaking where necessary through those representing them.

11. It is only during care proceedings that children have independent representation via the 'tandem model' of their own solicitor and Children's Guardian. This is the only effective backstop/quality control mechanism available to the children whose lives will be changed forever by the court's decision. Under the pre-proceedings protocol, where local authorities notify parents that care proceedings are being considered because of serious concerns, parents become entitled to legal help, local authorities of course have their own legal departments, but children have no access to legal advice. Post-proceedings children who are in the care of the local authority will have an Independent Reviewing Officer, who will conduct their Child Looked After reviews. We address concerns about this service later in this paper.

12. Courts have two decisions to make in care proceedings: 1) whether the threshold is passed i.e. the evidence is sufficient to show that the child has suffered or is at risk of suffering significant harm and 2) whether the welfare test is made out i.e. whether the child's interests require the court to make an order. It is very rare for care applications not to pass the threshold, and in many cases there is little contest about the fact that the threshold has been crossed, although the details of findings may be challenged. It is in relation to what order and what care plan will be in the child's best interests that there is more often dispute between the parties during the proceedings.

13. Nagalro is opposed to the Family Justice Review's recommendation that:

> *'the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are:*
>
> *- planned return of the child to their family;*
> *- a plan to place (or explore placing) a child with family or friends;*
> *- alternative care arrangements; and*
> *- contact with birth family to the extent of deciding whether it should be regular, limited or none.'(para 62)*[2]

[2] Family Justice Review Final Report, November 2011

14. The FJR saw court scrutiny of care plans as a cause of 'duplication and delay in court proceedings', and that 'this court scrutiny goes beyond what is needed to determine whether a care order is in the best interests of a child.' (paras 60, 61).

15. It is extremely concerning that the FJR does not appear to think the issue of who a child lives with – family or friends or an alternative placement – should necessarily be clear before the court makes a final order. A Care Order, which will give the local authority parental responsibility for the child, does not specify with whom the child will live and can cover an enormously wide range of possibilities from children remaining with their parents to children moving swiftly on to adoption via a Placement Order. For a court to simply make a Care Order is to decide very little about the long-term outcome for the child.

16. 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. The House of Lords judgment in Re S; Re W sets out what Nagalro would see as 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 concerned to have a reasonably clear picture of the likely way ahead for the child for the foreseeable future*."[3]

17. Nagalro remains unconvinced by the Family Justice Review's '*thread of unrealistic confidence'*[4] which we see running through the report in relation to the quality of the local authorities' performance in loco parentis, but which is not supported either by research or by the collective experience of our members.

18. We expressed further concerns that are still current:
'*A significant number of cases arrive at court without a core assessment and even those that do are too often of poor quality. Reducing the scope of the court's scrutiny of care plans is not the answer*. […] *Many authorities are striving hard to improve, but given the current economic climate and the present level of skills deficit, it will be some years before they will be able to achieve the standards envisaged by the Social Work Reform Board and the Munro Report*.'[5]

19. We also drew attention to:
- the high level of use of children's independent advocacy services such as NYAS and Voice by looked after children, as one indicator of inadequacies in the system
- the large body of data on the poor performance of local authorities acting in loco parentis
- the consistently poor outcomes for children in public care.

[3] http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020314/inres-1.htm.
[4] Nagalro response to Q 8, Interim Report of Family Justice Review
[5] As above

20. The experience of our members is that decisions about health and educational provision, type of placement, plans for sibling placement and the other matters indicated[6] can be crucial issues for children's welfare that cannot always be safely delegated to local authorities.

21. It is already too easy for local authorities to make decisions children for administrative reasons or for other reasons that are not child-centred. 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.

Current context

22. There are significant current problems in the services that deal with children, which hinder sound decision-making with and for children in a proportion of cases. The risks to children of poorly thought through care plans are increasing because of the:
    - continuing increase in care proceedings, combined with budget pressures on local authorities
    - reduction in quality of work that Cafcass permits guardians to undertake under its model of 'proportionate' working
    - loss of skilled independent social workers (ISWs) from court proceedings
    - ineffectiveness of the IRO service in holding local authorities to account.

23. 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. The continuing increase in care proceedings is putting a considerable strain on local authorities when combined with financial restraints. Recent research studies have found that about 40% of care proceedings cases come to court without an up-to-date core assessment.[7,8]

24. Those who work in the courts such as judges, solicitors and guardians report a significant proportion of cases in which there are serious problems with the local authority's assessment and planning. Inadequate assessments can mean that parents are assessed as safe to resume care of their children when they are not, or vice versa; that extended family members are wrongly assessed so that plans for adoption may be made where children can in fact be brought up by kinship carers such as grandparents, or vice versa.

25. Reducing the role of the court in exercising independent scrutiny of the state's exercise of its powers towards children is extremely worrying at

[6] Family Justice Review, Interim Report, March 2011, Executive Summary para 78.

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

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

a time when there are reductions in quality of other services for children. The cumulative effect of the reduction in the court's role in addition to the constraints in services listed above are likely to lead to increasingly arbitrary and poorly thought-out decision-making for children. We are further concerned that proposals for changing local authority duties in respect of maintaining sibling relationships and enabling contact to children in care are being canvassed in relation to adoption.

26. So a number of fundamental changes in children's rights are being proposed at the same time but in a piecemeal way. Taken together these 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 as already discussed at paras 5-8.

- ***How can we ensure that care plans are of sufficient quality?***

27. Cases are increasing in complexity due to factors such as changing family structures, cultural and ethnic diversity, the impact of poverty, substance abuse and other parental problems such as mental health issues, neglect and disability. Growing understanding of how neglect and abuse damage children's early development is one driver for the increase in applications for care orders.

28. Children need coherent care plans informed by early and skilled assessment. Delay is caused in a significant proportion of cases by poorly focused social work with families, poor quality evidence and lack of experience and confidence in social workers about thresholds and what information is required by the court.

29. There are no short-term fixes for these problems. Remedies include more thorough **training** both in initial social work professional training and post-qualification. **Mentoring** by experienced practitioners will help 'grow' the next generation of social workers. It will take several years for better, more specialist training of social workers and **the embedding of the Munro reforms** to take effect and lead to higher standards and a greater capacity for reliable, autonomous professional judgment in the social work workforce. It is unacceptable to make changes now based only on the hope of better services at some future date.

30. The court scrutiny of the care plan, which should be aided by investigation by the children's guardian, provides a vital check for children of the soundness of the plans for their future. **When courts cannot rely on the quality or impartiality of local authority assessments they must commission alternatives**.

31. The recent publication of research by Dr Julia Brophy of Oxford University [9], the first to look at the specific contribution of independent social workers to family courts, refutes many of the assumptions made without evidence, including by the Family Justice Review, about the work of ISWs. This research 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. This was evidence that courts needed in order to make their decisions.

32. In summary the study found that:
    - There was no evidence that ISW reports cause delay to court hearings
    - ISWs produce high quality reports to tight deadlines
    - There was no evidence of routine duplication with a current local authority core assessment
    - ISWs have 'added value': they are independent, highly skilled and experienced (median 24 years in child protection work)
    - They are child focused.

33. **Courts will need access to those ISWs who can produce high quality reports to tight deadlines** in the cases where they lack reliable evidence in order to reach their judgment. However, the Legal Services Commission has created major difficulties in relation to ISWs by draconian cuts in ISW fees as compared to more modest reductions in the fees of other experts. This has driven many of the most valued and experienced ISWs away from this field of work. Perversely the LSC will pay a higher total cost for a report from a psychologist, who can attract an hourly rate of £117, compared to an ISW whose fees have been cut from the norm of £50-60 per hour to £30, even when the ISW assessment of risk and parenting may be more appropriate to the court's task.

34. The loss of skilled ISWs from court proceedings will detract from the ability of courts to make best judgments in relation to children's needs. There is significant **spare capacity in the ISW sector** that is not being deployed because of structural barriers. **This valuable part of the workforce need to be 'stitched in' to the system** in order to stem the loss of the most experienced ISWs. There is scope of imaginative use of social enterprise and mixed economy models, but pilot schemes have not targeted this field of work to date.

- ***If the court role of scrutinising care plans is to be rolled back, how can we ensure sufficient scrutiny of care plans?***

[9] 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

Robust judicial case management

35. In our view the court must retain the discretion to scrutinise care plans in sufficient detail to satisfy itself that the plans are in the interests of children. The culture of robust judicial case management which is being put in place should enable courts to identify on a case-by-case basis where the local authority has done a good job, and where the care plan is coherent and meets the child's needs and ensure that these cases do not get drawn into unnecessary scrutiny of detail.

36. In those cases where care plans are based in inadequate assessment or are otherwise insufficiently coherent the court will need to ensure effective action is taken to safeguard the welfare of the child before it can make a final order.

Cafcass

37. There has been a reduction in the amount of time and quality of work that Cafcass permits guardians to undertake. The Cafcass Operating Framework introduced on 1 April 2012 legitimises a restricted model of proportionate working which is at odds with the legislative framework and which makes it clear that this is now a different and much more limited service.

38. This is leading to a loss of quality in the ability of children's guardians to scrutinise local authority care plans in court proceedings. This will impact on decisions about children taken during care and adoption proceedings. We fear that it will constitute a significant weakening of another core safeguard for children that should be available to children in proceedings.

39. 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.[10]

40. The quality of the Cafcass analysis is likely to become an increasingly significant issue given the drive to reduce the number of experts in proceedings.

IROs

41. The IRO service, even with its revamped role, has not proved a robust or effective means to hold local authorities to account. It cannot protect children against poor practice in any consistent or reliable way. The IRO service is not capable to exercising the level of monitoring that

[10] *O guardian, where art thou?* Martha Cover, article in Seen & Heard, Vol 22 Issue 2

children's needs require. The recent case A and S v Lancs CC [2012] EWHC 1689 (Fam)[11] provides a stark example of children who suffered significant harm over a lengthy period while in the care of the local authority. In that authority IROs had caseloads of 200 children. Even when subsequently reduced they were still, at over 100 children, substantially above the recommended level.

42. The Independent Reviewing Officer role is structurally flawed because it is not truly independent of local authorities. Some IROs are unable to challenge their employers and children therefore lack effective scrutinising of their care plans. In addition in some authorities IRO workloads are far to high to allow them to provide the level of detailed scrutiny required. Children's reviews do not take place with sufficient frequency for IROs to be in a position to monitor the issues for each child in detail or in a timely way. This is in contrast to what an experienced children's guardian should be able to do.

43. In Nagalro's view the time has come to implement s11 of CYPA 2008, which allows the IRO service to be removed from local authorities to an independent provider. [12] Cafcass would not be able to provide a suitable home for the service.

- ***How can existing structures in the courts and local authority be used to support the development of the care plan and ensure that the child has the best experience possible?***

44. **Social work assessment must be front-loaded** i.e. 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.

45. The best legislative framework can be ineffective if there are not sufficient human and other resources to implement the provisions effectively. Both local authority social service departments and Cafcass continue to be under enormous and unremitting pressure and this has an inevitable impact on the quality of the decision-making and the service received by individual children.

46. **More attention needs to be paid to hearing children's voices**. The skilled practitioners who provide Cafcass services need greater scope to exercise their independent judgment, and to enable them to spend more time with children so that their voices are heard. In an important judgment, Re K [2011] EWHC 1672 (Fam), the President emphasised the importance of the independent status of the Children's Guardian: "*I yield to no-one in my view that the guardian's independence needs to*

[11] http://www.bailii.org/ew/cases/EWHC/Fam/2012/1689.html

[12] This recommendation is made in Nagalro's submission to the House of Lords Select Committee on Adoption legislation, 25 July 2012 downloadable from http://www.nagalro.com/activities/publications.aspx

be cherished." He re-iterated how important it is for children that guardians can exercise independent judgment when working with solicitors in the 'tandem model' and that this "*remains the child's best protection against poor social work practice*".[13]

47. This will require significant change in Cafcass, which requires significant reform. The Cafcass Operating Framework is not fit for purpose. Nagalro made recommendations in its submission to the Family Justice Review about how to improve the representation of children. The aim would be to dispense with the oppressive and expensive Cafcass management hierarchy and create local Child Representation Units aligned to local family courts.

II. Six month time limit for cases – The Government has proposed that there will be a time limit of six months by which most care cases should be completed. At the same time, the Government recognise that there will be exceptions to this and that some cases may take longer than this.

Nagalro's position

48. Naturally it is in children's interests for there to be no delay in reaching decisions about them. A six-month time limit for care cases can therefore benefit children through reducing the emotional damage that can arise from disruption and uncertainty. It would minimise the time when children are in limbo, uncertain whether they will return to parents, go to stay with relatives or move on to adoption or long-term foster care. Children who remain in the care system, especially where they are in short-term placements, are liable to more changes in placement, in social worker and in care plan. There is extensive research evidence about the risks to children from corporate parenting.

49. Courts must be unfettered in their ability to make sound decisions about children's future welfare. Where it is unclear which option will be in a child's best interests the imposition of a rigid timescale risks institutionalising a justice system that has to make decisions in a rush and without good evidence. In effect courts will be guessing what will be best for children. This would be a violation of children's human rights and would lead to the wrong decisions being made about which family they will grow up in. Decisions can be wrong in depriving a child of the opportunity to grow up with their parents, or within their extended family, or in preventing a child from experiencing the security of an adoptive or permanent foster home when their own family cannot provide safe and stable care for them.

50. A number of unintended consequences of a strict time limit can be easily envisaged. Cases may be shorter but there may be more of them as repeat applications are made for cases to return to court because

[13] http://www.bailii.org/ew/cases/EWHC/Fam/2011/1672.html

issues were not properly dealt with on the first occasion. Other types of proceedings are likely be used more frequently, for example placement order applications will become more extensive with issues that are currently dealt with at the care order stage, such as contact with siblings and other family members, being dealt with then. At present placement order applications are often in effect wrapped in to care applications and dealt with at the same time.

51. Delay may be moved to a different part of the system, where children have less access to independent representation, for example by local authorities making greater use of sec 20 accommodation for children. The burden on local authorities of getting everything in place before they issue a care application that starts the clock ticking may be viewed as too demanding of resources. Where assessments have not been undertaken so that a case is not ready to go to court children may remain longer in sec 20 accommodation or at home in poor circumstances while the assessments are undertaken.

52. When decisions are made outside the court system children will be deprived of the protections afforded by the tandem model of Children's Guardian and their own solicitor to represent their welfare and best interests. A six-month timescale for care proceedings and limitations on the court's ability to scrutinise care plans will both impact on children by restricting the scope for independent challenge of plans about their futures. When they are accommodated under sec 20 they have an Independent Reviewing Officer, but as discussed at paras 41-43 this is not a robust or effective system for children. Nationally only eight cases were referred by IROs to Cafcass in the period 2004 - 11[14], meaning one key avenue for children to challenge local authorities is blocked.

53. It is vital that often-irrevocable court decisions are based on thorough and informed assessment by social workers, and in some cases by those with particular specialist expertise. For the six-month limit to work cases will need to arrive at court with sound, robust assessments already completed. This will require considerable work pre-proceedings. (Ref paragraph 44 above: social work assessment needs to be 'front-loaded'.) At the start of a case skilled social work assessment is essential to set a case on the right track, and to be most effective. Poor assessments cause untold problems of delay, with work and plans having to be unpicked and re-worked.

54. Where there has been little work done pre-proceedings courts will find it extremely difficult to reach the required judgments with any confidence about what will be in the best interests of the child. The court's involvement provides independent, external oversight that offers society reassurance that the degree of interference in family life is proportionate to the harm to children. Imposing a rigid time limit where

[14] para 215, A and S v Lancs CC [2012] EWHC 1689 (Fam)

courts have unreliable evidence on which to base decisions would serve to undermine confidence in the operation of justice.

55. In Nagalro's view the decision to impose the six-month time limit has been based on wishful thinking rather than on an accurate assessment of the state of local authority services and their capacity to provide high-quality assessment. The risks to children are very great. Given the current state of service provision it is likely that an expectation that most cases should conclude within six months is likely to prejudice the welfare of children.

56. It is worth noting that the idea of that cases ever did achieve a twelve week timescale prior to the Children Act is something of a myth. The piece of research undertaken as a pilot to see if this was achievable looked at a tiny sample of 14 cases. Only *three* of these cases reached completion before publication.[15]

- ***What are the circumstances when cases should last longer than six months?***

57. Put simply, the answer must be whenever the child's needs require it i.e. when six months is not long enough to arrive at a clear view of what plan will best promote the welfare of the child.

When a case lacks sufficient or good enough assessment

58. There are many excellent local authority social workers who provide a high quality service to children, families and courts. They often work under enormous pressure to provide timely, skilled assessments and a child-centred approach and they deserve our recognition and credit. Our criticisms of local authority social work are not designed to ignore or detract from these professionals, but it is vital to look at the whole picture across the country of systemic failings that blight the lives of too many children.

59. The consistent evidence is that many cases have had little or no adequate assessment when they arrive at court. (See paras 18, 23-24 above). This is inevitable in emergency cases where a child who is unknown to a local authority suffers an injury that may be non-accidental, for example.

60. However, many cases relate to children whose families have had extensive contact with children's services sometimes over very many years. Local authority performance is very variable both within and between authorities. Community Care has this week reported on local

[15] Department of Health (1992), *The timetabling of care proceedings before thee Implementation of the Children Act 1989*, *Evaluation of a pilot project in a magistrates court.* HMSO

authority children's services that are reliant on inexperienced and agency social workers.[16]

61. Too often work is undertaken with families on a sequential, process-driven basis, with repeat referrals receiving several initial assessments, being gradually moved up a menu of other services, such as referral to other agencies, parenting support, domestic violence programmes etc before being closed. This may happen many times before a sometimes random incident, such as a new partner with a history of child abuse moving in to a family, will move the case up the ladder into proceedings.

62. The change in approach to thresholds that has followed the baby Peter Connelly case means many local authorities are initiating more care proceedings, which puts increasing strain on their professional resources. Recent Cafcass care demand statistics show an increase of more than 50% over four years.[17] This increase in work comes at a time of financial restraint and cuts to local authority budgets. The children involved require the same degree of care to be taken in planning for their futures.

63. It is frequently only when a case goes to court that a robust examination of the evidence and all the options for the child is undertaken. Even though courts are criticised for the length of proceedings, the authority of the court tends to ensure a systematic and rigorous evaluation of what plan will be in the best interests of children. The court does provide some control over the timescale of processes, which can be lacking for children who are in care under sec 20 of the Children Act.

64. As we noted at paragraph 18 implementing Professor Munro's recommendations designed to raise the quality of professional judgment in children's social work will take a decade. It is not simply a question of improving training but requires a change in culture and approach from senior management.

Where cases are more complex such as:

- **Requiring specialist evidence**

65. In cases where medical evidence is unclear and/or complex the fact-finding element of care proceedings may require a longer period. The LSC's limitations on fees paid to expert witnesses has reduced the availability of experts willing to undertake work this in highly contested arena.

[16] Community Care: "Suffolk Council has just revealed that seven out of 10 social workers it employs have less than two years' experience." http://www.communitycare.co.uk/blogs/social-work-blog/2012/09/seven-in-10-social-workers-in.html http://www.communitycare.co.uk/blogs/social-work-blog/2012/09/an-interesting-article-appeare.html Both accessed 19 September 2012

[17] Cafcass care demand statistics: http://www.cafcass.gov.uk/news/2012/august_care_statistics.aspx

- **Highly contested cases**

66. In some cases the distrust between family members and the local authority is particularly great. This can be because of strongly held views: some parents lack insight into their failings and persist in believing that they have been treated unfairly. They may continue to contest because they do not accept the evidence of abuse and neglect.

67. In some cases local authorities have acted inappropriately. They may have taken a view of a case which was unjustified by the evidence but which they are unwilling to change. They may have failed to comply with their duties in a way that undermines confidence in their future performance. In such cases it may take longer for a court to assure themselves and others that a resolution that is in the best interests of the child is fairly achieved. In some cases the court will need to order a fresh assessment to establish the facts and ensure that plans are based on independently verified opinion.

- **Court monitored implementation of a care plan**

68. Where the care plan is finely balanced, for example where the rehabilitation of a child with its parents is to be attempted, it may be in the child's interests for the court to retain oversight of the case. This may be preferable to the case needing to be brought back to court within a short time period. It allows for continuity of key figures such as the judge, the children's guardian and solicitor, which is good practice, valued by the children themselves and shortens timescales.

- **Complexity of children's needs**

69. Where a sibling group has complex, varied and sometimes conflicting needs the court may require a longer time to consider all the options for all of the children.

Impact of decisions from other tribunals

70. In some cases a decision by another tribunal is required before care proceedings can be concluded, for example criminal or immigration proceedings.

- ***How can courts decide which cases should fall outside the proposed six month time limit?***

71. This must be decided according to what is in the best interests of the child as magistrates and judges must be able to use their discretion. The views of the Children's Guardian should also be sought because of their key role in relation to children. The Children's Guardian has a duty to inform courts both about a child's needs and about their wishes and feelings from a position of independence. However there must be real doubt about how effectively this service is operating and will operate in future.

72. **Finally**, in relation to public law we retain significant concern about the cumulative effect on the position of children of their diminishing access to the parts of the system that provide independent objective scrutiny of their circumstances i.e. the court, the children's guardian and solicitor, and the IRO. These need to be not only in place but robust enough to scrutinise what is happening for the child, to challenge poor practice effectively and to keep children safe. Changes that Cafcass has brought in changes in its procedures and practice through its Operating Framework risk children now only receiving a superficial service that does not accord with statute.

73. A service may appear to be in place from Cafcass but its quality is so attenuated that it cannot operate as it is designed to do. Cafcass may now allocate every case but practitioners carry such heavy workloads that in reality they simply cannot provide the quality and depth of work required to protect children's interests. Members report they are discouraged from spending the time they feel is necessary with children. While maintaining an apparent commitment to a mixed economy workforce Cafcass has in reality virtually stopped allocating work to its experienced self-employed practitioners, whom judges praised to the Justice Select Committee in July 2012.

74. We would want this APPG to note that the Key Performance Indicators as stated in the Cafcass Annual report for 2010/11 do not include a requirement to see children but continue to use allocation of cases as a target in what is essentially a process of case allocation rather than an audit of direct service delivery to children. (KPIs1, 2 and 6). The Interdisciplinary Alliance for Children wrote to the Secretary of State for Education on 17 February 2012 expressing their deep concern on this issue.

III. How can we ensure that court decisions are always taken in the best interests of the child? The Government have proposed to introduce legislation to ensure children have a relationship with both their parents after family separation, where that is safe and in the child's best interests.

75. 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 proposed in the Government's Consultation on Co-operative Parenting Following Family Separation. 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.

76. None of the government's four options for change, 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.

77. Any 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.

78. **Clearly, increased parental involvement is greatly to be desired in the majority of cases. What is not desirable and may be extremely dangerous for the children concerned is any legislative amendment which leads to an expectation or presumption of shared parenting as a default position**.

79. 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.

80. 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.

81. 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.[18]

82. 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

[18] 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

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 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.[19]

- 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.[20] 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*

[19] *'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

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

that placed psychological strain on the child'[21]*.* 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 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.

- ***What more could be done to ensure that judges receive information about the impact of the decisions they make?***

83. 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. The consultation document 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.

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

If the resident parent's driving licence is confiscated, for example, 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.

84. 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.[22]

85. 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.

86. Research and practice have consistently indicated that courts need a procedure that identifies potential conflict of interests between parents and their children through the provision of some independent objective evidence. Clearly not all children involved in s8 CA1989 disputes about their residence and contact arrangements will need separate party status but Parliament has acknowledged on the basis of all the evidence that they do need separate representation in more cases than is currently the case. Twice parliament has 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. The current figures continue to fall, as do the numbers of s7 CA 1989 welfare reports prepared by Cafcass.

87. 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.

i) 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.

[22] See Cafcass Operating Framework 1 April 2012.

li) 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 best practice is there to ensure that children's views are taken into account?***

88. 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.[23] Once the court decision is made then children may be effectively locked into arrangements which may not meet their developing needs and which may even be harmful and put them at risk.

89. 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 that 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 suffering the negative effects of 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.

90. **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.

Supporting documents sent (3 September, part 1 submission)

O guardian, where art thou? Martha Cover, article in Seen & Heard, Vol 22 Issue 2 (2012)

Nagalro response to Family Justice Review Interim Report Questionnaire, dated 17 June 2011

[23] 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