

**THE MINISTRY OF JUSTICE'S CONSULTATION
PAPER ON PROPOSALS FOR REFORM OF LEGAL
AID IN ENGLAND AND WALES**

**Response of
Nagalro**

**The Professional Association for
Children's Guardians, Family Court Advisers
And Independent Social Workers**

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The Nagalro Response

1. Nagalro is the professional association for over 700 independent social work practitioners and consultants, children's guardians and family court advisors. Many of our members are appointed to provide expert reports in family courts and appear in family cases alongside medical experts. A proportion of them also work for Cafcass as both employed and self-employed practitioners appointed in public and private law cases. Members also act as caseworkers for the National Youth Advocacy Service and as independent social work experts in public and private law matters. They have substantial experience in safeguarding children's interests in family proceedings, especially in those cases where children are parties.
2. Nagalro members have first-hand knowledge of practice in family courts in all areas of England and Wales. We make our response, therefore, in the light of the many years of accumulated experience of our members. Initially we present general comments and concerns regarding the consultation. This is followed by our answers to specific questions posed in the consultation document where we consider that we are able to comment from an informed position.

GENERAL POINTS

The Consultation is premature - the proposals lack a sound evidence base and should await the outcome of the Family Justice Review.

3. The Family Justice Review is about to produce recommendations as a result of its far reaching review of the Family Justice system. We would suggest that any consultation should await the findings and recommendations of that Review before making proposals for the comprehensive reform of Legal Aid in England and Wales. Nagalro appreciates the need to look carefully at financial expenditure at this time, reducing it where possible, but we are concerned that the changes suggested are not supported by evidence and may incur additional costs rather than savings to the public purse. The Public Accounts Committee has put on record its concern about the Legal Services Commission's poor track record in driving through policy changes which are unsupported by a sound evidence base. We are concerned that change uninformed by evidence and appropriate impact assessments may be counterproductive. Family courts do not only deal with straightforward disputes or matters of evidence. They are responsible for making decisions for and on behalf of children which will have life changing and life-long implications for them. A short-term approach which looks at saving money now, may be more expensive in the longer term – for example protracted and delayed court hearings in which children may be stranded in the middle of unresolved proceedings and the additional costs of much greater numbers of litigants in person.

Failure to consider children as stakeholders in Legal Aid Reform.

4. Nagalro is concerned that, once again, children have not been considered as stakeholders for the purposes of the impact assessment. A consequence of this is a set of proposals which do not take their rights and welfare into account. Children are not in a position to respond to such consultations and it is imperative that the government takes account of the views of those organizations that are in a position to at least partially fill this gap. Failure to ensure access to justice for children may lead to serious breaches of their rights under Article 6 and 8 European Convention on Human Rights. Consequent appeals to the European courts can be extremely costly.

Failure to include Independent Social Work (ISW) expert evidence within the scope of this consultation which includes all other experts' fees.

5. Current plans to implement drastic caps on legal aid payments to expert ISW witnesses will result in severe limitation on the availability of essential evidence in complex family proceedings and will limit access to justice for vulnerable children. We do not believe that can be the intention of the government. A more considered and holistic approach to the regulation of fees to experts could be achieved by including expert ISW's in the MoJ review from which ISW's have been specifically excluded. This would allow the impact of the changes on vulnerable children involved in family proceedings to be properly evaluated within the wider context of the Family Justice Review and the Munro Child Protection Reviews.

Many cases involving Domestic Violence would no longer qualify for Legal Aid.

6. We strongly disagree with the proposal to exclude so many applications involving children from the scope of the civil and family legal aid scheme and in particular to remove legal aid in private law cases except for those where domestic violence has been shown to be present through the existence of non-molestation orders and occupation orders. These cases are a very small number of total applications brought in public and private family proceedings where domestic violence is found to be an issue. It is too narrow to view domestic violence only in relation to those who have suffered physical violence and for whom there have been criminal proceedings.
7. The President of the Family Division in his Practice Direction (*Residence and Contact Orders: Domestic Violence*) (No 2) [2009] 1 WLR 251 stated that domestic violence '*includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm*' It is particularly evident, in cases in which our members are involved, that the experience of responding to an application in court can lead to a repeat or extension of this form of abuse. If these parties are not able to obtain legal aid to ensure that they have the necessary representation, then the case may not be adequately heard, all the evidence may not be presented and decisions may be made for children that do not reflect the risks they face. In some cases the parent may experience further abuse within the court setting. This cannot be in the interests of children or of justice.
8. There is extensive research evidence to indicate that almost half of all private family law cases involve allegations of serious abuse.¹ An inspection of private law front-line practice in Cafcass, published in August 2006, highlighted the vulnerability of those children who are the subject of private law s 7 CA1989 welfare reports and emphasised that fact '*that some of these children are "children in need"*' as defined by the CA 1989.² It was in recognition of these concerns that s120 Adoption and Children Act amended the definition of harm in the CA 1989 to include '*impairment from seeing or hearing the ill treatment of another*'. In addition s6 and 7 Children and Adoption Act 2006 gave Cafcass significant new statutory duties in relation to the facilitation and monitoring of contact and the assessment of risk to the children in the household. The proposals seriously underestimate the impact of domestic violence on children and we would warn against

¹ The Work of the Family Bar. Kings Institute for the Study of Public Policy. February 2009 at para 20 page xix

² Her Majesty's Inspectorate of Court Administration (HMICA) August 2006. Private law front line practice in Cafcass. Inspection Report. London HMICA

what may be the unintended consequences of removing access to skilled advice in such cases. We would also point out that the limitation of access to legally aided advice and representation will impact disproportionately on women who form the majority of primary carers.

Reducing the pool of experienced family lawyers and increasing first line advice via call centres.

9. In carrying out their statutory duties in relation to children in both public and private law proceedings, Nagalro members work closely with family layers and are dependent on their availability in order to provide the advice and representation necessary to protect vulnerable families and children within the court process. We are concerned that the proposals will further reduce the pool of skilled practitioners needed to provide access to justice for our most vulnerable members of society.
10. The growth of call centres and the proposal that a first step to getting legal help will be via a telephone operative is extremely problematic. Many of the families with whom we work are distressed and highly vulnerable. Their children may be potentially at risk and they may be at a considerable disadvantage in trying to access and utilising appropriate advice particularly if their first language is not English.

Question 1: *Do you agree with the proposals to RETAIN the type of cases and proceedings listed in paragraphs 4.37 to 4.144 within the scope of the civil and family legal aid scheme? Please give reasons.*

11. Yes. We agree strongly. We consider that the LSC's current system of guidance and scope limitation will achieve better access to justice. We are particularly concerned by the Green Paper's lack of definition of domestic violence. What exactly is meant by 'abusive relationships'?

Question 3: *Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.*

12. We welcome the retention of legal aid for children represented under the provisions of r9.5 FPR 1991 and in care cases, but we do not agree with the exclusion of so many applications involving children especially when provisions which have been previously enacted to represent children have yet to be implemented. Twice Parliament has passed legislation in recognition that '*children should have access to separate representation more frequently than they do at present*'³. Both s64 Family Law Act 1996 and s122 Adoption and Children Act 2002 added s8 CA 1989 residence and contact cases to the list of proceedings in which children may be considered for separate representation. There is no acknowledgement of this in the consultation document.
13. We seriously question policies which appear to place an over reliance on services of adult dispute resolution and mediation as the panacea which will both divert large numbers of cases away from court proceedings and protect the interests of children. The narrow definition of domestic violence is particularly concerning in this context. Many cases which fall outside the consultation's definition will be unsuitable for mediation and yet be ineligible for legally aided representation. This may lead to unacceptable imbalances of power between the parties and is likely to impact most adversely on women.

³ Hansard 4 November 2004

Question 6: *We would welcome views or evidence on the potential impact of the proposed reforms to the scope of legal aid on litigants in person and the conduct of proceedings*

14. We are concerned that the MoJ has not sufficiently considered the impact of what it acknowledges will be an increase in litigants in person in family proceedings.
15. The consultation refers to research⁴ which indicated that there was not a significant difference between cases where there was a LiP and those represented by lawyers. This research covered a range of cases but it should be noted that there were only a small number of family cases in the sample.
16. It is the experience of our members that in family cases, many of them private law cases, where there is a LiP there are a greater number of contested hearings, those parties with solicitors have more work to do, and there is an increased number of appeals resulting in considerable delays. These are cases which are brought by LiPs; they are not parties responding to proceedings brought by others. They are highly motivated to represent themselves fully in the proceedings. They bring challenges to the judiciary, to other solicitors in the case particularly the children's solicitor, and to court staff. For the court service to function efficiently increasing expenditure would be necessary on support services for LiPs, the cost of which could entirely offset any benefits from the removal of legal aid in these cases.
17. Until there has been a careful research and analysis of the impact of the presence of LiPs in cases it would be foolish to proceed with proposals designed with the aim of reducing costs.

Question 32: *Do you agree with the proposal to reduce all fees paid in civil and family matters by 10%, rather than undertake a more radical restructuring of civil and family legal aid fees? Please give reasons.*

18. No we strongly disagree. The LSC has acknowledged that it does not have details of the fees paid to experts. It can only estimate the total to be a proportion of disbursements, and has no statistics of the rates – or the range of rates – it pays to experts. It is not able to say whether a disproportionate amount goes on a few high cost cases, or whether it is spread across all cases. It is therefore not possible to say what the likely effect would be of such a uniform cut.
19. Nagalro considers that there should be no change until such time as the MoJ is able to produce the results of its efforts to gather more information in this area (following its consultation on experts' fees).
20. In the case of Independent Social Work (ISW) experts we strongly oppose this move. The LSC/MoJ has taken a decision to limit fees paid for expert ISW evidence in line with the rates paid to Cafcass family court advisers. Nagalro does not accept that this decision has been taken fairly and with full cognisance of the impact this will have on family courts, the children who will be affected by the decision and the supply of ISWs willing to provide expert evidence on this basis. The decision reduces the fees payable to ISWs to a rate which is below that which is economically viable and many ISWs will stop

⁴ *Litigants in Person: Unrepresented Litigants in First Instance Proceedings*, Department for Constitutional Affairs (2005).

doing the work. The LSC already has the necessary mechanism to challenge cases in which there are exceptionally high costs for ISW experts.⁵

Question 39: Do you agree that:

there should be a clear structure for the fees to be paid to experts from legal aid; in the short term, the current benchmark hourly rates, reduced by 10%, should be codified;

in the longer term, the structure of experts' fees should include both fixed and graduated fees and a limited number of hourly rates;

the categorisations of fixed and graduated fees shown in Annex J are appropriate; and the proposed provisions for 'exceptional' cases set out at paragraph 8.16 are reasonable and practicable?

Please give reasons.

21. Whilst we support there being a clear structure for fees paid to experts, it is a major concern to Nagalro that the question of fees for experts is being dealt with in such a piecemeal way by the MoJ. First, the question of ISWs was considered in what we consider was a fundamentally misleading and v flawed consultation on Family Legal Aid Funding from 2010 issued in December 2008. Secondly the MoJ issued a separate consultation on Expert fees which included all other experts apart from independent social work experts whose proposed new rates are capped at £30 an hour outside London and £33 in London. The ISW rates are substantially below all other professional experts. For example the suggested rates for psychologists travel are the same as the ISW's fee for their professional expertise. The rates for occupational therapists are £68 an hour outside London, nursing experts £81, psychiatrists £ 135 whilst vets giving evidence are paid three times the rate of ISW's. The response to the consultation was published in March 2010: this concluded that more information was needed and an exercise has been undertaken to obtain this information. Nagalro has registered and will continue to register its concern about the specific exclusion of ISW's from that process. ISWs were not included in the consultation, have not been involved in the general review of experts fees and therefore decisions have been taken on the basis of little or no information. It is significant that both the LSC and the MOJ have acknowledged publically that they have no accurate data on the annual amount spent on ISW expert witness reports so they are unable to quantify what would be saved.
22. The MoJ has still to produce its amended proposals for expert fees, and yet it proposes to implement fee capping in the absence of any evidence to demonstrate how that reduction will achieve the desired reduction in total legal aid spend. Nagalro is concerned about the impact of any changes in the fees paid to experts without sound evidence to support them. We believe that a proper risk and impact assessment should be carried out by the MOJ before implementing changes which could have a significant negative effect on both access to justice for children, and the outcomes of family court proceedings for vulnerable children and families
23. Many of Nagalro's members have indicated that they will not continue to undertake work as experts if the fees are reduced as currently planned. ISW expert witness evidence is very often cost effective in expediting proceedings and facilitating resolution of previously entrenched cases. Without the necessary

⁵ See further Focus 43 December 2003- LSC guidance.

expert evidence courts may be unable to make the right decisions for children and the chronic delays in an already overburdened family justice system may be exacerbated.

24.

Instead we ask the MoJ:

- To postpone implementation of any fee capping pending the outcome of the forthcoming Family Justice Review, when a considered decision on fee structures can be made on the basis of accurate data particularly in relation to the impact on children.
- To include representation from ISW experts in the ongoing MoJ project to review all other fee arrangements for experts.
- To extend the scope of the expert witness project to include fees for ISW expert evidence.
- To consider the apparent disconnect between the MoJ and the DfE in relation to the Government's wider agenda for the development of professional social work and the recruitment and retention of experienced child care professionals who are in such short supply.
- To prioritise the overarching safeguarding agenda for children and the provision of joint strategic approaches to all children's front line services.
- To commission research to examine the impact of the capping of ISW fees on the children and young people concerned.
- To commission research which aims to identify what value ISW assessments provide within family proceedings.

25. Only once this has been done would Nagalro want to comment on the proposals to codify experts' fees. However our current view is that given the nature of the work of ISW experts in engaging directly with families it is very difficult to quantify the extent of the work that will be required in any one case. In these circumstances there would be a strong preference for an hourly rate. If there is a move to fixed fees it is likely that a majority of the cases would be in the 'exceptional' category, which is not a workable option and would be likely to result in increases in costs.

26. The Family Justice Review will be producing its report and recommendations for consultation in March. This will include the role of experts and we would strongly recommend that we await the outcome of the Review before deterring large numbers of some of the most highly skilled and experienced social workers in the UK from further involvement in the work of the family courts at a time when their child protection expertise is so badly needed.

Question 49: *Do you agree that we have correctly identified the range of impacts under the proposals set out in this consultation paper? Please give reasons.*

27. No. We consider that there should have been greater consideration of the impact on children of the consequences of your proposals. The fact that children and young people are not identified in the consultation as a key stakeholder group is particularly disappointing given the over arching responsibility of every

government department in relation to the wider safeguarding agenda as set out in *'Every Child Matters'*.

28. The Ministry of Justice has recognised this responsibility by acknowledging the importance of making *'a reality of children's rights by setting an ambition of wellbeing for every child, described in terms of the five outcomes, and by setting an expectation that services should work together to promote this.'*⁶ The consultation document completely fails to do this and there is no room for complacency at a time when Lord Laming has warned that *'recent events have shown that very much more needs to be done to ensure that services are as effective as possible at working together to achieve positive outcomes for children.'*⁷

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

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⁶ 'Rights and Responsibilities: developing our constitutional framework' Ministry of Justice. March 2009. Cm 7577. para 3.71

⁷ The Protection of Children in England-A progress report. Lord Laming. TSO March 2009. para.1.1