

25<sup>th</sup> October 2006

Dear

I am writing to invite your support following the publication of the DCA Consultation paper 'Separate Representation of Children' CP/20/06 dated 01/09/2006. The paper gives rise to the following points of concern about the effect of proposals to inform the content of new Court Rules which would limit the access to the courts of children who are the subjects of intractable parental dispute.

### **Costs – The Paper does not compare like with like**

There is an alarming lack of transparency about the costs cited, which were published without prior discussion with NYAS. It is not clear how the consultation process has arrived at the statement that 'Using NYAS to act as Children's Guardian is more costly by approximately 53%'. (Para 41)

CAFCASS pay between £23.20 and £26.90 flat rate per hour to caseworkers dependant upon the region, and NYAS pay £32.00 professional time, £12.50 travel and waiting time. Court attendance is paid at £150 but not as a "further cost" in addition to an hourly rate, as the paper suggests. Private practice solicitors acting as Children's Guardians buy in social work expertise that charge up to £60 per hour (Para 39). There is a negligible difference between the two agencies, in rates overall

The statistical tables do not compare like with like. The average case costs for NYAS as stated in the paper, are £5,143. This includes the cost of legal representation and case worker input. The CAFCASS unit costs are given as £3,440 for 05-06 and do not include legal representation for the child (Para36).

The paper shows that the average cost, for legal representation for the child, is at least £3,330. Accordingly, when a CAFCASS Guardian is appointed this gives a total cost to the public purse of £6,770.

NYAS representation of the child provides a saving to the public purse of £1,627.

## **“Legal need”**

There is no definition in the Consultation paper for “Legal need”, and this is proposed as the sole criteria for party status of the child. In contrast, our experience of the Practice Direction [*Representation of Children in Family Proceedings President’s Direction pursuant to rule 9.5 of the Family Proceedings Rules 1991*, April 2004], is that it provides an excellent working framework that takes detailed account of the extreme vulnerability of children caught up in parental disputes. As Mr Justice Munby commented in *Re D (Intractable contact Dispute Publicity)*[2004]EWHC727 (para51) “intractable contact disputes are one of the ‘prime categories’ for separate representation of the children... In this situation the court can with great advantage make use of organisations such as The National Youth Advocacy service.” The clarity and thoughtfulness of the Practice Direction, coupled with measured judicial consideration of each individual case, ensures appropriate party status and results in the benefits of long term resolution for those children who most need it.

## **Deciding party status**

It seems inappropriate that CAFCASS should be in a position to limit the discretion of the presiding Judge. There is incoherence in the Consultation which suggests that following a decision to give party status being made by the court, that CAFCASS should be the preferred agency to act for the child, and ‘this will enable CAFCASS to take the lead on deciding when to recommend party status is required. As Lady Justice Arden commented in *Re H (A Child)*[2006] EWCA Civ 896, (para22) “ as a matter of established law decisions as to the exercise of discretion are to be left to the Judge”

## **CAFCASS should ‘always be the preferred choice of the court over independent practitioners.’**

We acknowledge the importance of early intervention and alternatives for children and families to prevent them being caught up in adversarial legal proceedings, and we welcome some of the plans for change. However many of these are still formative and CAFCASS do not have the capacity to subsume all such cases. It must be acknowledged that there are huge gaps in CAFCASS’ ability to respond appropriately in Private Law matters. The HMICA Report 2006 draws attention to CAFCASS’ deficits in relation to Private Law practice and this must then raise concern at the proposal in the paper that CAFCASS should ‘always be the preferred choice of the court over independent practitioners.’

## **The NYAS/CAFCASS Protocol is misrepresented**

The establishment of the Protocol in December 2005 reflects the Charity’s commitment to working in collaboration. The Protocol acknowledges that NYAS has a role in accordance with the Practice Direction. However it implies a limitation to our appointment, by way of the example provided, for when NYAS might be appointed, namely, where there is a breakdown in the

relationship between CAFCASS and the family. The appointment of NYAS in Rule 9.5 Separate Representation is not limited to the example given.

### **Impact - The need for an inter-departmental approach to funding**

Rather than reducing the number of 9.5 appointments by changing the Court Rules, and in doing so depriving children of legal representation and access to justice in the processes that shape their future, there is an urgent need for the DCA and the DFES to acknowledge the need for funding and to establish a joined up approach.

NYAS, as a Children's Charity, has worked extremely hard to develop expertise in the representation of children. We remain committed to cost effective approaches which establish a holistic understanding of the needs of children and provides the strongest possible partnership empowering children within Private Law proceedings. We are surprised and dismayed at the statement in the Consultation paper that 'the overall impact of the proposals on competition is minimal'. These proposals would have a significant impact both upon children and upon NYAS' ability to separately represent them using the tandem model approach.

We have achieved outstanding evidenced outcomes recognised in Case Law as effective. Lord Justice Wall commented in *Re H (A Child)*[2006] EWCA Civ 896 (para10) "In my experience NYAS does not take cases willy-nilly. It only takes those cases in which it thinks it can make a proper contribution", and in *AvA (Shared Residence)*[2004] EWHC 142 (Fam),(para132) "There is no doubt that the excellent service provided by NYAS in this case was crucial to its successful determination".

It would be a tremendous loss to the vulnerable children who need to be separately represented, if the drafting of new Court Rules severely limits the opportunity for children embroiled in protracted and acrimonious proceedings to have access to legal representation.

I would welcome your support in raising the profile of these issues in responding to the Consultation and writing to the The Rt Hon Harriet Harman QC MP, Minister of Constitutional Affairs at Department for Constitutional Affairs, Selborne House, 54 Victoria Street, London SW1E 6QW and The Rt Hon Beverley Hughes MP, Minister for Children, Young People and Families, again at the Dept. for Constitutional Affairs.

Yours sincerely

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