Nagalro Response to The President's consultation:

Review of the Child Arrangements Programme (private law working group)

About Nagalro

Nagalro is the professional association for Family Court Advisers, Children's Guardians and Independent Social Workers. It has approximately 700 full members in England and Wales who represent the interests of children in a range of public and private law proceedings. Our members are senior, highly experienced children and family social workers who work in a variety of roles. Members also act as Children's Guardians and Family Court Advisers for the Children and Family Courts Advisory and Support Service (Cafcass) where they work in tandem with children panel solicitors to represent the interests of children in care and other family proceedings. Many work as independent social workers and risk assessors providing expert witness reports in a wide range of complex cases coming before the family courts; in fostering and adoption agencies; in independent practice providing therapeutic services; as academics; as supervisors, mentors and consultants. Members have significant experience as managers, chairs of Adoption Panels and other specialist social work practitioner roles. Our members are primarily concerned to promote the paramount welfare of vulnerable children who are involved in family court cases. They have an important role in enabling the child's voice to be heard in court proceedings, so enabling compliance with Article 12 of the United Nations Convention on the Rights of the Child. They assist family courts to reach decisions about what plans will safeguard the child's interests and best provide for their future welfare.

Nagalro welcomes the opportunity to comment on the recommendations on the President's Review of the Child Arrangements Programme.

Annex 3 : Executive Summary of Recommendations

Nagalro wishes to support the validity of all the recommendations (numbers 1-30) and encourages their implementation as soon as possible.

Annex 12 : Consultation Questions

Question (a) – SSFA : We support the formation of the 'Supporting Separating Family Alliance'. We support the recommendation that the SSFA is overseen by Local Family Justice Boards.

Question (b) : MIAM : We support the five ways proposed to revitalise the MIAM in paras 61-69 of the review.

Question (c) – Gatekeeping and Triage: We support the proposed changed arrangements for gatekeeping, and for triaging cases.

Question (d): Tracks : We agree with the proposal concerning the allocation of cases to 'tracks' once in the Court system. The proposed distribution of work between tracks 1 and 2 seems very sensible.

Question (e) – SPIP's : We support the proposal to encourage more parents to attend SPIP's. We suggest that the attendance at SPIP's should be as early as possible after an application has been made to the Court. This would ensure that any change in 'attitude' by both parents to each other and the child involved (after attending the SPIP) can occur as early as possible and hence maximise the productive use of Court time at future Court hearings.

Question (f) – Returners : We support the proposals in relation to ' returner' cases, particularly relating to the early allocation to the original tribunal for triage.

Question (h) – General : We are concerned that Courts are not uniformly implementing, in full, the definition of 'Domestic Abuse' as specified in Practice Direction 12J.

We are copying below Nagalro's recent submission to the MoJ in response to their request for **Assessing risk of harm to children and parents in private law children cases** the contents of which are relevant to the CAP review.

Nagalro Response to Ministry of Justice Call for Evidence: Assessing risk of harm to children and parents in private law children cases

[1] Please tell us in your own words about how the family court responded to allegations of domestic abuse or other serious offences in your case, and/or the effects on you and/or your children.

Our members are social work practitioners in the family courts. They prepare Safeguarding letters, Section 7 reports, represent children's interests as Children's Guardians when appointed by r16.4 Family Procedure Rules 2010 though Cafcass and NYAS. They also work as independent social workers and provide expert reports to the court.

[2] Was your experience in the family court:

☑ In 2018-2019 ☑ In 2014-2017 ☑ Before 2014

[3] Are there any difficulties in raising the issue of domestic abuse or other serious offences against a parent or child, in private law children proceedings?

The experience of Nagalro members informs us that there are no particular difficulties in raising the issue of domestic abuse or other serious offences against a parent or

child in private law proceedings. However, there are difficulties with how such issues are then dealt with by the court.

[4] How are children's voices taken into account in private law children proceedings where there are allegations of domestic abuse or other serious offences? Do children feel heard in these cases? What helps or obstructs children being heard?

There is a serious problem in children's voices not being taken into account in private law cases. Children frequently have needs and interests which do not coincide with those of the parents and cannot be adequately represented by those parents who are focused on their own dispute. The initial report by Cafcass to the court, referred to as the Safeguarding Letter, is based on very limited information; namely the police and the local authority checks and a telephone interview with each parent of no more than 20 minutes duration. The child is not spoken to or seen and therefore the children's voices are not heard at all at this crucial, early stage.

Furthermore, the Section 7 reports are, frankly, rather superficial. The time allowed by Cafcass to undertake enquiries is inadequate and this does not allow sufficient time to speak to children, let alone develop a rapport with the children, allowing them to express their views.

The obstructions: Children who have experienced domestic abuse, find it difficult to open up, due to their divided loyalties, alignment with one parent, fear of upsetting either parent, or the resident parent in particular. They may have witnessed the abuse and may be frightened and have ambivalent feelings towards both parents. Often it is seen that the children align their views with the parent with whom they live and refuse to see their estranged parent to please the resident parent. Children may not feel that they have the necessary permission from the residential parent to express what they may be genuinely worried about in terms of their own safety and that of either or both of their parents or indeed to see their estranged parent. Equally if the allegations are false, they may be influenced to repeat the allegations and refuse to see the other parent. What appears initially to be obstruction, may due to lack of skill on the professional's part to understand the child's world, or a lack of time to gain the child's trust.

What helps? It helps to get to know the children, to build a relationship with them, to allow them to feel comfortable expressing their views, to understand the influences from the parent and extended family members and their attitude towards the estranged parent. Children need assurances that they will be safe and need time to come to believe those assurances.

What would help? Far too few children are separately represented under the provisions of r16.4 Family Proceedings Rules 2010 and there are too few clear procedural links between s7 Reporting and r16.4 representation to guide practitioners in complex cases.

[5] Are fact-finding hearings held when they should be? If they are not held, what reasons are given?

In some cases, findings are 'agreed' at court which bear little relevance to the reality or experience of the victims or the perpetrators. Although done with the best of motives, this often does not resolve the situation between the parents, because the underlying issues have been left to fester in an effort to reach an agreement leading to the children having time with the other parent. Additionally, there is often a delay in the finding of fact hearings, where they are held. The children's relationship with the other parent is adversely affected by the delay and the children's behaviour towards the other parent may have hardened. Parents who allege domestic abuse, will often have access to public funding to be represented. The other parent will be faced with either, potentially unaffordable legal costs, or representing themselves, the latter often adding to court delays. A number of parents simply give up what appears to them to be an unequal struggle. We cannot know how many of them were actually abusive and how many were simply unable to protect the children from the other parent's abusive behaviour.

[**6] Where domestic abuse is found to have occurred, how is future risk assessed and by whom? Is risk assessed only in relation to children, or also in relation to the non-abusive parent?**

The experience of the members of Nagalro informs us that there is insufficient time allowed to investigate the circumstances of the family. Any risk assessment in Section 7 reports is superficial and does not sufficiently grapple with the pertinent issues in the family about how domestic abuse effects the child and the non-abusive parent. This is likely to be related to the issue of inadequate fixed fees for such reports and lacks flexibility.

In some cases, independent social workers or other social work professionals are appointed who are very experienced and skilfully undertake the assessment of risks to the child and the non-abusive parent. This allows a timely and satisfactory outcome for the children where contact is recommended. In cases where the assessed risk for the child and the non-abusive parent is too high, no contact or only indirect contact is recommended.

[7] How effective is Practice Direction 12J in protecting children and victims of domestic abuse from harm?

Practice direction 12J, *where implemented*, is very effective in protecting children and victims of abuse. However, Nagalro understands that the implementation is hampered by the lack of resources in the courts and lack of legal advice available to the parents.

[8] What are the challenges for courts in implementing PD12J? Is it implemented consistently? If not, how and why do judges vary in their implementation of the Practice Direction?

Practice Direction 12J, if applied consistently and with adequate resources, is a good mechanism to protect children and non-abusive parents. However, there is concern

about its inconsistent implementation across the country and lack of proper resources.

The information available at the FHDRA is inadequate where domestic abuse is raised as an issue. The safeguarding letter merely 'flags up' the issues and there is no assessment of risk or attempt to understand the dynamics between the parties, significant others and the child.

There are delays due to unavailability of court timetable and waiting time for Cafcass to complete Section 7 reports, which often do not contain adequate risk assessments. Litigants in person struggle with understanding court processes and preparing statements.

Some courts have resources to keep the parties separate, but other courts have no private areas and victims have to face the perpetrators in the common waiting areas, or face cross-examination by those who have subjected them to repeated serious violence.

[9] What has been the impact of the presumption of parental involvement in cases where domestic abuse is alleged? How is the presumption applied or disapplied in these cases?

Section 1 (2A) Children Act 1989, in reality, did no more than to express within the statute the approach which the courts had been taking for very many years. It was always declaratory rather than effecting any real change in the law. Where domestic abuse is alleged, the courts will generally follow paragraph 25 of PD12J and decline to make a child arrangements order until after the fact finding hearing has taken place. Whilst this protects children in cases of actual abuse, it also disrupts the lives of children where the allegations of abuse are not established and wrongly harms their relationship with the other parent. Delay (of some duration) is inevitable whilst the court simply does not know what has, or has not, happened. Child contact centres, where they are adequately resourced and have capacity at fairly short notice, are a possible solution, but there are currently nowhere near enough of these.

[10] Where domestic abuse is found to have occurred, to what extent do the child arrangement orders made by the court differ from orders made in cases not involving domestic abuse?

In our members' experience, the child arrangement orders are usually not made where there has been domestic abuse unless and until the offending parent has gone through the remedial training and is able to demonstrate to the court that contact can take place without risk to the child or the other parent.

[**11] What is the experience of victims of domestic abuse or other serious offences in requesting arrangements to protect their safety at court? Please tell us about experiences where safety measures have been provided and where they have not been provided and when this occurred.**

The arrangements very much depend on the local courts. Some courts have consultation rooms that can be used by the victims whilst waiting for their case to be heard or to have a private consultation with their legal advisor (if they have one).

Many courts do not have the facilities to make arrangements during waiting time, or give evidence with a screen. It results in the victims have to face the perpetrator that causes worry and distress.

There is a lack of space in the District Judge's chambers for adequate safeguards to be put in place, such as, screens. Some parents who are litigants in person, do not have knowledge that safety measures can be available at court to protect them.

[12] Do family courts make the right decisions about whether an alleged victim of domestic abuse or other serious offences is vulnerable?

In our members' experience, generally the right decisions are made where the parents have had the benefit of the legal advice. However, where the parties are not legally supported, some parents 'agree' to findings which may bear no resemblance to the actual experience of the victims or the perpetrators. The value of such findings has limited value in assessing harm to the children and/or the victims of domestic abuse.

What helps? - our members are involved in such cases as Cafcass Associates, NYAS Caseworkers and Independent Social Workers. In our experience, an in-depth risk assessment of the nature and dynamics of the relationship between the parents, between the parent and child and other influences is essential.

For example, some victims remain opposed to their child having any relationship with the other parent even when any risk can be safely managed. In some cases, there have been serious, but exaggerated or false allegations made by a parent which have not been proved. In such cases, an assessment of the dynamics between the parties and other influential people in the child's life has led to a successful resolution for the child, enabling them to have a relationship with both parents.

Making the right decision is hindered by lack of relevant and sufficient information, available to the court about the family's circumstances and dynamics. As stated earlier, section 7 reports may lack sufficient depth and breadth to make safe decisions due to the limited time available to undertake sufficient enquiries. It is to be noted that, where self-employed Cafcass Associates are deployed, Cafcass pay a fixed fee for all cases despite the number of parties and children involved in a case thus limiting the extent of enquiries that can be undertaken. Our members inform us that they are routinely undertake enquiries for which they are remunerated to safeguard the child's welfare.

[13] What is the experience of victims of domestic abuse and other serious offences of being directly cross-examined by their alleged abuser/alleged perpetrator? What is their experience of having to ask questions of their alleged abuser/perpetrator? Please tell us about experiences where direct cross-

examination was allowed or required and when this occurred, as well as experiences where direct cross-examination was avoided in some way – please specify how and when this occurred.

Nagalro does not have information available to respond to this issue.

[14] What are the challenges for courts in implementing FPR Part 3A and PD3AA? Are they implemented consistently? If not, how and why are they inconsistent?

The Judges are generally aware of the vulnerability of the witnesses. The implementation is hindered by the lack of resources in the courts.

[15] How effective are these provisions in protecting victims of domestic abuse or other serious offences from harm in private law children proceedings?

There have been examples where there are allegations and counter-allegations which makes it difficult to conduct the finding of fact hearing. In one case, one party (mother) was legally aided and was represented. The father did not qualify for legal aid and was not represented despite alleging to be subject of domestic abuse. In this case, the father was required to prepare questions in advance and for the Judge to ask the questions from the victim. This places one party at a disadvantage who cannot ask supplemental questions which usually arise out of the responses to cross-examination. It is of note that the level of protection available in criminal cases is not mirrored in the Family Court. For example, in the Crown Court, the Defendant in a rape trial would not be permitted to personally cross-examine the alleged victim. Where the same issue is being heard in the Family Court, there is currently no such prohibition. This is a pure resource issue. Judges often sit in both jurisdictions and many advocates regularly appear in both courts and so there is no difficulty with the personnel. It is simply a matter of making the rules and resources available within the Family Court.

16] What evidence is there of repeated applications in relation to children being used as a form of abuse, harassment or control of the other parent?

It is understood that there are 30% repeat applications. However, it is not evident that such applications are generally used as a form of abuse, harassment or control of the other parent. In our experience, repeated applications are where final orders have been made without sufficient knowledge and understanding the family's needs and dynamics. Essentially, the order made was not adequate to meet the needs of the parties, or to address the fundamental issues. There is pressure on courts to bring cases to a close as soon as possible rather than keeping control over matters until a tested and working solution is in place.

Where the arrangements do break down, the parties have no other option other than to return to court. In our experience, such situations are resolved by undertaking an in-depth assessment of the parties, understanding the victims' needs, identifying and understanding the risk factors and putting safety measures in place to keep the child

and the non-abusive parent safe. Such approach attracts cooperation from both the parents to resolve their issues.

Separate representation of the child's interests and wishes and feelings can be a very effective tool in breaking up a toxic adversarial parental dyad and should be considered much more often.

[17] Under what circumstances do family courts make orders under s.91(14)?

Section 91(14) is rare and in our experience, the courts have a clear understanding of the basis upon which such orders can be made. For example, in one case, the father continued to make repeated applications when nothing had changed. He had not sought remedial support to address his abusive behaviour, despite professional advice that he must, nor was he able to understand the harm caused to the child by his repeated applications. In this case, it was appropriate to make an order under s91(14). In other cases, where final orders are made based on an analysis which has not been well thought through, the child arrangements orders break down because there has been no reliable solution found to the resolve the difficulties of the family.

The courts may also need to be mindful of the situations where child arrangements orders are deliberately frustrated to deprive a child of his/her relationship with the other parent.

[18] How do courts deal with applications for leave to apply following a s.91(14) order?

Nagalro is unable to comment on this issue since our members are not usually involved in these decisions.

[19] What are the challenges for courts in applying s.91(14), including applications for leave to apply? Is there consistency in decision-making? If not, how and why do inconsistencies arise?

Nagalro is unable to comment on this issue for the reasons above.

[20] How effective are s.91(14) orders in protecting children and non-abusive parents from harm?

Nagalro is unable to comment on this issue for the reasons above.

[21] What evidence is there of children and parents suffering harm as a result of orders made in private law children proceedings, where there has been domestic abuse or other serious offences against a parent or child? (This can include harm to a parent caused by a child arrangements order which requires them to interact with the other parent in order to facilitate contact). Please give details of the type(s) of harm that have occurred, when the harm occurred, the type(s) of orders made and whether they were made by agreement between the parties or their lawyers, or a decision of the court

Our members' experience informs us that where a finding has been made, there is usually a requirement for the perpetrator to undertake further work to address their abusive behaviour followed by an assessment of the impact of such work to ascertain whether the parent can have a safe relationship with the child. Our experienced members have been appointed by the courts to work with the parents to address issues of concern with a significant degree of success. Such appointments assure the non-abusive parents that the professionals take into account their concerns and recommend orders that facilitate a safe relationship between a child and the other parent. Equally, our members report that where there has been no change in the parent, the courts have been able to rely on the evidence of the social work professional when making orders for there to be no direct contact, in order to keep the child and the non-abusive parent safe.

[22] What evidence is there about the risk of harm to children in continuing to have a relationship – or in not having a relationship – with a domestically abusive parent (including a parent who has exercised coercive control over the family)?

Domestic abuse has lasting harmful impacts on children and there is a body of research and literature to show this, including, but by no means limited to, the work of Drs Sturge and Glaser.

Beyond this, the answer depends upon how well the abusive parent has acknowledged, accepted and reformed the abusive behaviour that was likely to cause harm to their child. This requires time and resources but it often leads to a safe relationship between the child and the parent. Where this can be achieved, this is the best and least damaging outcome for the child. It must be remembered that even where a parent is abusive, children will often continue to seek a relationship with that parent, to meet the child's needs. This can be dangerous to the child where either the parent is quite incapable of meeting those needs or is a risk to the child's safety. The point to understand is that keeping the child safe and promoting their best interests can be much more complex than might at first appear.

In cases where the other parent has addressed their behaviour but the victim is (quite understandably) distressed by having to face the other parent, the involvement of contact centres (where they can be afforded and are available), involvement of the new partners or other family members have safely facilitated the relationship between the child and the parent.

In cases, where there is no acknowledgement of the harm caused or likely to be caused to the child and the non-abusive parent, then orders for indirect contact only have reflected the need for the welfare of the child to be the paramount consideration.

[**23] What evidence is there about the risk of harm to children in continuing to have a relationship – or in not having a relationship – with a parent who has committed other serious offences against the other parent or a child such as child abuse, rape, sexual assault or murder?**

Where there has been a comprehensive evaluation by an expert (Social Worker or Psychologist), this has assisted the courts to make appropriate orders to reflect the degree and nature of the harm likely to be caused and whether or not such harm can be safely managed. These decisions are inevitably fact-specific and it would be dangerous to generalise.

[24] Are there any examples of good practices in the family courts or which the family courts could adopt (perhaps from other areas of law) in relation to the matters being considered by the panel?

Nagalro members have received positive feedback from the parents and lawyers where they have undertaken comprehensive assessments that have informed a safe decision making for children and the parents.
One of our members received the following feedback:

"I met [Name of the SW] in a difficult and protracted court case where her skills, knowledge, commitment and thoroughness were highly impressive and key to the eventual resolution. I have been in the area of family law for some 15 years and I can say without hesitation that she is one of the best social workers that *I have ever come across who showed impressive perseverance, conflict resolution skills and commitment, applying a combination of her legal training, report writing skills and social work background to turn a very difficult case around".*

[25] Do you wish to make any other comments on the matters being considered by the panel?

Nagalro suggests a review of the evidence which is made available to the court when considering the applications for child arrangements orders. Cafcass is charged with the responsibility to provide evidence to the court through Safeguarding letters and Section 7 reports.
Nagalro is of the view that there is very little provision in the present system for children's wishes and feelings to be ascertained which should be done after establishing a relationship with the child. This is a very important aspect of the evidence that must to be available to the court. Although the decisions being made impact most directly on the child, they are often the least consulted and the voice which is least heard.

Nagalro would urge the panel to undertake a further exercise to review how the whole private law system works for children and how it can be improved that would serve children's interests better.

In order to formulate an effective policy, the following information needs to be obtained and evaluated:

1. How many cases are disposed of at the first direction hearing?

2. How many s7 reports are undertaken by Cafcass or the local authority on average in each case? Each takes approximately 25 hours work to complete. Nagalro believes that in-depth assessment undertaken at the beginning of the proceedings would not cost more overall, but would save finance, time and emotional wellbeing of the children and their families. However, the actual information is needed to ensure effective use of current resources that can lead to safe decisions being made in the children's best interests.

3. How many cases include sufficient information about the children's wishes and feelings?

4. The percentage of cases that are repeat applications.

An evaluation of above information may lead to an understanding of how courts are responding to the private law applications and how they are being resolved. The outcome may be that an in-depth assessment is undertaken at the start that can differentiate different cases, such as:

- **The dispute is likely to be resolved with some guidance to the parents**. Those cases that are resolved here, are at the Safeguarding letter stage; such cases may in fact be more suitable for mediation. Legal aid at this stage is crucial to save more money later as lawyers are the best people to persuade reluctant parents of the potential benefits of mediation.
- **The dispute is** likely **to be resolved with additional support**, such as SPIP, Parents Apart Programme, support from the contact centre etc.
- **The dispute may** require **Finding of Fact hearing**.
- **The dispute is** likely **to need expert services**, such as DVVP, expert sexual abuse assessments and therapeutic services.
- **The dispute may** lead to no contact if the risk to the child cannot be managed.

Based on the information gathered, it may be that new pathways can be established that would make more effective use of the current resources and result in better outcomes that are in children's interests.

In particular, we would urge the panel to give urgent consideration to the question of whether the powers contained in section 41(6A) Children Act 1989 (as inserted by s122 Adoption and Children Act 2002) should be used to add s8 orders to the list of specified proceedings in which a child could routinely be made a party and represented by both a Children's Guardian and a solicitor. Twice parliament has looked at the evidence (see also s64 Family Law Act 1996) and introduced legislation to address the problems for vulnerable children in high conflict and complex cases

and twice implementation has been shelved to the continuing detriment of children and their interests

Nagalro would be willing to assist the panel in taking these suggestions further.

Contact us at nagalro@nagalro.com or telephone 01372 818504