

# **Separate Representation of Children**

**Consultation Paper**

CP/20/06

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This consultation will end on 8 December 2006



# **Separate Representation of Children**

Consultation to Inform  
the Content of New Court Rules



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**Separate Representation of Children Consultation Paper**

## Executive summary

Parental separation affects many children and their families. Some three million of our twelve million children will experience the separation of their parents during the course of their childhood. If the parents' separation is handled well any adverse impact on their children may be limited. When separation goes badly, and in particular where children are drawn into parental conflict, then the effects can be damaging for the children. Evidence shows that children in this situation suffer poorer outcomes and reduced life-chances.

The legal and court process can be slow and sometimes adversarial, and can contribute to a deterioration of the situation between separating couples and their children. The wishes and feelings of the child may be overlooked by parents locked in their own conflict.

The Government is committed to its programme of work set out in "Parental Separation: Children's Needs and Parent's Responsibilities - Next Steps," which is intended to provide better outcomes for children whose parents are separating, and to safeguard their interests when their parents have turned to the courts to resolve the situation under section 8 of the Children Act 1989 to decide where the child shall live and who the child shall see (residence and contact, and other orders in respect to children)<sup>1</sup>.

The Children and Family Court Advisory and Support Service (CAFCASS) has recently consulted on their proposals in "Every Day Matters,"<sup>2</sup> which sets out how CAFCASS intends to improve its service to children and families and proposes changes to CAFCASS frontline work in both public and private law cases<sup>3</sup>.

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<sup>1</sup> All section 8 Children Act 1989 applications for contact, residence, prohibited steps and specific issue orders are included in this consultation.

<sup>2</sup> This is only relevant to England. CAFCASS provides a service to the courts in England. CAFCASS Cymru is a Division of the Welsh Assembly Government and provides a service to the courts in Wales.

<sup>3</sup> Public law proceedings are those usually brought by local authorities or the National Society for the Prevention of Cruelty to Children and include matters such as care, supervision, and emergency protection orders. Private law cases are those brought by private individuals generally in connection with divorce or the parents' separation.

Children involved in public law proceedings are entitled to representation by a CAFCASS guardian and a solicitor (usually from a private practice), and are made a party to the proceedings. However, children involved in section 8 Children Act 1989 private law proceedings do not automatically have party status and the representation that accompanies it, unless the court makes an order to this effect under Rule 9.5 of the Family Proceedings Rules 1991. This provision allows a child to be legally represented by a solicitor who will usually be working in partnership with a guardian in a way that is comparable to the representation received by children who are the subject of public law proceedings.

Evidence has shown that separate representation is often ordered after the proceedings have been under way, sometimes for many months, or after a number of episodes of completed proceedings, as a tool to reduce inter-personal conflict between parents, or a means to secure expert assessment. It is also clear that the frequency with which separate representation is ordered varies greatly in different court circuit areas.

Section 122 of the Adoption and Children Act 2002 amended the Children Act 1989 to allow court Rules to be made to provide for children to be separately represented in all section 8 private law cases by making such cases 'specified proceedings' in line with public law proceedings. However, the Government has always been clear that such provision is only relevant for a small proportion of children who are involved in private law proceedings arising from parental conflict.

In order to ascertain the effect of separate representation on children the Department for Constitutional Affairs commissioned research<sup>4</sup> into the operation of Rule 9.5. While the research did not provide evidence to support the extension of the provision of separate representation to *all* section 8 cases, it has served to inform the proposals set out in this consultation paper, which are intended to achieve the best possible outcomes for children experiencing parental conflict who become the subject of private law court proceedings. There is also a need to ensure that consideration and use of separate representation is consistent across all areas and levels of court.

The need to make new court Rules was acknowledged in a written ministerial statement on 11 January 2006, which made it clear that new Rules of court would be developed. New Rules will now be established so that those children who need separate representation are provided with that in a timely and appropriate way. Your views in response to the proposals set out in this consultation paper are welcomed.

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<sup>4</sup> G. Douglas, M. Murch, C. Miles, L. Scanlan, Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, DCA publication, March 2006.

## Consultation

This paper sets out for consultation proposals on how to improve the outcomes for children involved in family proceedings. The consultation is aimed at all court users, the judiciary, legal practitioners, and others with an interest in family justice issues in England and Wales.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of the Code. The Consultation Criteria have been followed.

An initial regulatory impact assessment indicates that the court users, the judiciary, the legal profession, CAFCASS and other government departments are likely to be particularly affected. The proposals are likely to lead to additional costs or savings for businesses, charities or the voluntary sector, or on the public sector. A Partial Regulatory Impact Assessment is included on page 41.

Copies of the consultation paper are being sent to (among others):

The President of the Family Division

The Judiciary

The Magistrates' Association

Justices' Clerks Society

The Official Solicitor

British Association for Adoption and Fostering (BAAF)

The Department for Education and Skills (DfES)

The Children and Family Court Advisory and Support Service (CAFCASS)

The Children and Family Court Advisory and Support Service Wales (CAFCASS CYMRU)

The Law Society

The Bar Council

The Family Law Bar Association

Institute of Legal Executives

The Legal Services Commission

National Youth Advocacy Service (NYAS)

Resolution

Citizens Advice

Consumers' Association

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subject covered by this paper. Details of how you can respond to this paper are on page 39.

## Introduction

### The voice of the child

1. There is a duty under domestic and international law to safeguard the interests of children in family proceedings. These commitments also have to be considered in the light of the European Convention on Human Rights (ECHR) that not only protects the right of access to a fair trial (Article 6), but also protects the right to respect for private and family life (Article 8). Domestic and international obligations aim to ensure that the voice of the child can be heard, but only in ways conducive to their welfare<sup>5</sup>. Careful consideration must be given by all those involved in family proceedings to the wishes of those children who want to make their views known in proceedings, as well as those others who have no desire to be directly involved.

### Provisions to hear the child

2. Where a court is considering whether to make, vary or discharge a section 8 order, and this is opposed by any party to the proceedings, a court must have regard to the ascertainable wishes and feelings of the child (section 1, Children Act 1989). A variety of in-court and out-of-court provisions exist, which offer a range of ways by which courts may ascertain children's wishes and feelings in a way that fulfils legal obligations. The Rules relating to the representation of children in private law matters are set out in the Family Proceedings Rules 1991. In brief, Rule 9.2A allows competent children of sufficient age and understanding to participate in proceedings without a guardian, and Rule 9.5 provides for separate representation where a child has been made a party to the proceedings. Further detail on the provisions of Rule making powers is set out later in this consultation paper.

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<sup>5</sup> The UK has not signed the 1996 Council of Europe Convention on the Exercise of Children's Rights.

### **The Children and Family Court Advisory and Support Service (CAFCASS)**

3. The functions of CAFCASS are set out in the Criminal Justice and Court Services Act 2000. They relate to family proceedings where the welfare of children is or maybe in question. CAFCASS functions are to:
  - safeguard and promote the welfare of the child
  - give advice to the court about any application made to it in family proceedings
  - make provision for children to be represented in such proceedings
  - provide information, advice and support for children and their families
4. It is important to note that CAFCASS and CAFCASS Cymru are two separate organisations and as such follow different procedures. CAFCASS provides a service to the courts in England and is a Non Departmental Public Body (NDPB) sponsored by the Department for Education and Skills (DfES). Part 4 of the Children Act 2004 transferred responsibilities for CAFCASS functions in Wales to the National Assembly for Wales. CAFCASS Cymru is a Division of the Welsh Assembly Government.
5. Following the consultation paper “Every Day Matters” CAFCASS’ policy is to develop a new National Standard for early intervention, which guarantees a sequence of work on every referral in the first six weeks.
6. CAFCASS and CAFCASS Cymru provide dispute resolution to all courts at the first hearing. The aim is to facilitate an early resolution, having identified safety issues (child protection and/or domestic abuse), rather than the provision of a formal report. Extended dispute resolution schemes have been developed in the majority of the family courts in England following the publication of the President’s Private Law Guidance,<sup>6</sup> some directly involving the voice of the child.

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<sup>6</sup> On the 18<sup>th</sup> January 2005 the President of the Family Division issued guidance for the Private Law Programme to improve the resolution of private law family cases.

## Research

7. In order to understand the extent to which formal representation through a solicitor and guardian is meeting children's needs, or whether there are other ways in which their needs can be met, Cardiff University Law School were asked to carry out research into the operation of Rule 9.5 of the Family Proceedings Rules 1991<sup>7</sup>. Published on 23rd March 2006, the research focused on features, both beneficial and adverse to separate representation, alongside statistical evidence already in the public domain.

## Findings of the Research

8. The Cardiff University researchers consulted with children and their families to obtain their views on being separately represented in section 8 Children Act 1989 court proceedings, brought by their parents about future contact and/or residence arrangements. The research showed that giving the child party status and separate representation was most beneficial in intractable cases because it enabled the parents to refocus attention on the child, putting the child centre stage. A well-trained and experienced guardian was often able to unblock these cases and provide a *“balanced and reasoned report”* verifying the wishes and feelings of the child.
9. However, the findings also showed that bringing the child into the proceedings could be stressful and put too much responsibility on the child, *“particularly if they believe that the judge will make a decision based entirely on their view”*. Children can feel confused and manipulated by their parents, *“repeating unfounded allegations or simply reciting the parent’s view to the guardian.”* In addition to this, Rule 9.5 was often said to be invoked too late, adding delay and costs to the proceedings.
10. The research further indicated that: provisions for meeting children's needs could be improved; children should be provided with support and information throughout the proceedings; intractable and complex cases needed to be identified earlier and that the roles within separate representation need to be clearly defined.

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<sup>7</sup> The report can be found: [www.dca.gov.uk/majrepfr.htm](http://www.dca.gov.uk/majrepfr.htm)

11. Other recommendations made in the research report include:

- the need for the potential advantages of Rule 9.5 to be secured earlier in proceedings
- a call for greater judicial continuity
- clear, reliable and age-appropriate information about separation/divorce should be available for children from the beginning of proceedings
- early identification of the features of the case which are likely to produce intractable behaviour on the part of parents

12. Alongside statistical evidence, analysis of the Cardiff and other research does not support the extension of separate representation to children in *all* private law proceedings. Some children may feel overburdened by the additional responsibilities that come with being a party to proceedings. Therefore, it is considered that separate representation is required only if there are legal issues to be resolved - for example where the child has evidence or a legal submission to make that cannot be given by another party - and it is proposed that this should be the measure for considering whether a child should be made a party to the proceedings.

13. The full proposals including references to research are set out later in this paper.

## Children and Adoption Act 2006

14. The provisions in the Children and Adoption Act 2006 will, once implemented, help to minimise the development of intractable cases by providing additional support to parents. The Act provides the courts with more flexible powers to facilitate contact and enforce contact orders made under the Children Act 1989, including directing parties in a contact dispute to undertake a 'contact activity'. These include attending information sessions; meetings with a counsellor; parenting programmes or classes and other activities designed to deal with contact disputes. As the Government believes that for mediation to be successful it must be entered into freely and voluntarily, the court will not be able to direct parties to attend mediation as a contact activity. However, the court will be able to direct parties to attend a session to learn about the potential benefits of family mediation. The court will be able to attach conditions to contact orders, which may require a party to undertake a contact activity.
15. The Act will also enable the court to require a CAFCASS Officer, or a Welsh Family Proceedings Officer, to monitor a contact order and also to monitor a contact activity and report to the court on compliance with the order concerned.
16. Where a contact order has been breached the Act enables the court to make 'enforcement orders' imposing an unpaid work requirement; or award financial compensation from one person to another where losses have been incurred as a result of failure to comply with a contact order (for example, where the cost of a holiday has been lost).
17. In addition, the Act reforms Family Assistance Orders (which are already provided for in the Children Act 1989) by removing the requirement that they can only be made in exceptional circumstances, and by extending the maximum length of a Family Assistance Order from 6 to 12 months.

## **Scope of new provisions**

18. The consultation will focus on new court Rules for children involved in section 8 Children Act proceedings.
19. It is proposed that the new rules for separate representation will be restricted to section 8 Children Act cases. Current provision for party status and separate representation under Rule 9.5 will remain unaltered for cases other than section 8 proceedings.
20. It is not proposed to consider public law in this consultation, as these cases are generally specified proceedings under section 41 of the Children Act 1989.

## Summary of Proposals

### Party status

21. The findings of the Cardiff University research, and other research focusing on children's welfare, has shown that party status and separate representation is not in the best interests of the child in *all* section 8 cases and can cause undue stress to the child.
22. It is often used as a last resort in protracted cases or where it is deemed necessary for parties to undergo assessment, but where legal aid has not been awarded, or parties are not legally represented, and parents cannot afford or they refuse to pay for the necessary expert report(s).
23. It may not always be necessary to appoint a Children's Guardian, as CAFCASS already consider the child's welfare throughout section 8 proceedings. Where a child is not separately represented the CAFCASS Children and Family Reporter or Welsh Family Proceedings Officer will give full regard to the child's welfare and their wishes and feelings, which will be relayed back to the court. Therefore, it is proposed that party status is given to the child only when there is a *legal* need to do so, for example where the child has evidence or a legal submission to make that cannot be given by another party.

### Children's Guardians

24. When a decision has been made to give the child party status, it is proposed that the appointment of CAFCASS or CAFCASS Cymru (dependant upon where the child is ordinarily resident) as the Children's Guardian should always be the preferred choice of the court over independent practitioners. This will enable CAFCASS to take the lead on deciding when to recommend that party status is required, for example, where the child has evidence or a legal submission to make that cannot be given by another party.

## **Jurisdiction**

25. It is proposed that:

- all levels of court and judiciary should have the authority to decide if a child should be made a party in all family proceedings. The President's Guidance Note issued February 2005 raised the decision-making level to Circuit Judges, which was intended to address the unexpected increase in cases where party status was given to the child.
- all levels of court should be able to hear applications by the child concerned, for the court's permission to make an application for an order under section 8 of the Children Act 1989. The Practice Direction issued 22 February 1993 directs that these applications must be referred to the High Court. This includes applications under Rule 9.2A by children who have party status and wish to participate in proceedings without a Children's Guardian.

26. These proposals support the President's strategy for family justice, which intends that cases should be heard at the court most appropriate to deal with them. This will help relieve the pressure on the High Court judiciary, whose workload is increasing, and will give greater flexibility in distributing work between the family judges in the county courts and the under-used family magistrates in the Family Proceedings Courts. This will also help reduce delay and therefore undue stress to children who want to proceed without a guardian.

27. In line with research findings the aim will be to provide judicial continuity as far as is practicable. This supports the Private Law Programme and will provide for a quick and expert resolution of proceedings ending long periods of uncertainty for the child.

### **Children who wish to proceed without a guardian (Rule 9.2A)**

28. The current position for competent children who want to proceed without a guardian or a next friend is that they may only do so in Children Act proceedings. It is proposed that this be extended to other family proceedings and consultees are invited to consider what other proceedings would be appropriate. This will free up CAFCASS resources in proceedings where there may be no welfare issues but only legal points that need to be resolved. It will build in flexibility to other family proceedings when competent children wish to proceed without a Children's Guardian. This is in line with the Civil Procedure Rules, which provide that the court may make an order permitting a child to conduct proceedings without a litigation friend.

### **Attendance at proceedings**

29. Consultees are asked to provide views on whether it is necessary for both the guardian and children's legal representative to attend *all* hearings in cases where the Children's Guardian is in attendance. Currently, attendance of the guardian at hearings is obligatory and so consideration of making more efficient use of this professional time cannot fall on the Children's Guardian. There may be occasions where either only a solicitor is required or only the guardian or (perhaps only occasionally) neither of them.

### **Better information**

30. It is proposed to build on existing leaflets, videos and web sites available to children so that children are provided with reliable and age appropriate information during the course of proceedings to help them cope with associated anxieties and uncertainties. It is also believed that clarification of the roles and responsibilities within CAFCASS<sup>8</sup> will manage children's and parents' expectations as to the levels of representation that will be available.

### **Cultural change**

31. As well as developing new rules of court it is intended to promote a cultural change amongst all those working in the family justice system that will achieve a culture that is specifically child-centred.

32. Current opinion is against the judge speaking directly to children. Your comments are welcomed on whether direct discussions between children and judges would enable the children's wishes and feelings to be accurately represented.

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<sup>8</sup> For example, Children, and Family Reporters, Children's Guardians, Reporting Officers.

## Background

### Work trends

33. The former President, Dame Elizabeth Butler-Sloss, with the concurrence of the Lord Chancellor, issued a Practice Direction on Rule 9.5 in April 2004. This Practice Direction aimed to bring greater consistency to judicial practice and it set out the circumstances where it is considered to be in the best interest of the child to be made a party.
34. However, the number of Rule 9.5 appointments doubled within the first six months of the Practice Direction being introduced. All regions in England experienced an increase in these cases without a corresponding decrease in the high-use regions. The high-use regions in fact also saw an increase in 9.5 appointments. CAFCASS was concerned that the increased workload was having a negative impact on their ability to deliver a satisfactory service to *all* children.
35. Dame Elizabeth subsequently issued a Guidance Note to the judiciary in February 2005. The guidance in effect elevated the decision-making power to the level of Circuit Judge. Monitoring by CAFCASS continued, but the statistical evidence did not show a levelling off of total Rule 9.5 appointments until this year, though inconsistencies across regions remain.
36. Although CAFCASS statistics show that the caseload has now stabilised across regions, the frequency of appointments is still more than twice that during the period preceding the former President's Practice Direction. Statistics show a 105% increase for the period between April 2004 to March 2005 to that of the period between April 2003 to March 2004.
37. Before taking the decision to make the child a party, consideration should be given as to whether an alternative route might be preferable. The options are: asking an officer of CAFCASS (or a Welsh Family Proceedings Officer) to carry out further work; or make a referral to social services under section 37 of the Children Act 1989; or make use of one of the new direction powers of the Children and Adoption Act 2006 following its implementation. The evidence submitted to court would enable the judge to decide whether the circumstances warrant separate representation.

## The Rules

38. Section 122 of the Adoption and Children Act 2002 comprises three elements. Subsection 1(a) came into force in 2005. The provision amends section 41 of the Children Act 1989 by adding applications for the making or revocation of a placement order to the list of those proceedings, which are “specified” under that section. In these circumstances the child is to be separately represented in every case (unless the court decides this is unnecessary in order to safeguard the child’s interests).
39. The remaining subsections - 1(b) and (2) made amendments to the Children Act 1989 relating to rule making powers in sections 41 and 93 and came into force in December 2004. No court rules have been made under the amended provisions.
40. Section 122 (1)(b) amended section 41 of the Children Act 1989 Act to emphasise the rule making powers to add proceedings for section 8 orders to the list of “specified” proceedings in that section. This would require children to be separately represented in **all** section 8 Children Act cases. However, the Government is not convinced that this would be in the best interests for children in all cases. It is therefore intended that general rule making powers will be used to give the court powers to make the child party in particular circumstances.

### **CAFCASS plans following consultation on Every Day Matters**

41. Following the consultation paper “Every Day Matters” CAFCASS<sup>9</sup> plans to develop a new National Standard for early intervention, which guarantees a sequence of work in the first six weeks:
- early screening, completion of checks where needed, assessment, including a risk assessment, and analysis of every referral, in order to form a clear view of each individual child’s needs at the earliest possible point
  - the maximum amount of dispute resolution in private law cases, in the interest of individual children
  - where there are safeguarding issues within interim contact arrangements, a clear risk management and safety plan will be put in place
  - a clear case plan for every referral where work will continue beyond the six week point, setting out recommendations in the form of action plans for individual parties on behalf of each child
  - brief analytical writing where a report or a position statement is needed
  - producing children’s wishes and feelings statements routinely, with needs analysis integrated into the statement, on behalf of individual children in private law cases where dispute resolution with parents is unsuccessful or inappropriate
42. To effectively give the child a voice in court proceedings there must be a cultural shift towards enabling children to have a greater say in the processes that shape their future. However, there are barriers to achieving a more child-focused family justice system. The adversarial nature of private law proceedings means that parents are embroiled in disputes in which they cannot easily disentangle their emotions or focus clearly on the best interests of their children.

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<sup>9</sup> “*Every Day Matters*” does not apply to CAFCASS Cymru

## CAFCASS reports

43. There are a number of issues which impact on the clarity with which CAFCASS reports fully convey children's wishes and feelings. These include:

- the adversarial style of private law proceedings has contributed to the development of unnecessarily long reports because CAFCASS practitioners are apprehensive about being subjected to "hostile cross-examination" by advocates. The research has indicated that because of this apprehension felt by CAFCASS practitioners reports may not always represent the wishes and feelings of children as closely as they should
- practitioners may wish to protect the child from their parents' reactions. The CAFCASS officer writing the report "in code" may therefore obscure the child's wishes and feelings, which may require a certain amount of reading between the lines to decode or unpack
- concerns about the completeness of the representation of children's feelings in reports. These highlight an inherent tension in the family justice system: *"In the absence of the opportunity to hear from children directly, the judge or magistrates in family proceedings become wholly dependent upon CAFCASS practitioner's reports for their understanding of the child's wishes and feelings"*.<sup>10</sup>

44. The establishment of new court Rules should be accompanied by appropriate CAFCASS guidance about report writing to ensure a safe minimum is achieved in cases most in need of such reports. This would allow professional time to be better spent directly engaging with children and families to reach positive and enduring outcomes for parties, especially children. However, a court may still order a welfare report (section 7 Children Act 1989)<sup>11</sup> if it has concerns that there are child protection/welfare issues to be reported.

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<sup>10</sup> Dr A L James, Turn Down the Volume? Child and Family Quarterly, Vol. 12, No.12, No.2 2004, p.197

<sup>11</sup> The court can request a welfare report under section 7 Children Act 1989, either from the local authority or from CAFCASS on such matters relating to the welfare of the child.

45. It is important to ensure that reducing the proportion of CAFCASS resources devoted to report writing, in order to focus on dispute resolution, does not limit the opportunities for children to have their views and feelings recorded. However, the models being developed for initial assessment and early intensive dispute resolution period include plans to ensure CAFCASS does identify the wishes and feelings of the child. It should also be noted that not all children wish to become involved in proceedings. Some children would rather professionals reach informed decisions without their direct involvement.

### **Supporting change**

46. The Cardiff research report, alongside consideration of other research focusing on children's welfare and other statistical evidence, will be used to inform the making of future Rules of court. The establishment of court Rules will not take place in isolation and will be accompanied by detailed discussion with those who have a role in developing the proposals and, with the agreement of the President, a supporting Practice Direction.
47. Any new Rules to be made as a result of this consultation are likely to be made by the Family Procedure Rule Committee. The Committee will use general Rule making powers and the Rules made will form part of the new Family Procedure Rules. It is intended that these Rules will be simple and easy to follow and that they apply to all tiers of family court.
48. Work will be carried out with DfES, CAFCASS, and the Legal Services Commission, to ensure that the introduction of Rules and change in practices will be properly and sustainably supported. This will include consideration of the need for resources, training, and guidance, and the capability of the different organisations to deliver change without unduly impacting on their ability to fulfil their existing duties and functions in relation to other children and families.

### **Next steps**

49. Following the research findings the primary objective now is to establish new practices, court Rules and guidance that draw on existing legislation such as Rule 9.5 and Rule 9.2A of the Family Proceedings Rules 1991.
50. The proposals are set out in this consultation document. In the meantime, existing provisions for the representation of children remain in force, which continue to offer a range of ways in which the courts may ascertain children's wishes and feelings.

## The Proposals

### Proposal 1

**A child should be made a party to proceedings only where there is a legal need to do so.**

When a child is made a party to the proceedings a guardian and a legal representative are appointed. This paper considers whether this is the best way to ensure that the voice of the child is heard and whether separate representation is in the best interests of the child.

The findings of the Cardiff University research, and other research mentioned throughout this paper has shown that party status and separate representation is not always in the best interests of the child in *all* section 8 cases. It is often used as a last resort in protracted cases and can cause undue stress to the child who may not wish to participate in the process, either preferring to leave the parents to sort out the issues or feel that they are responsible for a decision “for” or “against” one parent or another, or simply do not feel capable of dealing with the stress of court proceedings on top of that caused by the parents splitting up.

It should not be forgotten that some children have no wish to participate at all. Fortin (*Children’s Rights and the Developing Law: Law in Context, Butterworths, 2003*) explains:

*“Whilst some [children] would like an “outside” advocate to listen to their concerns and even to be present in discussions about their future, others consider it important to maintain family privacy.”<sup>12</sup>*

Whilst children may feel isolated and unsupported during parental separation, when it comes to negotiations about family reorganisation and the possibility of court proceedings, it does not follow that all children want to be directly or actively involved. Through CAFCASS, their interests are already represented by the Children and Family Reporter without the need (and possible burden) of party status. In some cases, children might not see the relevance of legal proceedings by comparison with the more important and emotional tasks in hand. As a 12 year old girl put it:

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<sup>12</sup> J Fortin, *Children’s Rights and the Developing Law: Law in Context, Butterworths, 2003*, p.209.

*"I don't think I would have liked to know more...I wouldn't really have minded if I didn't know anything about it...It's more the emotional side – how other people feel about it."*<sup>13</sup>

In this instance it may have been detrimental to the interests and welfare of the child to ask them to take any further part in proceedings.

Consideration should be given to the legal obligations that come with having party status, for example receiving and serving documents and attending court hearings. This places a burden on the child which could be detrimental to their welfare. Another consideration is CAFCASS' limited resources to act as the Children's Guardian. It is essential that these resources are not called upon in cases where it is not warranted. CAFCASS already consider the child's welfare throughout section 8 proceedings, and their plans for intensive work with families in the early stages of proceedings will make it increasingly possible to find a resolution at an earlier stage.

The Parenting Plans "Putting your children first"<sup>14</sup> provide practical advice to parents in dispute over contact and residence. The guide includes a section about how to focus on children's needs and the importance of listening to children and seeing the dispute through their eyes. Valuable lessons have been learned about what parents found helpful in the Family Resolution Pilot Project. The project ran between September 2004 and August 2005 in Brighton County Court, Inner London Family Proceedings Court, and Sunderland County Court. The project was designed as a pilot scheme to assist parties involved in contact proceedings after relationship breakdown. The new provisions in the Children and Adoption Act 2006 include contact activities that will also help to focus parents on children's needs.

Research has told us that separate representation is often used because the child's voice needs to be heard more loudly, above that of the parents. All of the interventions referred to above are designed to achieve this without the need for legal representation. However, there will be cases where legal representation is necessary to deal with specific legal issues, for example, where the child has evidence to give or a legal submission to make that cannot be given by another party, and where the court considers there is a need in terms of Article 6 (access to a fair trial) of the European Convention of Human Rights.

An issue may arise that involves a conflict between the competing rights of the adult parties and the children. Legal support may be needed to put the case for the child. Therefore, it is proposed that party status be given to the child only when there is a legal need to do so.

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<sup>13</sup> G Douglas, M Murch, M Robinson and L Scanlan, Children's Perspectives and Experience of the Divorce Process, Family Law, May 2001, p.375.

<sup>14</sup> A guide for separating parents, DfES publication: <http://www.dfes.gov.uk/>

## Experts

The Cardiff University research also highlighted that respondents to questionnaires identified that access to public funding for expert assessment as a benefit of Rule 9.5 was a key determining factor in some appointments.<sup>15</sup> This was especially so in intractable cases where it was deemed necessary for parties to undergo assessment, but where legal aid had not been awarded, or parties were not legally represented, and parents could not afford or they refused to pay for the necessary expert report(s). Judge C Bellamy in a recent article (Family Law, April 2006) raised this issue.

*“due to restrictions in eligibility for public funding we...see more cases where parties are underrepresented and unable/unwilling to consider the need for expert assistance or assessment. In those...often intractable contact cases the only way to try to help a child to establish contact...is with their being separately represented.”<sup>16</sup>*

**Question 1:** Is the requirement of a legal need sufficient to cover the criteria when a child should be given party status? If not, what other criteria or circumstances should the court apply?

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<sup>15</sup> G. Douglas, M. Murch, C. Miles, L. Scanlan, Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, DCA publication, March 2006, p.163.

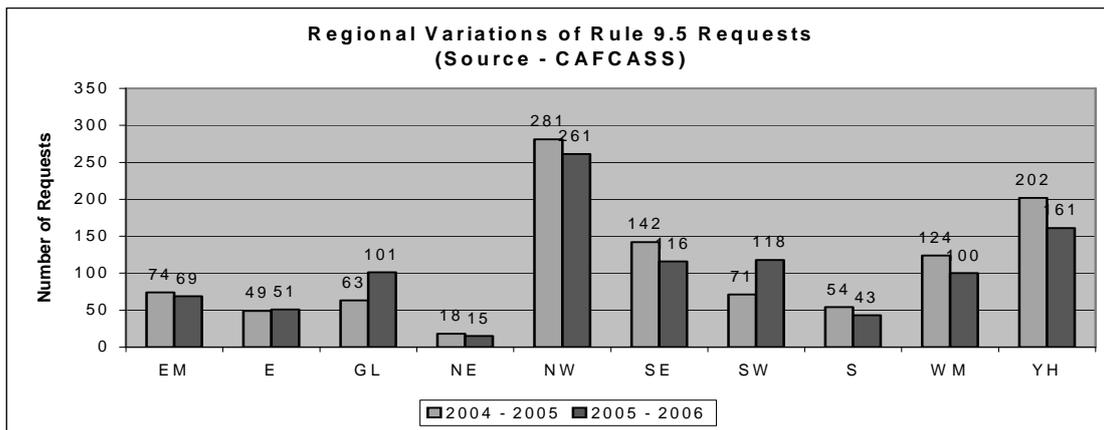
<sup>16</sup> Judge C. Bellamy, Rule 9.5: Further Reflections, Family Law, April 2006.

## Consistency

Contrary to the original intentions, the President's Practice Direction (April 2004) did not achieve consistency across the court circuit areas of the number of children made party to the proceedings. There is comparatively high usage of Rule 9.5 in the North West and Yorkshire and Humberside and to date there has been no clear explanation for this. The Cardiff University research highlighted an "apparent reluctance"<sup>17</sup> to make the child party on the part of the judiciary, though no explicit reasons were given for the regional differences. It is not known whether it is a differential reluctance or something else that explains the regional variation.

Other reasons have been advanced by Professor Murch in *The Voice of the Child in Private Law Proceedings in England and Wales*. The article highlighted that judges in some areas "might instead rely simply on the welfare reports from the CAFCASS reporter".<sup>18</sup> The article also suggests that judges in the high use regions believe that the "greater application of rule 9.5 will benefit a wider range of children involved in these private law proceedings than their judicial counterparts in low use areas".<sup>19</sup>

Since no definitive reasons for the differences in application of separate representation have been identified, it is apt that consideration of this issue should form part of this consultation.



<sup>17</sup> G. Douglas, M. Murch, C. Miles, L. Scanlan, Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991, DCA publication, March 2006, p.159.

<sup>18</sup> M. Murch, *The Voice of the Child in Private Law Proceedings in England and Wales*, International Family Law, March 2005, p.16.

<sup>19</sup> Ibid p.16.

**Question 2:** Given the regional differences if this proposal is applied nationally do you think that a greater level of consistency will be achieved?

**Question 3:** What are the possible reasons for the regional variations?

**Question 4:** What else can be done to address this inconsistency?

## Proposal 2

**When a decision is made to make a child a party to the proceedings CAFCASS should be the preferred choice of the court to act as the Children's Guardian.**

Current Rules provide that the court may appoint as a guardian either a CAFCASS officer, or (with his consent) the Official Solicitor, or (with his consent) some other proper person.<sup>20</sup> Therefore, although consent of the person to be appointed is required for appointments other than CAFCASS, each is equally open to the court. The establishment of a protocol between the National Youth Advocacy Service (NYAS) and CAFCASS in December 2005 clarifies the respective roles of the two organisations when the provision of a children's guardian is required following a child being made a party.

The intention of the protocol is that only where one or more members of the family can no longer work with CAFCASS, because their relationship with CAFCASS has broken down, will the court consider using another organisation or individual to ensure appropriate welfare and legal input. There may be fears about CAFCASS' ability to allocate Children's Guardians and this was conveyed in Judge Bellamy's recent article *Rule 9.5: Further Reflections* (April 2006):

*"It is inevitable...that judges are going to look for alternative options where CAFCASS cannot allocate an officer to fill a r9.5 appointment within a reasonable time. This may be by using NYAS...or perhaps by the appointment of a solicitor as guardian with permission to the solicitor to instruct an independent social worker."*<sup>21</sup>

It is understandable that perceptions of lack of resources (real or otherwise) spark fears of delays in the allocation of CAFCASS Guardians.

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<sup>20</sup> Proper person is defined in Order 1 r3 of the County Court Rules 1981

<sup>21</sup> Judge C. Bellamy, *Rule 9.5: Further Reflections*, Family Law, April 2006

Rules could provide for CAFCASS to be appointed unless CAFCASS is unable to provide a Children's Guardian or there is some other reason why CAFCASS is not suitable. Alternatively, CAFCASS could be appointed in all cases and then decide whether to undertake the work or contract with another organisation to provide the service.

**Question 5:** Do you agree that CAFCASS should be the preferred choice of the court to act as the Children's Guardian?

**Question 6:** If your answer to question 5 is yes – how best can this be achieved?

**Question 7:** Are there any circumstances when NYAS or other independent practitioners should be used instead of CAFCASS to act as the guardian?

### **Small Firms responding to this consultation**

**Question 8:** What would be the likely overall impact on your business?

**Question 9:** What do you estimate would be the cost to your business (if any) of this proposal? It would be helpful if you could show how you reach that figure.

### **Proposal 3**

**All levels of court and judiciary should have the authority to decide if a child should be made a party in all family proceedings.**

Rules do not provide for Family Proceedings Courts to make Rule 9.5 appointments. Consequently, in any case where separate representation is requested in a Family Proceedings Court a transfer to the county courts (who do have jurisdiction) is required.<sup>22</sup>

The President's Guidance Note issued in February 2005 to the Designated Family Judges raised the decision-making level to Circuit Judge. This was intended to address the unexpected increase in cases where party status was given to the child. However, the caseload remains high and inconsistent across court circuit areas. Current statistics show that the caseload has reached a plateau, but that numbers still remain more than double that of the period preceding the President's first Practice Direction in April 2004.

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<sup>22</sup> This proposal refers to all family proceedings where Rule 9.5 applies.

Since most section 8 cases are dealt with by District Judges in the county court, applying the Guidance Note has meant that a delay of an extra hearing has been introduced into proceedings as the case is passed to the Circuit Judge, after which the case is passed back to the District Judge to continue proceedings. It is proposed that the authority to make Rule 9.5 appointments is open to all levels of judiciary in all courts.

The general approach to the modernisation and harmonisation of Family Court Rules is that there should be a single set of Rules for all family courts. This supports the establishment of a unified administration, under the new HM Courts Service and the concept of a single civil court as set out in the consultation paper "A Single Civil Court?" published in February 2005, which will allow cases to be dealt with by the most appropriate judge. As the consultation paper explains:

*"... rather than relying on structural and jurisdictional boundaries to ensure appropriate allocation of work, it might be more effective to allow all judges (including lay magistrates) to have a general jurisdiction in principle, but then restrict its use as necessary."*<sup>23</sup>

The policy change would not only remove the delay of an extra hearing it would free up the capacity of Circuit Judges. The move would also support the policy of judicial continuity as far as is practicable.

<p><b>Question 10:</b> Should all levels of court and judiciary have authority to make the child a party to proceedings?</p>
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#### Proposal 4

**All levels of court should be able to hear applications by the child concerned for the court's permission to make an application for an order under section 8 of the Children Act 1989.**

The Practice Direction issued 22 February 1993 directs that these applications (for leave) must be referred to the High Court. This includes applications under Rule 9.2A of the Family Proceedings Rules 1991 by children who have party status and wish to participate in proceedings without a Children's Guardian. However, these applications are rarely so conceptually difficult that they have to be referred to the High Court in the first instance.

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<sup>23</sup> A Single Civil Court? DCA Consultation Paper CP 07/05, February 2005, p.20.

This proposal supports the President's strategy for family justice. In a speech to *Resolution* on 1 April 2006 the President set his overall strategy as follows:

*"First to institute and push forward the strategy of "cascading down" within the unified administration as recommended by the Judicial Resources Review [October 2005] and accepted by the senior judiciary, so that cases are heard at the lowest level available and appropriate to deal with them. This is necessary to relieve the pressure on the High Court judiciary whose work load is increasing and whose numbers are capped, as well as to reduce delays within the system.*

*Second, it is necessary to achieve greater flexibility in distributing work between the family judges in the county court (who are also at full stretch and themselves overtaxed), District Judges, and the under-used family Magistrates in the FPCs, where there is plenty of spare capacity in most regions and a Magistracy eager to perform."*

By allowing any tier of court to hear these applications they will be heard more quickly. This will therefore have an impact by reducing the period of uncertainty for children who are able and want to proceed without a guardian or next friend under the provision of Rule 9.2A, as their application for leave will no longer have to be heard in the High Court.

The Family Procedure Rule Programme is drafting Rules that, if implemented, are intended to allow Family Proceedings Courts to exercise the jurisdiction that is currently the preserve of the High Court. The aim of the new Family Procedure Rules will be to harmonise the Rules across the different levels of court. This is consistent with both the statutory requirement to make Rules that are simple and simply expressed and the broader drive to move towards a single family court.

In response to research findings the aim will be to provide judicial continuity as far as is practicable. This supports the Private Law Programme and will accelerate the conclusion of proceedings ending long periods of uncertainty for the child.

<p><b>Question 11:</b> Do you agree that applications for leave made by children should be heard in all tiers of family court?</p>
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## Proposal 5

**Children who are able and who want to proceed without a guardian or a next friend should be able to do so in other family proceedings. The current provision in Rule 9.2A of the Family Proceedings Rules 1991 only allows this in Children Act proceedings.**

This will offer an alternative to appointing a guardian **and** a legal practitioner unnecessarily in family proceedings other than Children Act proceedings. This will also build in flexibility to family proceedings where there may be no welfare issues, but where there are only legal issues that require representation. This in turn will free up CAFCASS resources when the appointment of a guardian is not necessary. This is in line with Civil Procedure Rules Part 21.2 (3) – the court may make an order permitting a child to participate in proceedings without a litigation friend.

Mabon v Mabon and Others<sup>24</sup> confirmed that Rule 9.2A of the Family Proceedings Rules 1991, as amended, was sufficiently widely framed to meet the United Kingdom's obligations to comply with article 12 of the UN Convention on the Rights of the Child and article 8 of the European Convention on Human Rights. This case recognised that the autonomous and consequential rights of children had grown.

**Question 12:** To what other family proceedings should the provisions in Rule 9.2A be applied and why?

**Question 13:** Other than being written into court Rules, how else could the provision of Rule 9.2A Family Proceedings Rules 1991 be promoted to competent children?

## Proposal 6

**It is not necessary for both the guardian and solicitor to attend *all* hearings in cases where there is separate representation.**

The esteem in which tandem representation is held and its perception as the “gold standard” for listening to children is acknowledged. There is no wish to abandon the tandem model. The consideration is whether it should be flexible enough to accommodate the guardian and solicitor acting in tandem, without necessitating the attendance of the guardian and solicitor at every hearing, and whether letters/short briefings from the guardian or the solicitor would suffice in providing case updates where appropriate. Currently, attendance of the guardian at hearings is obligatory and so considerations of making more efficient use of this professional

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<sup>24</sup> CA: Thorpe, Latham and Wall LJJ: 26 May 2005.

time cannot fall on the Children's Guardian. There might be occasions where either only a solicitor is required or only the guardian or (perhaps only occasionally) neither of them.

**Question 14:** Is it necessary for the solicitor to attend all hearings?

**Question 15:** Would restricting the role of the solicitor to certain hearings where they must actively represent the child (rather than hear the evidence of other parties) be detrimental to the best interests of the child?

**Question 16:** Might the requirement for attendance of the guardian at all hearings be relaxed in some way? What should the test be?

## Proposal 7

### **Children will be provided with reliable information during the course of proceedings to help them cope with associated anxieties and uncertainties.**

One observation from the Cardiff University research, which supports recommendations from the recent Child Care Proceedings Review, that providing children with reliable information from the beginning of proceedings is highly important.

*“A number of children are clearly ignorant, confused or made anxious by the knowledge that their parents are going to court to contest residence or contact. Some worry that their parents will be punished for behaviour to which the children themselves feel they might have contributed (such as refusing to go on contact visits).”<sup>25</sup>*

Information should be set out in clear, accessible and age appropriate language about the whole court process. This could help inform expectations and reduce disappointment. The Cardiff University research found that *“confusion (or ignorance) over the guardian's role meant that some children were disappointed or resentful if the guardian did not accurately relay their views as they wanted them put to the court.”<sup>26</sup>*

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<sup>25</sup> G. Douglas, M. Murch, C. Miles, L. Scanlan, *Research into the operation of Rule 9.5 of the Family Proceedings Rules 1991*, DCA publication, March 2006, p.8

<sup>26</sup> G. Douglas, M. Murch, C. Miles, L. Scanlan, *Research into the operation of Rule 9.5 of the Family Proceedings Rules 1991*, DCA publication, March 2006, p.190

Reliable information would also address children's prevailing image of "courts as scary places with a punitive ethos, which could, in intractable cases, lead...to the child believing he/she could be separated not only from the non - resident parent but from the resident parent as well."<sup>27</sup>

For competent children of sufficient age, and who wish to instruct their own solicitor under the provision of Rule 9.2A of the Family Proceedings Rules 1991, (which would appeal to more confident children who may wish to take a more direct involvement in proceedings) information about how they can be represented must be provided. The opportunity of being given a voice in matters that affect them would empower the child and this in turn could free up the time of CAFCASS resources.

There are some excellent leaflets, videos and web sites that provide age appropriate information for children, for example the NCH children's charity web site, the CAFCASS website and the Parenting Plans published by DfES.<sup>28</sup> Working with CAFCASS and DfES it is proposed to review and build on information about court proceedings and how this might improve methods of reaching the children who need this information.

**Question 17:** What sources of information for children are you aware of?

**Question 18:** How good do you think the current information for children is?

**Question 19:** How could it be improved?

**Question 20:** In what other ways could information is made available for children?

## Proposal 8

### To promote a cultural change that will achieve a more child centred family justice system.

Other than accurately representing the children's wishes and feelings on paper, how else can their views be made known? The answer could be to provide the opportunity for children to speak directly to the judge in private as currently takes place in Germany, Austria, and France, for example.

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<sup>27</sup> Ibid, p.206

<sup>28</sup> <http://www.nch.org.uk/>  
<http://www.dfes.gov.uk/>  
<http://www.cafcass.gov.uk/>  
<http://www.cafcass.gov.uk/cafcassCymru.htm>

In his recent speech to the UK Association of Women Judges in March 2006, the President clarified that in the majority of cases, it is not necessary for the judge to see the child in person because a CAFCASS report will have recorded the views of the child but that there would be two instances where doing so would be desirable -

*“First where...there is cause to question whether the reporting officer or guardian’s expression of the child’s views is sufficient or correct...Second...where the child has himself expressed a wish to speak to the judge.”*

Current opinion is against the judge speaking directly to children primarily because what is said in private by a child to a judge cannot be tested in evidence, and secondly, the judge cannot promise confidentiality to the child over his duty to safeguard the interests of the child. Nevertheless, consideration ought to be given to judges speaking to children as it would help redefine their perceptions of “scary” judges and the “punitive ethos” of the court environment. More importantly, it would help the judge obtain an informed picture of the case without the interpretation of a CAFCASS officer, even if the child’s views cannot be submitted as evidence.

**Question 21:** Do you feel that judges should speak to children as a matter of course?

**Question 22:** Acknowledging that the judge cannot use children’s views as evidence in making judgments and cannot uphold confidentiality over the duty to safeguard the interests of children, what are the other considerations in relation to the judge hearing the child in person?

**Question 23:** How can the court environment be made friendlier to children?

## Conclusion

The Government is committed to the well being and safeguarding of children and will uphold this commitment by ensuring that children and young people have an opportunity to have their views heard in matters that affect their future, but without undue stress being placed on them. No unnecessary burden should be placed on the child if the complexity of the case does not warrant it. Your views are welcomed on these proposals to improve provisions for the separate representation of children. They will inform the drafting of new court Rules. Through the development of these proposals and new court Rules it is intended that the family court procedure will improve and promote a child centred approach where the voice of the child can be heard.

## Questionnaire

Your responses to the following questions set out in this consultation paper are welcomed.

### Proposal 1

**Question 1:** Is the requirement of a legal need sufficient to cover the criteria when a child should be given party status? If not, what other criteria or circumstances should the court apply?

**Question 2:** Given the regional differences if this proposal is applied nationally do you think that a greater level of consistency will be achieved?

**Question 3:** What are the possible reasons for the regional variations?

**Question 4:** What else can be done to address this inconsistency?

### Proposal 2

**Question 5:** Do you agree that CAFCASS should be the preferred choice of the court to act as the Children's Guardian?

**Question 6:** If your answer to question 5 is yes – how best can this be achieved?

**Question 7:** Are there any circumstances when NYAS or other independent practitioners should be used instead of CAFCASS to act as the guardian?

### Small Firms who are responding to the consultation

**Question 8:** What would be the likely overall impact on your business?

**Question 9:** What do you estimate would be the cost to your business (if any) of this proposal? It would be helpful if you could show how you reach that figure.

**Proposal 3**

**Question 10:** Should all levels of court and judiciary have authority to make the child a party to proceedings?

**Proposal 4**

**Question 11:** Do you agree that applications for leave made by children should be heard in all tiers of family court?

**Proposal 5**

**Question 12:** To what other family proceedings should the provisions in Rule 9.2A be applied and why?

**Question 13:** Other than being written into court Rules, how else could the provision of Rule 9.2A Family Proceedings Rules 1991 be promoted to competent children?

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**Question 14:** Is it necessary for the solicitor to attend all hearings?

**Question 15:** Would restricting the role of the solicitor to certain hearings where they must actively represent the child (rather than hear the evidence of other parties) be detrimental to the best interests of the child?

**Question 16:** Might the requirement for the guardian at all hearings be relaxed in some way? What should the test be?

**Proposal 7**

**Question 17:** What sources of information for children are you aware of?

**Question 18:** How good do you think the current information for children is?

**Question 19:** How could it be improved?

**Question 20:** In what other ways could information be made available for children?

**Proposal 8**

**Question 21:** Do you feel that judges should speak to children as a matter of course?

**Question 22:** Acknowledging that the judge cannot use children's views as evidence in making judgments and cannot uphold confidentiality over the duty to safeguard the interests of children, what are the other considerations in relation to the judge hearing the child in person?

**Question 23:** How can the court environment be made friendlier to children?

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- M. Murch, *The Voice of the Child in Private Law Proceedings in England and Wales*, International Family Law, March 2005
- *A Single Civil Court?* DCA Consultation Paper CP 07/05, February, 2005

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this consultation exercise (eg. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
<b>If you would like us to acknowledge receipt of your response, please tick this box</b>	<input type="checkbox"/> (please tick box)
<b>Address to which the acknowledgement should be sent, if different from above</b>	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## **How to respond**

Please send your response by 8<sup>th</sup> December 2006.

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### **Extra copies**

Further paper copies of this consultation can be obtained from this address and it is also available on-line at <http://www.dca.gov.uk/index.htm>

### **Publication of response**

A paper summarising the responses to this consultation will be published in three months time. The response paper will be available on-line at <http://www.dca.gov.uk/index.htm>

### **Representative groups**

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### **Confidentiality**

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

The Department will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

## Partial Regulatory Impact Assessment

### Title of proposal

New court Rules for the separate representation of children in section 8 Children Act 1989 proceedings.

### Purpose and intended effect

#### Objectives

1. To establish court Rules for England and Wales to make a child a party in section 8 parental separation cases only where there is a legal need to do so. To improve the outcomes for children and to reduce court delays in the interests of access to child-focused justice.
2. The new court Rules will draw on existing legislation such as Rule 9.5 and Rule 9.2A of the Family Proceedings Rules 1991, and also the President's Practice Direction issued in April 2004, that sets out the circumstances for giving a child party status.
3. The policy is to uphold the Government's commitment to improve outcomes for children by ascertaining their wishes and feelings, but without placing undue stress and unnecessary burden on them that could be detrimental to their welfare if the complexity of the case does not warrant it. This is not to say that separate representation should be ruled out for cases where it is considered appropriate, but to consider this with the objective to achieve better outcomes for children in a sustainable way.

## Background

4. Children involved in public law proceedings are entitled to separate representation by a Children and Family Court Advisory and Support Service (CAFCASS) guardian and a solicitor (usually from private practice) and are made parties to the proceedings. However, children involved in private law proceedings do not automatically have representation in this way unless the court makes them a party to proceedings under Rule 9.5 of the Family Proceedings Rules 1991. This provision allows a child to be legally represented by a solicitor who will usually be working in partnership with a guardian in a way that is comparable to the representation received by children who are the subject of public law proceedings. Rule 9.2A allows competent children of sufficient age and understanding to participate in proceedings without a guardian.
5. Making the child a party to the proceedings is a step that will be taken only in cases where there is a legal need to do so, for example, where the child has evidence or a legal submission to make that cannot be given by another party, and where the court considers there is a need in terms of Article 6 (access to a fair trial) of the European Convention of Human Rights.

## Rationale for government intervention

6. The current situation must be revised to ensure that children and young people are given a voice in matters that affect them and in ways conducive to their welfare. If the present system and services remain unchanged this will continue to compromise the ability of CAFCASS to quickly allocate officers to cases most in need of separate representation in private law cases, and the backlog of public law cases will remain.
7. Rule 9.5 caseload is still more than twice that of the period preceding the President's Practice Direction. Statistics show a 105% increase for the period between April 2004 to March 2005 to that of the period between April 2003 to March 2004 (the year before the issue of the President's Practice Direction). If the caseload remains at its present level the situation of rising legal aid costs and overburdened CAFCASS resources will not be conducive to the representation of children in these and other cases.
8. The *mandate* for the establishment of new court Rules originated from a written ministerial statement of 11 January 2006 which stated that "New Rules of court will be developed", informed by relevant research reports.

9. The policy *driver* is to ensure that the case warrants separate representation and that those cases be targeted so that children's best interests are at the forefront. The President's Practice Direction issued in April 2004 aimed to effect a consistent application of the provision in courts across England and Wales and target its usage in the "high-use" regions. Contrary to original intentions however, Rule 9.5 caseload doubled within the first six months of the Practice Direction being introduced.
10. Rule 9.5 cases are highly resource-intensive on CAFCASS and costly. This is a further pressure on legal aid budget, especially when cases bypass CAFCASS and are allocated to independent practitioners and private solicitors for the provision of a children's guardian. Private law proceedings also incur the delay of an extra hearing because only a Circuit Judge can order party status for children. This requires a transfer from a District Judge to a Circuit Judge for it then to be returned to the District Judge to continue proceedings. The present situation of overburdened CAFCASS resources, increased costs and delay is not in the children's best interest.
11. The consultation proposes to provide information about the provision of rule 9.2A of the Family Proceedings Rules 1991, which provides for a child of sufficient understanding to participate in proceedings without aid of a Children's Guardian. It is hoped that this will give competent children a voice in proceedings, which affect their future and alleviate costs and resource problems associated with separate representation.

## Consultation

The development of the policy has been discussed with:

- Department for Education and Skills
- CAFCASS
- CAFCASS Cymru
- Legal Services Commission

## Options

### Option 1: Do Nothing

- If the current situation is not revised, the present system and services would remain unchanged
- The number of cases with child party status will remain high. Latest CAFCASS statistics to June 2006 show that caseload is still higher than prior to the issue of the President's Practice Direction in April 2004
- The current situation of rising legal aid costs and overburdened CAFCASS resources will remain
- The ability of CAFCASS to allocate officers to cases most in need will be compromised and the current backlog of CAFCASS public law cases will remain or increase
- Without building on the early intervention by CAFCASS it is likely that giving the child party status will increasingly be used late in the process. The result will be that difficult cases will continue to be prolonged.

### Option 2: Establishment of Court Rules

12. A child should be made a party to proceedings where there is a legal need to do so, for example, where the child has evidence or a legal submission to make that cannot be given by another party. These legislative provisions will uphold the policy commitment to improve outcomes for children by ascertaining their wishes and feelings, but without placing undue stress on them.
13. All levels of court and judiciary should have the authority to decide if a child should be made a party in all family proceedings
14. All levels of court should be able to hear applications by the child concerned for the court's permission to make an application for an order under section 8 of the Children Act 1989.
15. Children who are able and who want to proceed without a guardian or a next friend should be able to do so in other family proceedings. The current provision in Rule 9.2A only allows this in Children Act proceedings.
16. In addition to proposals to reduce the amount of professional time spent on report writing, consideration is extended to reviewing whether it is necessary for both the guardian and solicitor to attend *all* hearings in cases where there is separate representation.

## Costs and benefits

### Sectors and groups affected – the proposed changes will affect:

17. **Independent Practitioners and Private Practice Solicitors** – The provisions of the rules for separate representation allows a child to be legally represented by a solicitor, who will usually be working in partnership with a guardian. The proposal to give the child party status, only where there is a legal need to do so, may reduce the number of cases where independent practitioners and private practice solicitors will be called upon.

Currently, attendance of the guardian at hearings is obligatory and so consideration of making more efficient use of this professional time cannot fall on the Children's Guardian. There may be occasions where either only a solicitor is required or only the guardian or (perhaps very occasionally) neither of them. Solicitors may not be required to attend all hearings within family proceedings thereby reducing costs.

18. **CAFCASS** – Any administrative impacts will fall largely on CAFCASS in terms of how they report the wishes and feelings of the child to the court.

19. **Judiciary/Courts** – Changes will have an impact on the judiciary, who will need to consider on a case by case basis whether there is a legal need to give the child party status. The proposals will also impact on the allocation of work across all levels of court and judiciary

20. **Children who are subject of, or party to, family proceedings** – The proposals contained in this consultation paper are intended to ensure children and young people have an opportunity to express their views in matters that affect them, in ways conducive to their welfare. The proposals aim to resolve current delay in court procedure, resource burdens on CAFCASS and financial burdens on the legal aid budget by targeting separate representation to cases that warrant it.

21. The proposals intend to inform children of sufficient age and understanding of the provision under Rule 9.2A of the Family Proceedings Rules (1991) allowing them to instruct a solicitor direct without the aid of a CAFCASS Guardian.

22. The proposals will not have any disproportionate effect on any social group or individual. The proposals will not undermine the rights of children with disabilities as the court may consider in any individual case that the presence of such a disability means that there is a legal need for the child to be a party. It is also possible for a child's wishes and information about the disability to be made known through the CAFCASS welfare role regardless of party status.

### **Race Equality Impact**

23. These proposals will not have any race equality impact. They will not have a disproportionate affect on either children or adults from ethnic minority backgrounds.

### **Costs**

#### **Cost of referring a case to the Circuit Judge for Rule 9.5 decision-making.**

24. The President issued Guidance to all Family Judges in February 2005 that (unless there were exceptional circumstances) District Judges should adjourn and transfer the case to a Circuit Judge in order for them to appoint a guardian. Judicial practice varies greatly. Some, but not all District Judges transfer cases to a Circuit Judge, while others prefer to confer with the Designated Family Judge to obtain approval to make Rule 9.5 appointments due to the urgency of the situation. In other instances, District Judges obtained the decision of the Circuit Judge to make a Rule 9.5 appointment over the phone.
25. Where a case is adjourned and transferred to a Circuit Judge it currently takes on average up to 4 weeks for the case to be referred to the Circuit Judge to make a Rule 9.5 appointment, depending on the capacity of that judge to accommodate the case. There is the assumption that once the Circuit Judge has dealt with the question of whether or not to make a Rule 9.5 appointment, the case is routinely sent back to the District Judge. However, some Circuit Judges retain the case for the sake of judicial continuity, which creates a further imbalance within judicial workloads.
26. This is not the most efficient use of the capacity of Circuit Judges, who are a significantly more expensive resource, and whose remit is to hear the more complex cases. Therefore, decisions concerning Rule 9.5 appointments could rest at a lower level of judiciary.
27. The length of time it takes from when the case is put before a Circuit Judge to being passed back to a District Judge (and not necessarily the same District Judge) for the next directions hearing varies between 2 weeks and 2 months. The process of referral to the Circuit Judge before the hearing is continued at District Judge level can take up to three months in total.
28. The average duration of a directions hearing is 30 minutes. The average cost of a 30-minute directions hearing involving 2 legally aided parties is £205, with £65 being funded by HMCS and £140 by legal aid.

29. Between March 2005 and May 2006 CAFCASS statistics indicate there have been 1134 Rule 9.5 cases and NYAS figures show they have had 207 cases, giving a total caseload figure of 1341 Rule 9.5 cases.<sup>29</sup> Based on these statistics the growth of cases from March 2005 to May 2006 has cost an additional £275,000.
30. Implementing proposal 4, that all levels of court and judiciary should have the authority to decide if the child should be made party, will result in savings of £205 per case. It will eliminate up to three months delay in the referral of the case to a Circuit Judge and back to the District Judge. It will also improve judicial continuity in hearing Rule 9.5 cases.

### **Costs relating to legal representation and party status for the child**

31. With regard to *legal* representation for the child, the latest Legal Services Commission figures for 2005/06 indicate that the average cost of one legally aided party under the age of 18 in section 8 Children Act 1989 contact cases is at least £3,330.<sup>30</sup> This figure includes cases dealt with by CAFCASS with a publicly funded solicitor. By comparison, the average cost of the legal representation of a person over 18 in section 8 cases is £2,668. Therefore, children incur a greater average cost than those for adults.
32. Joining the child as party only where there is a legal need to do so would therefore save on the cost of party status to the legal aid budget in those less complex and conceptually difficult cases.
33. Implementing such a proposal would reduce costs to the legal aid budget. Whilst this change may have an impact to CAFCASS, it would nevertheless result in savings to in the overall process. Use of CAFCASS guardians would cost less on the public purse than if; for example NYAS or another independent practitioner were to be appointed as a children's guardian.
34. Party status is sometimes requested by parties to obtain an expert report, funded by legal aid. This may be especially so in intractable cases where it is deemed necessary for parties to undergo assessment, but where legal aid has not been awarded, or parties are not legally represented, and parents cannot afford or they refused to pay for the necessary expert report(s).

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<sup>29</sup> In the absence of any mechanism that allows HMCS to collect statistics on Rule 9.5 cases the only available statistics are collected by CAFCASS and National Youth Advocacy Services (NYAS).

<sup>30</sup> The average cost of £3,330 is only for a client under the age of 18 and not for all funded clients.

35. Party status involves a children’s guardian and solicitor acting in tandem, which places obligations on the child that come with being a party, for example receiving court papers. The alternative to ordering party status could, for example, be a limited appointment of a lawyer solely for the purpose of instructing an expert. Doing so would eliminate the costs of a Children’s Guardian and the obligations accompanying the party status of the child. It would also ensure that Rule 9.5 is not being requested by parties solely for the purpose of securing an expert (as CAFCASS would make the recommendation) when parties cannot agree funding.

**Costs of a children’s guardian, allocated and funded by CAFCASS**

36. The average unit cost (incorporating price inflation) of a Rule 9.5 case to CAFCASS is at least £3,363 with an average of an additional 75 hours being spent per case. The increase in these cases has in turn resulted in increased costs to CAFCASS of £1,829,000 over a 3-year period from 2003-04 to 2005-06. This is illustrated in the table below:

<i>CAFCASS Statistics – Rule 9.5 Cases</i>			
<i>Year</i>	<i>2003-4</i>	<i>2004-5</i>	<i>2005-6</i>
<i>All s8 Orders (HMCS)</i>	<i>63,278</i>	<i>63,419</i>	<i>63,637</i>
<i>Rule 9.5 orders</i>	<i>526</i>	<i>1081</i>	<i>1033</i>
<i>% of s8 orders that are r9.5</i>	<i>0.83</i>	<i>1.70</i>	<i>1.62</i>
<i>Unit cost to CAFCASS (inc. price inflation and rounded to the nearest 10))</i>	<i>£3,280</i>	<i>£3,370</i>	<i>£3,440</i>
<i>Total Cost to CAFCASS (rounded to the nearest 1000)</i>	<i>£1,725,000</i>	<i>£3,643,000</i>	<i>£3,554,000</i>

37. Should caseload be returned to 2003 levels (which do not include the NYAS caseload) there would be an estimated saving to CAFCASS of at least £1,829,000 over a 3-year period for Rule 9.5 cases.

38. Proposals that decrease caseload volume and costs are the preferred option to equalising and stabilising costs across regions.

**Costs of a children’s guardian, allocated by NYAS and funded by legal aid**

39. The increase in Rule 9.5 cases has been a particular concern to the Legal Services Commission who fund independent practitioners. They have confirmed that private practice solicitors acting as Children’s Guardians buy in social work expertise that charge up to £60 per hour. In addition, NYAS charge the Legal Services Commission £32 per hour. A further cost of £150 is charged for a half-day attendance in court. The data available from CAFCASS indicates that the unit cost of a CAFCASS Guardian in Rule 9.5 cases equates to approximately £52 per hour.<sup>31</sup> This figure includes the overhead costs of CAFCASS allocating a Children’s Guardian, the management of that guardian and support services. It is not possible to accurately cost the savings to the legal aid budget. However, anecdotal evidence suggests that implementing proposal 2, that when a decision is made to make a child a party to the proceedings CAFCASS should be the preferred choice of the court to act as the Children’s Guardian, would result in cost savings from a more seamless approach and service with clearer and fewer interfaces.
40. The below statistics from NYAS for the period April 2003 – March 2006 show an increase of 83%, over a 3-year period from 2003-04 to 2005-06, in costs for Rule 9.5 cases.

<i>NYAS statistics – Rule 9.5 appointments</i>			
<i>Year</i>	<i>Apr 03 - Mar 04</i>	<i>Apr 04 - Mar 05</i>	<i>Apr 05 - Mar 06</i>
<i>R9.5 appointments</i>	120	153	158
<i>Case cost of r9.5 cases (rounded to the nearest 10 )<sup>32</sup></i>	£4,480	£4,710	£6,240
<i>Total for costs to legal aid budget (rounded to the nearest 1000)</i>	£538,000	£721,000	£986,000

41. The average case cost for NYAS is £5,143. Using the statistics based on the average unit costs to CAFCASS and case costs to NYAS for Rule 9.5 cases, calculations show that using NYAS to act as children’s guardian is more costly by approximately 53%. If CAFCASS subsume Rule 9.5 cases into their workload as a result of proposal 2, and supported by its recent protocol with NYAS, this will result in 53% (£1780 per Rule 9.5 case) of savings to the public purse each time a CAFCASS guardian is appointed.

<sup>31</sup> There is no comparative rate for a half-day attendance in court.

<sup>32</sup> These figures include a small number of cases where NYAS have represented children in rule 9.2A cases – 2.7% in 2003/04, 2.5% in 2004/05, and 8% in 2005/06.

42. Implementing proposal 5 will enable children of sufficient age and understanding to instruct their own solicitor in other family proceedings and will also result in approximate cost savings of at least £3,363 per case – the result of eliminating the average unit cost of a Children’s Guardian altogether. The current provision in Rule 9.2A of the Family Procedure Rules 1991 only allows this in Children Act proceedings. There are no statistics that show the exact number of Rule 9.2A cases to date. Anecdotal evidence however suggests that caseload is very small. Promoting the provision would not only have a positive impact on the welfare of a child, empowered by taking more direct involvement in decisions affecting their future, it would also save on the average unit costs of allocating a Children’s Guardian.

#### **Costs relating to CAFCASS section 7 reporting**

43. Figures based on the number of hours spent on writing section 7 reports indicate that CAFCASS spends approximately 25 hours<sup>33</sup> at a cost of £1,300 per report. It is intended that the proposals build on CAFCASS’ intention to reduce the amount of professional time spent on report writing. Financial and resource savings could then be allocated to focus on earlier and more effective interventions for the purpose of improving outcomes for children in line with CAFCASS’s consultation paper, *Every Day Matters*.

#### **CAFCASS Cymru**

44. It is important to note that the above statistics do not apply to CAFCASS Cymru. It is intended that proposals that refer to CAFCASS and CAFCASS Cymru will be subject to further discussions.

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<sup>33</sup> CAFCASS (England) have estimated that it may take 40 hours to prepare a complex section 7 report in those areas where Alternative Dispute Resolution schemes are in place.

## Benefits

45. The situation of increased costs, delays, and overburdened CAFCASS resources is not conducive to the representation of children in cases that most need it. By targeting cases where there is a legal issue to be represented and providing better information about the provision of Rule 9.2A, where a child does not wish to use a guardian, it is intended that these negative impacts will be addressed. The following benefits will be delivered by the proposals contained in the consultation document:

- the wishes and feelings of the child will be identified earlier in proceedings
- party status is given to the children that most need it
- children of sufficient age and understanding will be empowered by the provision of Rule 9.2A
- by building on existing literature children will receive better information about the court process and the decisions that affect their future
- delay in the allocation of guardians will be reduced
- the pressure on CAFCASS resources will be reduced
- CAFCASS should be the preferred choice of the court to act as the Children's Guardian, which will relieve financial burdens on the legal aid budget
- the amount of professional time spent on report writing will be reduced
- the reduction of time spent by legal representatives in court will relieve financial burdens on the legal aid budget
- improved in judicial continuity as a result of eliminating the extra hearing incurred in referring the case to the Circuit Judge for Rule 9.5 decision-making
- there will be greater flexibility in distributing work between all levels of court and judiciary

### **Compensatory Simplification Measure**

46. These proposals will not increase the administrative burden for private sector businesses. Any administrative impacts will fall largely on the public sector and more specifically CAF/CASS.
47. The proposals aim to lead to the new Rules of court that draw on existing legislation such as Rule 9.5 and Rule 9.2A of the Family Proceedings Rules 1991, and additionally the President's Practice Direction issued in April 2004. The new court Rules will govern the practice of courts in England and Wales.
48. It is proposed that primary legislation is not revised but that general Rule making powers be used to give the court powers to make the child a party where there is a legal need to do so, for example where the child has evidence or a legal submission to make that cannot be given by another party.
49. The proposals will lead to new court Rules, which will be placed in the proposed new Family Procedure Rules together with Rules based in part on the existing Family Proceedings Rules, re-written and adjusted as a result of the proposals for Rules harmonisation. The proposed new Family Procedure Rules will be laid by the Family Procedure Rule Committee and will govern the practice and procedure to be followed in family proceedings in the High Court, county courts and Magistrates' Courts. It is intended that as far as possible the Family Procedure Rules will be harmonised and modelled on the Civil Procedure Rules. This will be for the benefit of individual court users, the public sector and the private sector.

### **Small Firms Impact Test**

50. The Small Business Service has been consulted and they advise further consultation with small firms of solicitors and their representatives during public consultation in order to gather views on the possible impact of these proposals on their businesses. Small firms are encouraged to participate in this consultation and contribute their views.
51. Views are welcome, particularly from small businesses dealing with family cases, which may be affected by these proposals.

### **Competition Assessment**

52. The overall impact of the proposals on competition is minimal. Procedure for the allocation of a Children's Guardian has been clarified by a protocol issued in December 2005 between NYAS and CAFCASS. This protocol reinforces the President's Practice Direction of 2004, Guidance of 2005 and also in Rule 9.5 of the Family Proceedings Rules 1991, and clarifies the respective roles of the two organisations when the provision of a children's guardian is required following a child being made a party.
53. Responses are encouraged from stakeholders' on the assessment and the impact of the proposals. If you disagree with assessment of the impact on competition please provide supporting reasons.

### **Enforcement, Sanctions and Monitoring**

54. The policy change for the separate representation of children does not introduce any civil penalties. The proposal is to make court Rules that will establish the circumstances where a child can be made a party in section 8 Children Act proceedings. When a child is given party status, a children's guardian and solicitor is appointed. This is highly resource intensive and costly. It is intended that the child will be made a party only when it is appropriate, after considering the alternatives, and it is proposed that this should be where there is a legal issue to be addressed, and in cases where the child is the person making the application, as in the provisions of the Children and Adoption Act 2006.
55. It will be important to consider steps to ensure that Rule 9.2A is appropriately applied and monitored. It should not be used to load costs on to the child's funding certificate for them to be borne by the limited Community Legal Service Fund rather than the individual adult parties to the proceedings. However, where there may be an impact is where CAFCASS carry out extended conciliation. However, it is believed that this process will be more cost-effective and controllable than using private practitioners.
56. There is currently no case recording mechanism in place to isolate Rule 9.5 cases from general family law cases involving children under 18 years of age. Subject to funding, it is suggested that system changes to IT accompany the implementation of court Rules in order to record private law cases where Rule 9.5/9.2A has been invoked. Doing so would allow Rule 9.5/9.2A cases to be quickly identified for the purpose of research and evaluation.

57. Another aspect of monitoring would be to work jointly with CAFCASS and the Legal Services Commission to agree what can be put in place to record (i) who represents the child (ii) the costs involved in doing so, and (iii) how much time is spent on a case by those acting as children's legal representatives. It is likely that monitoring these cost elements will fall to the Legal Services Commission. However, it should be noted that such monitoring might become more difficult for the Legal Services Commission as graduated fees are applied.
58. In order to measure the impact of policy change an evaluation or review will need to be undertaken, using qualitative and quantitative methods.
59. Qualitative evaluation will obtain the views of children and their families in answer to questions i.e.
- Have the new provisions for legal representation met the needs of children which have been made party to proceedings under Rule 9.5?
  - How have the provisions met their needs?
60. Quantitative evaluation will obtain the following as a means of measuring the cost-effectiveness and efficiency of court proceedings under the new provisions:
- Number of Rule 9.5/9.2A cases at the point of policy implementation
  - Number of Rule 9.5/9.2A cases a year after policy implementation
  - Average costs involved in Rule 9.5/9.2A cases at the point of policy implementation
  - Average costs involved in Rule 9.5/9.2A cases a year after policy implementation
  - What is the average number of hours spent by CAFCASS/NYAS/private solicitor on Rule 9.5/9.2A cases at the point of policy implementation?
  - What is the average number of hours spent by CAFCASS/NYAS/private solicitor on Rule 9.5/9.2A cases a year after policy implementation?
  - What is the average duration of Rule 9.5/9.2A cases at the point of policy implementation?
  - What is the average duration of Rule 9.5/9.2A cases a year after policy implementation?

## Summary and recommendation

61. Private law proceedings that entail separate representation of children are highly resource-intensive on CAFCASS and costly beyond the available legal aid budget, especially when cases bypass CAFCASS and are allocated to independent practitioners to act as a guardian. The risk of Option 1 (do nothing), is that the present situation of overburdened CAFCASS, legal funding resources, increased costs and delay is not in the best interest of children.
62. Option 2 is recommended in order to establish court Rules based on existing regulations. Doing so will improve outcomes for children by clarifying the cases where Rule 9.5 should be invoked and by ascertaining their wishes and feelings at an earlier stage than at present. It will also result in the following savings:
- up to three months in the referral of the case to a Circuit Judge before being returned for hearing by the District Judge
  - £205 per case as a result of eliminating the extra directions hearing before the Circuit Judge and allowing all levels of court and judiciary the power to make Rule 9.5 appointments
  - an average of at least £3,330 per case to the legal aid budget were the child is not joined as a party to proceedings and savings to public funding
  - £1,829,000 (over a corresponding period) to CAFCASS if Rule 9.5 caseload is returned to 2003 levels
  - 53% savings per case to public funding if a guardian is allocated by CAFCASS, rather than by NYAS or an independent practitioner
  - £3,363 (average unit cost) per case to CAFCASS of providing a children's guardian, if the proposal to promote greater use of Rule 9.2A is implemented

## Declaration and publication

I have read the regulatory impact assessment and I am satisfied that the benefits justify the costs

Signed .....

The Rt Hon Harriet Harman QC MP  
Minister of State for Constitutional Affairs  
Department for Constitutional Affairs

Date

Contact point

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### **The Consultation Criteria**

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

**These criteria must be reproduced within all consultation documents.**

## Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622, or email him at: [consultation@dca.gsi.gov.uk](mailto:consultation@dca.gsi.gov.uk)

Alternatively, you may wish to write to the address below:

**Laurence Fiddler**  
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**5th Floor Selborne House**  
**54-60 Victoria Street**  
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**SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 39.



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