

The National Youth Advocacy Service response to the Legal Services Commission Consultation “Family Legal Aid Funding from 2010: A Consultation”

Information about NYAS

NYAS is a national, not for profit, children’s charity that provides legal advice and representation for children and young people, including separate representation for children under Rule 9.5 in accordance with the rules of the court, the President’s Practice Direction, and the NYAS/Cafcass protocol.

Foreword

The Consultation paper indicates that the proposals set out in the paper are partly as a result of the concerns of the sustainability of legal aid, given the significant increase in family legal aid average case costs. Yet ‘it is not about cuts’, there is an expectation ‘to spend the same under the new scheme’. The Foreword emphasises the values that underpin legal aid - improved client access, quality services and value for money – and the protection of representation and advocacy services for families. It is our view that this should include access to quality services by children and young people. The impact of these proposals will be to cut funding from significant areas of our work and to remove those quality services from the scope of the fund.

The Consultation proposes standard fees, fixed fees and reforms affecting other areas of family remuneration including payment to cover some expert fees. The LSC assert that they have been called upon to fund activities that are the statutory responsibility of other agencies which is not an appropriate way to use legal aid funds. It is our view that the LSC are impeding the responsibility of the Judiciary under the Children Act to ensure that the welfare of the child is paramount, and that that is encapsulated within the Welfare Checklist.

1. The Executive Summary

The impact on NYAS of the proposals is significant. The proposals within the Consultation Paper represent a direct attack on the work of NYAS, in particular the 9.5 separate representation of children in Private law proceedings. It does not address the difficulties that will ensue for children and young people if the work currently undertaken by NYAS is excluded from scope.

It does not acknowledge the importance of an independent service for those children and young people where the relationship with statutory services has broken down, nor does it address the difficulties caused by damaging delays and further anxiety and estrangement for children from their non resident parent. Whilst we appreciate the need to reduce costs, it is important that children and young people continue to have access to independent justice which has due regard to their welfare.

Summary of Proposals

Introduction to proposals

The context and objectives of the Consultation assert that this is a cost controlling exercise, although not cost cutting! It is our view that it will not 'provide a step to allow for solicitors to prepare for Best Value Tendering'; the proposed standardised payment system is far from simple and there will be insufficient time for adjustment to any changes which follow the consultation, before the BVT exercise which has already been announced as phase 2, and scheduled for July 2009.

NYAS considers that the LSC should ensure that reforms continue to provide access to justice for all children and young people. NYAS believe that the LSC need to ensure that existing valuable services are not disrupted, whilst also ensuring best value. This is of particular relevance in respect of the service offered by NYAS to children and young people nationally in Rule 9.5 appointments which come via the Courts. All referrals to NYAS are made in accordance with the Cafcass/NYAS Protocol with specific case approval by the LSC for funding.

The Consultation purports to be about 'increasing access to priority family services for parents, children and others', however it is our view that the impact of these proposals, and the proposals in 'Civil Bid rounds for 2010 contracts', will be to restrict access for children and young people.

Private Family Law Representation Scheme

The proposed structure and fees for private law representation are to include separate representation of children in private law proceedings under rule 9.5.

Representation of children is significantly different to representation of parents. It requires more time to take instructions, communicate legal advice effectively and accurately reflect a child's true wishes and feelings. Where a child is not competent a full assessment needs to be undertaken to provide a report with a recommendation in the best interests of the child. The child's representative is often the lead solicitor in instructing other experts, because of the impartiality and the focus on the child and as such Rule 9.5 and Rule 9.2 appointments should be excluded from the scheme.

Proposed harmonisation of rates:

There is concern that the effect of these proposals will be to reduce the availability of skilled and experienced Counsel. There is no recognition of the different and particular skill sets required for different roles. The proposals fail to recognise the benefits in terms of cost, of having experienced practitioners who will often be instrumental in bringing about a satisfactory and speedy conclusion.

Family Funding Scope Changes

NYAS strongly disagree with the proposal to remove from scope the funding of solicitors acting as independent guardians and the proposed removal from scope of all independent social work in cases where Cafcass / Cafcass Cymru do not provide for a Guardian under Rule 9.5.

NYAS caseworker costs are comparable to those of Cafcass and we accept the need for the reduction of fees currently charged to the fund at rates of up to £70 per hour. NYAS rates have not increased since 2002.

We note that there are no proposed changes to the Court Rules which allow the appointment of NYAS as a suitable agency to act as Guardian. There is an urgent need for a 'joined up' approach by government departments to ensure that a funding route is established which allows for the continuation of our work and maintains our independence.

2. Introduction

The proposal is to remove certain disbursements from the scope of funding as part of the drive to ensure that legal aid resources are focussed on legal advice and representation. It ignores the imperative within the Children Act 1989 for the courts to ensure that the welfare of the children is paramount. It will remove the effective provision for children provided by NYAS through its tandem model of separate representation. It does not take into account the long term savings to the public purse of this specialist and independent intervention, and ignores the effectiveness of the model for children caught up in protracted and long standing family disputes. It will leave a gap in the provision of this much needed service to vulnerable children and young people. The increasing number of referrals and the growing backlog of cases provide evidence that Cafcass as the statutory agency, cannot meet the current need, and undoubtedly would be unable to respond to any greater demand upon their services.

The rising Cost of Family Legal Aid.

We acknowledge the need to address rising case costs but do not consider that Para 2.8 applies to Separate Representation under R 9.5. There has been no differentiation made within the analysis of private law costs, to show the cost change for Rule 9.5 appointments. In our experience there has been an increase in the volume of R 9.5 work. In contrast to the LSC's submission that they have spent more money on helping fewer people, our caseload demonstrates that more money has been spent on helping more children under Rule 9.5, in increasingly complex and demanding cases.

Legal Aid Market

The Consultation indicates at paragraph 2.13 that the LSC ‘believe that the services we purchase should be expressed in terms of outcomes achieved not time spent. We want public money to be spent rewarding quality work, carried out efficiently.’

The ‘systematization’ of family legal aid work will not achieve a better understanding of the real costs of family work. Block contracting, especially with price competition, will drive down standards, reduce time spent with clients, and encourage the employment of less qualified and experienced staff.

It is our view that the ‘restructuring of the market’ will result in a ‘one size fits all’ approach to the provision of legal advice and representation in the most sensitive area of human experience. It will deny some children and young people, caught up in the most acrimonious parental disputes, the positive outcomes achieved from having the opportunity to have their wishes and feelings properly understood by the courts. It will also leave some vulnerable children exposed to the risk of significant harm.

Scope of Experts payments

NYAS accepts the need to reduce some experts’ costs however NYAS is extremely concerned at the proposal to remove from scope independent social work costs and the cost of solicitors acting as guardians. We consider that this constitutes a direct attack upon our work, where expert social work opinion supports our achievement of effective outcomes for children in entrenched and complex Rule 9.5 cases. We consider that there needs to be full and open discussion about these proposals which would have a major impact upon our work.

3. Background to the Proposals

Making legal rights a reality for children and families: LSC strategy for family legal aid, March 2007

“The government’s vision for the family justice system is to put children at the heart of the system, protect vulnerable people, ensure the system is accountable, and to provide simple processes that prevent unnecessary delay.”

This is not reflected as a primary intention of the LSC in the consultation, despite reference to the research from 2007, in order to demonstrate the intentions of the LSC. Further, the intention to purchase ‘integrated family and social welfare law services’ is undermined by the removal from scope of the entire welfare element of Rule 9.5 work. We do not agree that the current Consultation ensures the focus remains on the client needs of children and young people, but actively discriminates against them.

Equality and diversity

The LSC highlight that they must examine how its policies impact on the experience of diverse groups and in particular the most vulnerable groups in society. NYAS consider that the needs of children and young people need to be taken into account as a vulnerable group. We agree that “legal aid is fundamentally about equality and rights and that any reduction in access has a significant negative impact on excluded groups”. The NYAS model acts flexibly and effectively for children and young people and this should be given specific consideration by the Legal Services Commission in respect of the long term outcomes and savings to the public purse as a result of our intervention. We know that NYAS’ work produces savings by moving entrenched cases quickly through the courts and achieving effective outcomes for the children, thus reducing the number of applications submitted to the Court where the child is the subject. NYAS believe that there would be a disproportionate impact on children and young people if the proposals to exclude NYAS caseworker costs in R 9.5 appointments are implemented.

We do not agree that these proposals support equality and diversity but will seriously impact on the effective service currently being provided to children and young people caught in the middle of acrimonious family disputes. NYAS is committed to working in partnership with the LSC and regularly engages with the judiciary, the Family Justice Council at national and local levels, and with a number of stakeholders to ensure that we achieve the clear outcomes expected of us in providing legal advice, assistance and representation to children and young people and to improve outcomes for children. We do not believe that the proposals set out in the consultation will achieve that common aim. It is significant that NYAS as a recognised and closely scrutinised provider of Rule 9.5 representation is not included in the LSC’s list of consulted family groups particularly when the proposals set out in this consultation will have such a significant impact on the Charity.

NYAS is committed to working in partnership and we are committed to the effective management of the Legal Aid budget, which we feel is evidenced in our clear practices and procedures.

4. Private Family Law Representation Scheme

Before continuing with ‘the move towards market principles’, the LSC should consider the appalling consequence of such blind adherence in the financial markets. A more measured approach to allow the continuation of specialist, niche services for children, with appropriate cost limits imposed, would ensure sustainable access to the most vulnerable children across the country.

Fees that are based on office of origin would have a seriously detrimental effect on our ability to provide a national service to children and would penalise us for maintaining a main office in the North West. Court based fees would be more realistic.

Best value tendering, and a regional determination of fees payable, will make it impossible to maintain a flexible and specialist service, responsive to the needs of children and the courts, wherever they are in England and Wales.

Children

Level 3

NYAS does attempt to ensure resolution of cases at the earliest opportunity, with the least possible intervention of the court. It is recognised that 9.5 cases are the most entrenched and difficult of cases and the idea that they can be resolved through mediation is unrealistic - by the time these cases reach NYAS they have exhausted every possible avenue for resolution. It is our view that, like mediation, the separate representation of children should be acknowledged on the grounds that each case resolved via separate representation brings savings to other parts of the fund. NYAS continues to demonstrate that our intervention offers effective long term outcomes for children and significant long term savings to the public purse. It is important that children are adequately represented and given equality of arms through appropriate specialist advice in any proceedings in which they are involved.

Rule 9.5 – Certificates issued to joined children

It appears that representation of children under R 9.5 is being compared to that of parents represented within Section 8 of the Children Act 1989. It is our view that the work undertaken is very different. The representation of the parents does not involve detailed consideration of the welfare checklist on behalf of the child, a crucial element of representation of children. By virtue of meeting the criteria for separate representation under R 9.5 the case is distinguished as complex/exceptional. As such it has not been able to be resolved in the usual way and necessarily requires specialist and expert opinion, and is likely to result in increased costs. It is not appropriate to draw a comparison between representing children in Rule 9.5 cases and other Private Law children cases.

5. Family Funding Scope Changes

The LSC intend to ensure that limited resources are focussed on legal advice and representation and not diverted to fund inappropriate costs.

It is our view that the proposed changes are significant scope changes which will have a detrimental impact on the ability of the Courts to make decisions in the best interests of the child where the welfare of the child is paramount as per s1 (1). This again raises the same issues as those raised by NYAS in 2006 in response to the Consultation on Separate Representation of Children, where the need for a joined up approach between Government departments was highlighted. The impact of these proposals on the children

represented through the work of the National Youth Advocacy Service will be devastating.

Consultation questions

Q.10 Do you agree that Rule 9.5 cases should be included in the fee scheme? If not please provide evidence as to why they should not.

Whilst it is acknowledged that this Consultation is not about the principle of fixed fees, NYAS believes that costs should continue to be paid on hourly rates. Rule 9.5 cases are inherently more complex by virtue of meeting the President's Practice Direction. In addition the need to take instructions from children and young people requires particular skills and more time to ensure that they are empowered within the legal process in which they are often unwilling and reluctant parties.

Q 11 Do you agree with our proposals on multiple parties? – Domestic violence

This question focuses on the fees payable and does not consider the Practice Directions, protocols and judicial guidance relating to issues of domestic violence. These proposals will lead to inequality in litigation, as more parents will be unrepresented. Serious consideration needs to be given to the impact on children where an abused parent feels pressured into reaching an unsatisfactory financial arrangement, and there is a need to address the serious issue of increased risk of harm.

Q 19 In light of the findings from the Care Proceedings File Review do you agree with our proposal not to proceed with bolt – ons?

No. Care cases as with Rule 9.5 Cases, are by their very nature exceptional and the LSC should not be seeking to identify any single common factor or group of factors which would allow differentiation of payment. There clearly needs to be a more detailed analysis of what constitutes complexity in both these areas of work.

Q.44 Do you agree with this proposed approach to panel uplifts? If not, which fees would you reduce in order to pay for panel uplifts?

No. Following the Consultation on Civil Legal Aid Contracts 2010, the LSC set out proposals for requirements for Panel membership which will impact on practice costs. It is not reasonable therefore to remove panel uplifts.

Q 47. Do you agree with our proposed approach to the payment for self employed advocates' preparation for advocacy?

No. It is inappropriate to suggest that less preparation is required for interim hearings, than for final hearings, particularly in complex cases. In fact, good preparation at an early stage can lead to earlier resolution and reduced costs to the LSC fund as a result.

Q 48. Do you agree with our proposed approach for paying for conferences?

No. Solicitor advocates and self employed advocates should be recognised equally for their attendance at conferences

Q 49. Do you agree with the proposal of paying a 'per hearing' fee and if not would it be more appropriate to pay to pay a standard fee for all hearings up to one day with additional payments for hearings going over one day?

No. There is no research into Private Law to support these changes. It is our experience that a number of interim hearings do go beyond one day, and there are no identifiable predictive indicators of this. To pay a standard fee is reasonable only where the level of that fee accurately reflects the time and work expended.

Q 50. Do you think there should be different fees for different types of hearings?

No. The input at each hearing in R 9.5 cases is significant as the focus is essentially early long term resolution for the children involved.

Q 51. Do you agree with our proposals to pay tapered per hearing fee for interim hearings? Would it be preferable to pay a fixed amount for all hearings lasting up to one day with additional payments for hearings going above that time?

No. All hearings should be equally remunerated. The LSC proposals suggest that the Judiciary are not effective case managers and do not make every effort to ensure that hearings are proportionate and necessary. This is not our experience and it is insulting to both the Judiciary and the legal profession who are duty bound to adhere to their respective codes of conduct and to ensure the swift and effective conclusion of proceedings.

Q 52. Do you agree with the proposed approach of paying a per hearing fee for the final hearing?

No. This approach does not ensure appropriate remuneration.

Q 53. Do you agree that in private law cases the exceptional threshold should be when a final hearing exceeds two days?

No. As there is no research undertaken in private family law, it is inappropriate to calculate hearing length for private law final hearings in the same way as for care proceedings. There are an increased number of litigants in person in private law proceedings, in particular in Rule 9 .5 proceedings, and as a result this leads to an increase in the length of hearing time. There is an unsatisfactory analysis and lack of accepted definition of complexity. Length of hearing does not of itself necessarily

constitute complexity. The LSC have failed to take account of those factors which are only too familiar to practitioners in the field.

Q 54. Do you think that there should be exceptional fee payable for interim hearings?

No. An interim hearing should be paid for at the same rate per day rather than taking a tapering approach.

Q 55. Do you agree with the proposed approach to exceptional cases?

No. Each day of a final hearing should be equally remunerated. In addition there should be no distinction between self employed advocates and solicitor advocates in payment for preparation for final hearings.

Q 57. Do you think that there should be an early resolution fee in private law children and/or finance cases?

No. This questions the integrity of the legal profession and suggests that they would encourage early resolution in order to receive the enhanced fee rather than conducting the case in the best interest of their client. For children in R 9.5 cases, pressure should not be exerted on their parents to make early decisions which impact on the ability of the child to be part of the decision making process.

Q 60. Do you agree with our approach to paying for exceptional travel time?

No. It does not take into account the role of specialist national services, and prejudices the ability of the client to seek an advisor with specialist skills outside their local area.

Q 61 Do you agree with the proposed approach of continuing to pay self employed advocates practising at the Bar separately for advocacy?

Yes.

Q 62 – 64 - No objections.

Q 65. Do you agree that the funding of solicitors and others as Guardians in Rule 9.5 cases should be removed from scope?

No. It is the responsibility of the court to ensure that when any decisions affecting a child are made, the welfare of the child is a paramount consideration. s1 (1) Children Act 1989.

The Judiciary should not be fettered by inadequate evidence in respect of a child's wishes and feelings. To suggest that this work can be carried out in its entirety by one government agency, namely Cafcass, is unrealistic. To suggest that placing exclusive handling of these cases by or through Cafcass 'would ensure a consistent quality assured process subject to appropriate controls and inspection, achieving best value for money'

ignores the evidence of both recent inspection report findings and judicial concerns reflected in court judgements.

There is evidence that NYAS already addresses the vacuum in Cafcass service provision and can achieve successful results with those entrenched cases where Cafcass has failed or the relationship with the family has broken down. The proposals would prevent children and young people from accessing independent services. This is particularly important in work with families who have lost confidence in Cafcass. Under these proposals there will be nowhere else to turn for families whose relationship with Cafcass has broken down.

If NYAS services were to be commissioned by Cafcass it would place Cafcass in the position of gate keeping, and would impact on our independence, and our ability to work with those families unable to work with Cafcass.

The stated focus of the LSC is children and families and the proposed changes in scope would destroy NYAS provision of what is acknowledged to be an effective national service. As a result more private law matters which could have been effectively resolved through NYAS will become liable to translate into Public law concerns with an accompanying increased cost to the public purse for many years to come. In addition, Cafcass, an already overstretched statutory agency, will not be able to meet the needs of these vulnerable and damaged children and families, the children will not receive an adequate service and the experience and skills built up by NYAS over many years will be lost.

The proposals seek to exclude NYAS as a provider for separate representation when we have been acknowledged widely as an important provider of this invaluable service for children and young people. They do not take into account any of the established procedural requirements from the LSC to NYAS for the granting of new certificates, nor of protocols agreed between NYAS and Cafcass. If the LSC propose that the funding for Rule 9.5 representation should be paid for by Cafcass alone this sets Cafcass as either sole providers or the gatekeepers for children's representation. This may result in the denial of access to justice for the most vulnerable group of children who are caught up in the difficult and entrenched disputes of their parents. These children must be allowed access to skilled and independent representation and have equality of arms (Article 6 ECHR) without having their right to access to the courts determined by a commissioning body of the State.

The LSC has provided figures to the Law Society and Cafcass without reference to us as to their accuracy - a criticism of the original Separate Representation Consultation in 1996 - and Cafcass have made enquiries of NYAS as to the number of 9.5 appointment cases we currently have. This suggests to us that the LSC have already made its mind up on the outcome of this consultation before it has even closed.

The LSC propose that if Cafcass ‘fail in their duties then this should be challenged appropriately’. In recent years Cafcass has frequently been challenged about their failure to carry out their duties, to little effect, and we invite the LSC to put on record what they believe to be an effective and appropriate challenge to Cafcass in this regard.

The proposals acknowledge that within the court rules some other proper person can be appointed as guardian for the child in private law proceedings if it appears to be in the child’s best interest to be made a party to family proceedings. We note the proposal for the LSC not to fund the appointment of a guardian but only to pay for legal representation under R 9.5. We further note that in the consultation on changes to the *Family Proceeding Rules*, there are no proposals to change the rules about the appointment of some other proper person. ‘NYAS’ could continue therefore to be appointed as guardian by the court, but the funding issues urgently need to be addressed.

NYAS urges Government departments to work together to establish a consolidated funding route, in line with Government strategy in other areas of children’s policy, which supports partnership working between the voluntary and statutory sector.

Q.66 Do you agree that where CAF/CASS does not fulfil its statutory obligations to appoint a guardian the legal aid fund should pay for independent social work expertise in Rule 9.5 cases? If yes, in what circumstances and why?

NYAS strongly believe that the LSC should not distinguish between legal advice and representation and welfare considerations when the Children Act 1989 clearly sets out welfare as a paramount consideration.

We are aware of the difficulties Cafcass has in fulfilling its statutory obligations and we are also aware of the concern about increasing costs to the LSC fund. This brings us back to the longstanding debate about who should pay for what, as an essential part of Rule 9.5 representation. The LSC has a duty to ensure access to justice and say they are committed to the provision of legal services to children and families. In removing social work expertise from scope the LSC is denying access to justice to the most vulnerable client group which they have a responsibility to support. We recognise the wide variation in fees charged by independent social workers and accept the need to cap fees to a consistent level. However, the work of NYAS clearly demonstrates that where Cafcass are unable to provide the appropriate social work expertise, in particular when the relationship with Cafcass has broken down, it is essential that children have access to an independent agency.

Rather than excluding social work expertise in Rule 9.5 cases, and destroying established, valued and effective services for damaged and troubled children, there needs to be a recognition of the value added by an independent agency such as NYAS, and the consequent reduction of cost to the public purse in the longer term. As such it should be the responsibility of the LSC to support this work and recoup from Cafcass if necessary, any costs which they consider to be the statutory responsibility of that other government department.

Whilst the LSC have entered into a Pilot with the Department of Health for other experts, this has not yet been completed and it seems premature to make proposals at this stage. There is no evidence that there will be any cost saving and there is already concern that the level of expertise available within the proposed new arrangements will severely limit the availability of more experienced experts.

The LSC have not addressed the escalating costs of other experts' fees within this consultation. There has been no evidence of an attempt to monitor, cap or standardise the cost of independent social work which the LSC highlights with rates as high as £70 an hour. In contrast NYAS has been intensely monitored and scrutinised. We have been unsuccessful in our attempts to work together with the LSC to address the issues identified in respect of Rule 9.5 work. The LSC have not given consideration to any comparable pilot of alternative models involving independent services, rather they propose to deal with the issues by a blanket removal from scope. We feel that this is a destructive approach.

Annex D Fee Calculations

It is of considerable concern that the LSC calculations require detailed algebraic and mathematical analysis. In view of the limited timescales and the complexity of the entire consultation it has not been possible to spend the time that would be required to be able to comment on the content.

Annex E

Para 1.6 highlights that there has been no review of private law cases due to their volume, yet the LSC seek in the consultation to draw comparisons to the findings within public law.

It is of concern that they have not identified the factors which make R 9.5 cases complex.

The LSC highlight a decrease in private law cases from 2004/05 – 2007/08 by 7.7%, but an average increase cost per case of 14%. There has been no consideration given to the factors that may contribute to this. It is our view that these would include:

- a reduction in the number of suppliers,
- an increased number of litigants in person which puts additional pressure on the cost of represented parties,
- an increase in the complexity of the cases which reflect the changes in family dynamics.

The justification for ruling out Bolt on factors in care proceedings is given as insufficient volume of cases where the factor was present. There has been no consideration of factors relevant to private law proceedings and once again the LSC are not comparing like with like.

We are dismayed that a small group decided upon the review criteria without representation from the NfP sector. Even more concerning is that as a result of the conclusions reached by this group the LSC has sought to use the same evidence and apply the same conclusions derived from public law, to private law cases without review or research to support that approach.

Annex G

Impact Assessment and Equality Impact Assessment

Consultation and Engagement

We are disappointed not to have been part of the Provider Diversity Reference Group nor the Family Stakeholder Group, given the serious implications for our service contained in the proposals set out in this consultation. It would appear from the figures cited in Para 5.48 that NYAS undertake in the region of half those cases not undertaken by Cafcass or Cafcass Cymru. As such we would have hoped to have informed the consultation proposals prior to their publication.

Q.71 Do you consider that the impacts on NFP's are justifiable in ensuring sustainable access to legal services for clients?

The impact assessment suggests that NFP providers of family law will see an increase in their income- as NYAS is one of these providers and the impact of the proposals is such that it may force us to cease our 9.5 work.

We find this assertion incredible but typical of the LSC's inability to accurately reflect the reality of the changes they introduce on a truly comparable basis.

Q.72 What will be the impacts on your organisation if the proposed areas are removed from the scope of legal aid funding?

NYAS would no longer be able to operate the tandem model in R9.5 work. All of our cases are referred directly from the courts in line with the President's Practice Direction and the NYAS/Cafcass protocol. In addition we are subject to stringent monitoring by the LSC in respect of the granting of certificates. In view of the detail in both the Practice Direction and the agreed Protocol, as to the appropriateness of our intervention, the devastating impact of these proposals give no recognition to the highly developed model already in place nor to the recognised value and effectiveness of that model and the long term savings to the general public purse.

The impact of these proposals on the most vulnerable children that we represent will be to deny them access to independent, skilled and effective services. Cafcass are already unable to respond adequately and there will be an increase in the number of children unable to have their interests properly represented. It will limit the ability of the judiciary to appoint a sufficiently skilled and independent agency who they can rely on to bring about an effective outcome in the best interests of the child.

If Cafcass were to be the only providers or commissioners of Rule 9.5 guardians we would no longer be an independent agency, but an adjunct of a statutory body and subject to their gate keeping.

Q.73 What will be the impacts on your organisation if the proposed capped rates are implemented?

NYAS rates are comparable to those of CAFCASS. Professional time £32.00 per hour
Travel £12.50 per hour. NYAS undertakes Rule 9.5 work because we are committed to the difference we make to the lives of the children we represent.

Q.74 Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients?

No. Consideration needs to be given to the exceptional circumstances requiring continuity of the professional for the child, and each case should be considered individually with an appropriate case plan being approved. We consider that the impact of these proposals will be to deny some children access to appropriate legal services which include welfare consideration.

Q 75 What will be the impacts on your organisation if these proposals are implemented?

HMCS

Whilst the LSC make reference to the freeing up of resources to be focused elsewhere and to their commitment to fund the provision of legal services to people in need. There is no detail provided of the extent of resources to be freed up and there is no acknowledgement of the children who will be left in need. It is extremely concerning that there is no commitment to funding from any government department to ensure that the needs of these vulnerable children will be met, if the LSC proposals are implemented.

Software providers

These changes may offer lucrative opportunities to software providers but there is no recognition of the likely impact on organisations of the cost of new software packages and no provision for these costs to be recouped.

Q.76 Do you think there will be any negative equalities impact on clients and providers as a result of the proposals to remove certain disbursements from scope?

Yes

Initial Equalities Impact Assessment

The proposals do not consider the impact on children and young people who will in reality not be provided a service as a result of the proposed changes to be introduced by the LSC. Whilst the LSC indicate not wanting to “disincentive undertaking work for any particular client group and to ensure that the proposals do not have a greater impact on any particular client group” they are in fact preventing NYAS from undertaking the work for which we are known and respected. These proposals discriminate against children and young people, and ignore the specific needs of our client group. There will be a significant and greater impact on our young clients than on any other group of clients.

Under the Single equality Scheme, Para 6.7, the children we serve should be targeted as a vulnerable and excluded group. The effect of these proposals will be to render our client focussed services to be out of scope. The consultation proposals are not congruent with the LSC’s stated vision for legal aid; in particular, it does not support ‘understanding the needs of the public for justice and listening to the client voice’.

Q.79 Do you have comments on any prospective impacts on small firms and self-employed advocates?

NYAS is a charity that delivers a service nationally to an increasing number of children and young people. The impact of these proposals on the charity’s work will be devastating. Under the current proposals NYAS would no longer be able to provide a service under R 9.5, for which we are renowned. All our staff are committed to achieving the best outcomes for children, often by being prepared to work long and unsocial hours to meet the needs of children. It is important to recognise the serious and adverse impact on small and specialist organisations and their staff and clients.

The proposals acknowledge that ‘the potentially small data sets available on which to undertake analysis - restrict any conclusions on the impact’, and in view of the limited data available it is difficult to reconcile this with the statement ‘we do not expect there to be a disproportionate impact on small providers’ (Annex G Para 9.2)

It is also difficult to reconcile with the table showing cost benefit analysis contained within the main evidence base. (Annex G page 43).

This approach to evidence is little short of farcical!

Q 81 Do you have any comments on the draft specification?

It is our view that the publication of a draft specification at the same time as the Consultation is indicative of the value placed by the LSC on responses to the Consultation. It would appear that decisions have already been taken and the publication of the draft specification reflects the haste with which the LSC wishes to push these changes through. It is unrealistic to expect respondents to be able to provide a detailed response to the consultation and simultaneously consider and respond effectively to this

draft. This unseemly haste discriminates against smaller organisations that do not have staff whose sole responsibility is to respond to such consultation exercises.

NYAS objects, in particular, to the ruling out of scope of funding for Guardians (10.157), and to the ruling out of independent social work enquiries in rule 9.5 work. (10.158.) Setting of rates for independent social work expertise without detailed analysis of alternatives, nor any pilot study of alternative methods of provision and payment, discriminate against social workers and prevent measured consideration of any approach which might have a less damaging impact on outcomes for vulnerable children. (10.159)

The removal of costs and expenses relating to risk assessments, leaving them the sole responsibility of Cafcass or Cafcass Cymru, will expose vulnerable children to the serious risk of unidentified harm. We have evidence from the new Cafcass commissioning arrangements of our own Supervised Contact centre Services, that Cafcass will not be meeting the existing demand for assessment of supervised contact in some areas. NYAS wishes to place on record our very deep concern about the consequence of this for children caught between entrenched and warring parents.

C: Additional questions.

General comments and key concerns.

It is a concern that the consultation does not specifically consider the impact of the proposals upon the Human Rights of the children and young people who are our clients. It is our view that there will be a significant impact for this group upon:

- Article 6 ECHR right to a fair trial and equality of arms
- Article 8 ECHR, right to respect for a private family life
- Article 10 ECHR, freedom of expression.
- Article 13 ECHR, effective remedy.

No consideration has been given to the Practice Directions, protocols and judicial guidance relating to Rule 9.5 appointments.

By restricting choice and causing delay it is our view that children and young people are denied the right to effective remedy (Article 13 of the European Convention of Human Rights). The proposals will deny some of the most vulnerable children an effective voice in proceedings before the Court. These children are invariably involved in the most intractable and acrimonious parental disputes, and under the proposals they would have nowhere else to turn for skilled and independent representation.

The consultation proposals will severely restrict and even deny the right to legal representation of children caught up in protracted proceedings. It is widely acknowledged that CAF/CASS do not have the capacity to undertake all such cases, and some children will not receive the representation they are entitled to. We have no confidence in Cafcass ability to achieve effective commissioning arrangements.

If Cafcass were given the responsibility to commission Rule 9.5 guardian services, there will no longer be any truly independent provider of such services.

NYAS' Mission Statement has adopted article 12 of the United Nations Convention on the Rights of the Child "to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative body". The LSC must accept that the welfare element of our work is an appropriate part of legal representation when Sc 1(2) of the Children Act 1989 makes the child's welfare the court's paramount consideration.

The charity has worked hard to develop a credible, national service providing separate representation to children involved in protracted parental dispute. We remain committed to cost-effective approaches which establish a holistic understanding of the needs of children and provide the strongest possible partnership, empowering children within private law proceedings. We are dismayed at the proposed changes to funding arrangements, which would reduce children's access both to the courts and seeks to exclude us from this important area of work.

The proposals would have a significant impact, both upon children and upon NYAS' ability to separately represent them effectively. Whilst we are aware of the pressure upon the public purse and the increasing need to reduce costs, we feel that it is short-sighted to seek to remove an efficient and effective remedy which, in the long term, moves cases swiftly through the Courts and achieves effective outcomes, reducing overall demand on the public purse. We have no reason to believe that placing responsibility for these services with Cafcass would enable us to continue to offer an effective service. Access to independent separate representation not only reduces costs through removal from the court process of some of the most long standing and entrenched cases, but also provides a significant contribution to a preventative strategy which impacts on poverty, crime and the mental health of children and young people in this country.

We urge the LSC reconsider its proposals and to work with other government departments to establish an appropriate funding route for our specialist, voluntary and independent service which achieves significant positive outcomes for the most vulnerable children.

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