INTERDISCIPLINARY ALLIANCE FOR CHILDREN

CONSULTATION ON CO-OPERATIVE PARENTING FOLLOWING FAMILY SEPARATION

RESPONSE

5 September 2012

The Interdisciplinary Alliance for Children (IAC) welcomes and supports the Government's commitment to encouraging both parents to play a part in the child's life following separation. Societal changes and the shift towards patterns of serial monogamy have had a cumulative effect on the position of children and young people affected by parental separation and divorce. However, the problems the Government seeks to address are complex and we do not believe that amending the current legislation will have the desired effect. We are profoundly concerned that it will have unintended consequences in undermining the central principle of the Children Act 1989 (CA1989) as set out in s1, which dictates that in any proceedings concerning a child where the court is determining any question regarding the upbringing of a child the welfare of the child is the paramount consideration. The proposals constitute a potential erosion of that core principle, which would leave children with insufficient protection from harmful or unsafe contact arrangements. The Consultation paper does not explain what is not working under the CA1989 and why the proposed legislative changes are needed.

The problems identified do require a range of overarching social policy reforms and initiatives as part of a co-ordinated cross departmental strategic approach. However, the proposed approach is over simplistic in seeking to change behaviours and improve the quality of human relationships between parents and their children through legislative provision. Moreover, there are significant dangers in espousing an approach which is fundamentally one dimensional and which is not evidence based.

Our reasons for taking this view are set out below.

1. Both the Family Justice Review Panel and the Justice Select Committee have considered an extensive body of evidence and both concluded that that the idea of promoting shared parenting through changing the wording of CA1989 was seriously flawed. In their final report, the Family Justice Review concluded that no legislative statement promoting meaningful relationships should be introduced because *'the core principle of the paramountcy of the welfare of the child is sufficient and that to insert any additional statements brings with it unnecessary risks for little gain'.* We are puzzled by the Government's decision to depart from this view.
2. There is no evidence to suggest that Judges are not starting from a position in favour of both parents having a meaningful involvement in their children's lives.

3. Contact with the child often lapses - not because involvement has been discouraged by one parent but rather because the non-resident parent fails to take up the agreed arrangements.
4. The Justice Select Committee noted that the majority of applications resulting in 'no contact' had in fact been abandoned by the applicant parent.
5. The assumption that both parents should continue to have a meaningful relationship with their child after separation, provided that this is safe, is already well established.[1]
6. It would be both wrong and counterproductive, to imply that parents have rights over, rather than responsibilities for, their children.
7. We agree that the focus of shared parenting decisions must be what will work best for the child and not how much time each parent should be allocated. However, all and any of the four legislative 'steers' proposed carry the risk that they will be interpreted by parents in conflict as a potential 'right' or 'green light' to equal parenting time, which may well not be in the best interests of their child.
8. There is compelling evidence from research and from other jurisdictions that should deter Government from taking this step.[2] Denmark has recently repealed a law which operated a presumption of shared care and the Australian research and experience is salutary in indicating that there are no consistent patterns for outcomes regarding shared care and primary care.
9. Research on the shared care of children in conflicted parental situations sounds warning notes of the long term emotional impact on the children concerned. '*Such findings suggest that a significant proportion of these children emerged from family court proceedings with substantially shared care arrangements that occurred in an atmosphere that placed psychological strain on the child'.*[3] There are particular grounds for concern about children under the age of four who are especially vulnerable to shared care arrangements and can be regarded as a risk group regardless of whether the arrangements are amicable or not.
10. Dr McIntosh's research suggests that children may be at risk when certain factors are present, such as parents having low levels of maturity and insight; poor emotional availability of the parent to the child; on-going high levels of inter-parental conflict, on-going significant psychological acrimony between parents and when one or both parents see the child as being at risk when in the care of the other.
11. The proposal fails to take account of the fact that almost all separating parents – some 90% do not use the courts to resolve issues of residence and contact

[1] *'Parental Separation. Children's Needs and Parent's Responsibilities'* 2004. DCA and DfES 2004 Crown Copyright Cm 6273 and *'Parental Separation; Children's Needs and Parent's Responsibilities: Next Steps'* .DfES 2005. Crown Copyright: Cm 6452.

[2] *Caring for children after parental separation: would legislation for shared parenting time help children*? Family Policy Briefing 7. Department of Social Policy and Intervention, University of Oxford May 2011

[3] *'Cautionary notes on the shared care of children in conflicted parental separations'* McIntosh and Chisholm. 2008 Australian Institute of Family Studies.

with children and the remaining 10% are those with multiple problems as indicated above. The evidence indicates that going to court is a last, rather than a first, resort. The Australian evidence shows that cases where the child's or parents' safety was at risk were not being effectively filtered out of the shared parenting scheme by the courts. Attempting to increase parental involvement in this small group of cases (some 10%) through broad brush legislative assumptions, which may be misunderstood by both parents and courts, would represent a fundamental and damaging misunderstanding of the nature of the problems, which in turn could lead to unsafe judicial decision making.

12. Legislative amendment as proposed could lead to increased litigation and be counterproductive in leading to conflict between the court's duty to give paramount consideration to the best interests of the child and a duty to promote shared parenting. Moreover it should also be noted that this will arise in the context of increasing numbers of litigants in person following implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

SPECIFIC POINTS IN RELATION TO THE FOUR OPTIONS PROPOSED

Option 1. There is no mention of children's article 12 UNCRC rights and of how their interests are to be safeguarded and represented in the proceedings. Nor is there a clear definition of what is meant by '*a presumption'.* The consultation stresses that the presumption would not apply in cases where the parent posed any risk or where the court believes that the parent's involvement is not consistent with the child's welfare. It is however silent on the question of how the court is to be sure that it has the necessary information to enable it to make an assessment of risk. The Cafcass operating framework makes it clear that a s16 CA1989 risk assessment may be carried out over the phone using an 'arm's length' risk assessment script. This is now a formulaic process with no objective input of information apart from that supplied by the two parents. There is no mention of the possible need for a s7 welfare report to be prepared by Cafcass or the need to consider making the child a party to the proceedings under the provisions of r16.4 of the Family Procedure Rules 2011 (and under LASPO legal help will not of course be available to fund the obtaining of police disclosure, medical reports, etc, to establish the existence of any previous domestic abuse).

Option 2. There is no explanation or definition of what is meant by 'fullest possible involvement' which means that this phrase may be differentially interpreted by each parent in ways which risk conflict with the welfare principle. There is a fundamental confusion between quantity and quality of contact time and there is overwhelming research evidence to demonstrate that the quality of the parental relationship does not improve as a proportion of the quantity of contact time with a child.

Option 3. There is no definition of what is meant by the 'starting point' and this option constitutes a de facto presumption.

Option 4. The proposed addition to the welfare check list under s1(3) of the CA 1989 is unnecessary. It already places a responsibility on the court to put the welfare of the child at the centre of all decision making. There is no evidence that the court does not *already* consider the need for children to have a meaningful relationship with both parents within the overarching context of the child's best interest. The proposed amendment risks skewing the focus of the court's decision making by introducing a potentially conflicting imperative, thereby undermining the paramountcy principle and diluting the safeguards for the child.

Clearly, increased parental involvement is to be desired in cases where it is safe and where children will clearly benefit. What is not desirable and is potentially dangerous for children is to build into legislation an expectation or presumption of shared parenting as the default position which contains within it an underlying presumptive definition that such an arrangement automatically constitutes a child's best interests.

ENFORCEMENT PROPOSALS AND THE RIGHTS AND WELFARE OF CHILDREN

Whilst accepting that a small minority of parents may deliberately breach, frustrate or undermine court-agreed contact arrangements, we would be deeply concerned about enforcement measures that failed to take full cognizance of or give consideration to the likely impact on the children concerned. The consultation document fails to address the issue of how children's rights and welfare are to be protected in the event of the court ordering a change of resident parent in the absence of any independent assessment and representation of their position and views.

Para 6.2 of the consultation paper states that in cases where there is wilful refusal to comply with an order of the court '*short term punitive action may be needed to achieve compliance and safeguard the longer term interest of the child'*. The consultation paper is pre-empting the court's determination of the child's welfare needs by assuming on the basis of unspecified evidence that achieving compliance will, by definition, be in the best interests of the child. Again, the consultation fails to address the key question of how - and on the basis of what evidence - the court may be sure that such a change will be safe and how the views of and impact on the child are to be ascertained.

Consider, for example, a case in which the resident parent's driving licence is confiscated. The child may very well suffer, as well as the parent, as it could impact on the parent's ability to get the child to school on time and to participate in all the social and out-of-school activities that children enjoy.

Para.7.1 of the consultation paper states that *'if there is a genuine difficulty or welfare issue which is preventing compliance with the court order, the court will*

consider how best to resolve this….the court will have the option of taking enforcement action against the parent concerned to secure what the child needs'. However, we remain unconvinced that the current risk assessment procedures are sufficiently robust in order to be confident that they justify the somewhat sweeping assumption that punitive measures will actually be what is needed.

We also have substantive reservations about the equation of the refusal to pay maintenance with the refusal to comply with court ordered contact as an argument to support similar enforcement procedures. These are very different issues as the amount of maintenance payable is predicated by the finite amount of income available – it is not informed by the best interests of the child. There has always been a deliberate demarcation between these separate issues, precisely because there is a risk that contact might be seen as being 'bought' or 'sold'.

Throughout the document there is a failure to explain how the views of children and young people concerned are to be ascertained, how the potential risks to them is to be assessed and how the legislative changes proposed will be supported by non-court based services.

The Family Justice Review expressed substantive concerns about how the voice of the child is to be heard in private law proceedings; however the Government has failed to explore options for progress in this area. Clearly not all children involved in s8 CA1989 disputes about their residence and contact arrangements will need separate party status. However research and practice have consistently indicated that children need separate representation in more rather than less cases indeed Parliament has twice passed legislation to achieve it - namely s64 Family Law Act 1996 and s122 Adoption and Children Act 2002. Neither piece of legislation has been implemented, leaving the safeguards for the child in s8 disputes proceedings much too weak.

Of the 98,000 children involved in s8 residence and contact proceedings in 2009, only 1% were separately represented in proceedings by a children's guardian and a children's solicitor under the provision of r9.5 Family Proceedings Rules 1991 (now r16.4 FPR 2011). Cafcass figures show that the numbers have fallen in the last two years from 1,803 in 2008/9 to 1,449 in 2010/11.

Overall, we feel that the enforcement proposals constitute a somewhat blunt instrument to crack a small nut of great complexity. We would like to have seen a consultation paper which included a much more evidence-based and thus nuanced discussion on the development of a range of services and strategies designed to support separating parents and their children, not just at the time of separation, but afterwards when court and professional attention has waned. The development of Parenting Information Programmes and Parenting After Parting programmes have proved extremely helpful in seeking to change attitudes and raise awareness of how

to move from co-partnering to co-operative co-parenting without jeopardising the welfare and happiness of the children concerned.

It is a matter of regret that the consultation paper fails to grasp an opportunity to address the key questions of how the proposals will impact on the children concerned and how their interests and rights are to be protected in the event of the law being amended in the way envisaged by the proposals. Once orders have been made, children are effectively locked into the arrangements agreed and have no awareness of anything they can do to initiate change. In the context of a need to place children at the centre of decision making we would ask you to consider the legislative measures below as a priority in putting the interests of children centre stage in the court's decision making.

1. The relaxation of the rules which require leave to be obtained under s10 CA 1989 thus enabling children to seek leave to initiate or vary their own s8 CA 1989 residence and contact orders.

2. The implementation of s122 Adoption and Children Act 2002 - using the President's Direction of 2004 as guidance; this would add s8 contact proceedings to the list of specified proceedings in which a child may have party status and separate representation.

The Alliance would like to stress that we consider that there are constructive alternative approaches to achieving the desired objectives in relation to co-operative co-parenting where parents cannot agree but which place children at the centre of decision making. We would welcome an opportunity to set these out and discuss further the points we have raised above if this were considered helpful and appropriate.

Endorsed by:

The Association of Lawyers for Children (ALC)

British Association of Social Workers (BASW)

The Professional Association for Family Court Advisers, Children's Guardians and Independent Social Workers (Nagalro)

The National Youth Advocacy Service (NYAS)

Children's Rights Alliance for England (CREA)

Women's Aid

National Association of Probation and Family Court Officers (NAPO)

The Law Society