NAGALRO RESPONSE TO THE FAMILY PROCEDURE RULE COMMITTEE CONSULTATION:

Draft Amendments to Family Procure Rules: proposal for new draft Part 3A of the Family Procedure Rules 2010

(Children & Vulnerable persons: Participation in proceedings and giving evidence)

Nagalro is the professional association for Children's Guardians, Family Court advisers and Independent Social Workers. It has nearly 1000 members who have many years collective experience of working with and representing children and young people in the full range of family proceedings in both public and private law matters.

Nagalro welcomes this change in the rules and the opportunity to respond to the consultation. The proposed rule changes will impact on the lives of all of the children and young people with whom we work. The consultation focus on Article 12 UNCRC is particularly welcome as it underpins all of our core tasks.

It has long been a concern of the Association that there has been a marked disparity in the approach taken to children and young people within different applications within the Family Justice System, and between different courts. In particular, we are concerned about the marked contrast between the treatment of children as witnesses in criminal and family proceedings and in the dichotomised approach to children in public and private law. This is not a distinction which is recognised in other countries and jurisdictions. Although the welfare of the child is theoretically of paramount importance in law, in practice, as Sir James Munby, the President of the Family Division has recently pointed out - *'The court proceeds, if one bothers to think about what is going on, and most of the time we do not, on the blithe assumption that the truth - and a proper appraisal of what is in the child's best interests - will in some mysterious way emerge from the adversarial process between the parents'.*[1]

The disparity between the experiences of children within private law and public law proceedings is huge. In public law, with the model of tandem representation, the welfare considerations are the focus of the guardians enquires and analysis report and the communication of the child's views the focus of the child's solicitor. Children in private law proceedings have no such equivalent, and the scant time allowed to the preparation of section 7 reports will often allow for only one meeting of the child and a Cafcass officer or in many cases not even that, if matters resolve after a Safeguarding letter only or without the filing of a Section 7 report. Many of these children and young people are largely excluded, from participation in the proceedings that so clearly involve them, and their parents may often not be the ideal people to be informing a court about what the children actually want. The Association is pleased that this proposed rule change will require the court to focus on this issue at an early stage and to then keep under review the question of participation as the case

[1] *Sir James Munby. President of the Family Division. 'Unheard Voices: the involvement of children and vulnerable people in the family justice system' Family Law Volume 45. August 2015 pages 895-902.*

progresses. It is the view of the Association that children should, as a matter of course be joined as parties to contested private law proceedings that progress to the need for a Section 7 report and are contested, or where enforcement of child arrangement orders is being considered, as these cases are those were participation by the child or young person concerned is so key.

In supporting these proposed rule changes the Association would want to ensure that in looking at the factors set out, engagement in proceedings as a child party and engagement as a witness are not conflated. A child or young person, who is a party, should be actively involved as a matter of course, not exception (subject to the courts power to regulate presence in the courtroom). The Association wants to see a move to it being a matter of routine for those young people who want to, to feel able and welcome to be present in court.

NAGALRO CONSULTATION RESPONSES

1. a) **Does rule 3A.1 identify with sufficient clarity and robustness, the circumstances when the court should be considering ensuring that children are able to participate appropriately in the proceedings in the light of Article 12 UNCRC?**

There is a need to reflect Article 12 UNCRC and the right of a child to express a view if he or she wishes and is old enough with more clarity than the current drafting. (See ZH (Tanzania) v SSHD [2011] UKSC 4). There is provision in children proceedings for the court to consider the attendance of the child under rule 12.14 FPR 2010.

(b) **Draft rule 3A.1 refers to 'where proceedings <u>involve</u> a child'. Is the use of the word <u>involve</u> sufficiently clear about which children are covered by the rule?**

No -'involved' may be too vague a term and may possibly be subject to subjective definition. The proposed new Part 3A will apply to all family proceedings and should be engaged when any decision is being taken in which the outcome will have a direct impact on a child or young person's life.

(**c) Draft rule 3A.2 (1) provides that the court must consider whether a child should participate in the proceedings by reason of meeting one of the conditions in paragraph (2). Do you consider that these conditions are appropriate? If not please give reasons**.

The Association very much welcome the placing of a positive duty on the court to consider a child or young person's participation in proceedings. Our only concern is how is the court to have an understanding of the child or young person's views, how is that to be gathered and by whom, in proceedings where the child is unrepresented? At first appointment hearings in private law matters Cafcass will not have met with the child. For the rule to be truly effective a mechanism needs to be established to enable participation. There appears to be an overlap between 3A.1 (1)(a) and 3A.2(2). What is described here at 3A.2 (2) are the conditions applicable to whether a child should participate. Conditions (a) and (b) are obvious. Condition (c) overlaps with 3A.1 (1)(a) but is expressed differently. We don't need the extra layer of confusion about when is a child 'involved'. The simple answer is to amend 3A.1(1)(a) to say *"a child who is a party to the proceedings, the subject of the proceedings but not a party to them, or otherwise affected by matters in the proceedings or the decisions which will be made in the proceedings"*. If that is used instead of the current wording of 3A.1(1)(a) then the question above about *"Is the use of the word <u>involve</u> sufficiently clear about which children are covered by the rule?"* goes away.'

2. **The overriding objective of the Family Procedure Rules is to enable the court to deal with cases justly having regard to any welfare issues involved. Dealing with a case justly includes so far as practicable -**

a. **Ensuring that it is dealt with expeditiously and fairly;**
b. **Dealing with the case in ways which are proportionate to the nature importance and complexity of the issues;**
c. **Ensuring that the parties are on an equal footing;**
d. **Saving expense; and**
e. **Allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.**

The Committee recognises that, as currently drafted, the overarching objective (rule 1.1) does not refer to children. Some committee members have raised concerns that this is an omission and would like to see the overriding objective updated to reflect the need to consider children within proceedings.

(a) Should the overriding objective be amended so as to emphasise consideration by the court of participation by children in proceedings?

We share the concern of those committee members who felt that the overriding objective in rule 1.1 should be updated to draw particular attention to the need, not just to ***consider*** but to ***enable*** the participation of children within proceedings. The primary legislative duty imposed by the Children Act 1989, enshrined in the "welfare principle" and the Welfare Checklist place the child and their wishes and feeling at the core of decision making. We see these new rules as a refocusing and emphasis of those key principles, and it would be helpful to emphasise them.

(**b) Is the overriding objective sufficiently dealt with in the draft rule, as it appears at sub paragraph (3) in each of 3A.3, 3A.4 and 3A.5 taking account of the court's duty under rule 1.2 to give effect to the objective whenever it exercises any power given to it by the rules or interprets any rule?**

Article 12 UNCRC gives children and young people a free standing right to participate in decision making forums when decisions are made which affect their lives. Therefore we would prefer wording which reflects the free standing nature of those rights. We would suggest that the decision for the court is '**how'** children and young people should participate rather than **'if'** they should participate. The rest of the drafting in 3 A(1) and (2) is generally very helpful. However, 3A (2) g would benefit from more clarity in relation to who might inform the child of the outcome of the proceedings. Is this a responsibility of the court or could this be delegated to a child's parents? In which case how will the court be assured that the child has been accurately informed?

3. Eligibility. The Committee has considered how best to establish when this rule applies. In particular the current rule sets out that the court has discretion to make directions where a vulnerable witness/party's participation in proceedings is 'likely to be diminished'. The Committee has considered further criteria but, on balance, felt that a more high level description was required to make sure that the court has control and can make decisions on eligibility without being restricted by any specific criteria. The committee would welcome your comments, in particular how we can make sure the measures are not used unnecessarily tying up resources and causing delay.

Nagalro welcomes the open approach proposed by the Committee, a restrictive approach would, we consider be counter productive. Courts are used to recording the reasons for their directions, whether it be for the instruction of an expert, or joining a party or any number of case management decisions taken, we are confident that proper consideration will similarly be applied to the application of this rule. No one in the Family Justice System, is blind to the resource implications of any decision, indeed those in front line practise are only too aware, therefore a broad rule applied on a case by case basis, ensures flexibility to achieve the aim, but is not in our view likely to open a flood gate.

We believe there should be a positive duty on practitioners to bring to the Court's notice that it may need to consider these Rules in a particular case, whether in relation to a child or young person, party or witness.

(a) Do you agree with the use of the phrase "is likely to be diminished" to define the persons other than children to whom the rules apply and who may be eligible for assistance (see the following rules 3A.1 (1) (b) and (c), 3A.4 (1), 3A.5 (1), 3A. 9 (1) (a) and (b)?

We agree, as it is an open phrase that allows for the infinite verity of physical, cognitive, mental, and cultural or other considerations that may impact on an individual's ability to engage fully and fairly in proceedings. It is particularly important that it allows consideration of the impact of coercive control and fear, in cases of domestic abuse or family intimidation, which may affect a witness who in all other respects would be thought to be perfectly capable of participation. The key is to ensure that all the evidence needed to determine the matter justly is before the court, and that parties and witnesses are treated fairly with equality of arms.

(b) Do you think that the proposed rule, which is intentionally drafted at a high level, provides sufficient clarity for judges, practitioners, parties and court staff to be clear about the specific circumstances in which it should be applied?

Yes.

4. In addition to eligibility the special measures in 3A.7 (1) must be used appropriately in order to make sure the court complies with the overriding objective and makes best use of available resources. For example the current provision of intermediaries at court in family proceedings is at the discretion of the judiciary and requires agreement from HMCTS before funding is provided. Consequently, new rules need to reflect this arrangement and support the most appropriate use of such a provision. The current draft at 3A.5 states that the court must consider whether the quality of evidence given by a party or witness is likely to be diminished and, if so whether it is necessary to make one or more of the directions in order to assist the party or witness give evidence. Rule 3A.6 sets out a list of factors which the court must have regard to. Rules 3A.6 (j), 3A.7 (4) and 3A.11 (2) deal with the availability of measures. Current draft rule 3A.4 makes similar provision about a party's participation in proceedings. We would welcome views on whether additional safeguards are required to make sure that the measures are used appropriately and in accordance with available resources. For example;

(a) Should certain measures in 3A.7 (1) be subject to an enhanced level of agreement from a senior judge?

(b) In particular, should there be a further test before a party or vulnerable witness is eligible for assistance from intermediaries?

(c) Should some measures be subject to availability, or should there be express provision for discussion between the judge and HMCTS staff on the availability of a measure before a direction is made?

No. The additional safeguards suggested are about gatekeeping resources rather than protecting the participant in proceedings. We don't see that the involvement of a higher level of judge is appropriate or necessary as there is no justification for treating this case management decision differently to others, many of which have resource implications. Also it will serve to build in delay. What is needed is for every family court in the country to produce a page on their website, which details the measures available and how to make it happen e.g. how to arrange the live link, how to arrange an intermediary. Once the judge makes the direction, it is inevitably in the hands of the parties' lawyers (and often in private family law proceedings, where there are less lawyers – the lay parties) to make the practical arrangements. Better information is needed and should be made public.

5. Factors the court is to have regard to: The Committee noted that reference to a party or witness's employment is not contained in the list of factors the court is to have regard to in draft rule 3A.6(G). Would a party or witnesses employment status be relevant to the consideration? If so, should a reference to employment be included in the list of factors?

No. We don't see this as providing essential additional information.

6. Do you have any other comments on the draft rule?

1. In general we consider that far greater clarity is needed in relation to Article 12 UNCRC and children and young people in private law proceedings. In particular, the wording of 3A.2.3 is descriptive rather than enabling and vague in relation to the responsibility of the court to consider making the child a party under the provisions of FPR16.4 and 5. We are very aware that separate representation for children is a very rare resource and courts are generally discouraged from making children parties save in the most exceptional cases. (See the President's Direction (Representation of Children in Family Proceedings) [2004] 1 FLR 1188 and the Cafcass Practice Note [2006] 2 FLR 143 apply.)
In particular, the former directs that separate representation is a step '*to be taken only in cases which involve significant difficulty and consequently will occur in only in minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of Cafcass to carry out further work or by making a referral to social services or possibly by obtaining expert evidence.'*
Currently only 0.8% - around 1,800 of the nearly 250,000 children whose parent's separate each year have party status in s8 CA 1989 proceedings and all the evidence from research and practice suggests that this figure is much too low and that children who may be at risk or in need in terms of the CA 1989 are slipping through the net. What is needed is a much stronger statutory imperative for courts to consider the need for separate representation-we say this particularly bearing in mind the implications of LASPO and the increasingly tight rationing of the remaining scant legal aid resources.
Whilst the proposed rule change is extremely welcome, we fear that it lacks the necessary statutory teeth to bring about the 'cultural *revolution'* in practice envisaged by the President and would suggest this now would seem the logical time to implement a long overdue piece of legislation, namely s122 Adoption and Children Act 2002.
On two occasions Parliament has approved changes to primary legislation that would

introduce a right to separate representation for children into private law proceedings: first by s64 of the Family Law Act 1996 and secondly by s122 of the Adoption and Children Act 2002 – which extended the list of specified proceedings under s41 CA1989 whereby there is a presumption that a children's guardian is to be appointed by the court. The child would be made a party to proceedings with a solicitor appointed by the court to represent them - thus putting children on an equal basis with other parties and providing them with the benefits of tandem legal and welfare representation. It is a matter of great regret that Section 122 of the Adoption and Children Act 2002 is the only section of that Act which still remains unimplemented thirteen years later.

2. There is mention of giving reasons in the order if the judge decides not to make a direction under 3A.3 (2) i.e. judge decides that a case management direction is not required to help the child participate. We cannot see a specific provision for reasons to be given if the judge decides that the child should not participate at all. That decision (consider whether a child should participate) is at 3A.2 (1). It is in that section that there should be a rule about recording the decision and giving reasons for it. We would expect as a matter of routine that a decision either way is recorded.

3.3. A.2 (3) says the court must consider any views expressed by the child about participating. This begs the question: what if the child has not expressed any views? Does that mean that the court has discharged its obligation to consider views because none where expressed? If the child meets the conditions so the court has a positive responsibility to consider whether the child should participate, then who is going to bring to the court's attention the child's views about participation? In public law proceedings, a children's guardian, the child's solicitor or the social worker can be charged with actively seeking out the views of the child (whether subject to the proceedings or not and effected in some other way by the proceedings). In private children law proceedings the draft rule say this matter needs to be considered no later than the FHDRA (which is the first hearing). As indicated the court cannot reply on what the parents' say as often this will be completely different things, with each having their own take on the child's competence and understanding. We know that the child or young people themselves are highly likely, particularly in very conflictual situations been unable to express a view to either parent for fear of upsetting one or the other and are thus likely to have a wholly different third view. As indicated above Cafcass only do a schedule 2 safeguarding letter and won't speak to the child before the FHDRA as the safeguarding queries are done by making telephone calls with the parties. So then the next chance will be if and only if, the court directs a s.7 report. By that stage the proceedings could be well developed and what of the case where the court never makes a s.7 direction? So who is going to get the views of the child and present them to the court so the court can take them into account when deciding whether the child should participate? The same questions arise re: 3A.3 (4) about how the court must consider any views expressed by the child about how the child wants to participate or give evidence.

4. Finally we would urge that consideration be given to the provision of a programme of interdisciplinary training to accompany implementation of the new rules

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