

Parental Separation: Children's Needs and Parents' Responsibilities

Background

Rights of Women is an Industrial and Provident society, which was founded in 1975 to promote the interests of women in relation to the law. We run a free, national confidential telephone legal advice help line for women. We specialise in advising in family law, especially domestic violence and Children Act matters. Rights of Women works to attain justice and equality by informing, educating and empowering women on their legal rights. We are a membership organisation and our activities include producing publications, organising conferences and training courses and undertaking policy and research work.

As an organisation we are concerned about women's access to justice and are very concerned that the proposals set out in this paper may directly discriminate against women. The U.K. is a signatory to the United Nations Beijing Declaration and the Government has made a commitment to improving women's legal literacy and access to justice.

It is vital that every element of the revised funding code produced as a result of this paper be equality proofed - in that it be tested to ensure it does not discriminate on the basis of gender, race, disability, sexuality, age, religion or traveller status. We have not confined ourselves to answering the questions posed and have commented on other points and issues which arose from the paper.

Overview

The aim of this consultation paper is to outline proposals by which parents who have separated or are going through a relationship breakdown, can resolve parenting issues in an amicable way and without necessarily resorting to the courts.

The paper aims to do this by informing and advising parents on how to deal with the consequences for their children of their separation and importantly, how to access the information which is available to help them.

We feel that there are many positive aspects in this paper which in theory, would allow the separation process to run a much smoother course. However, there are a number of concerns and points which we would like included within the proposals in order to safeguard women and ensure that they are gaining access to justice without compromising the welfare of the child.

Our paramount concern must always be the welfare of the child and his/her mother. In order to abide by this principle, women must be able to firstly access the legal system. There must therefore be a thorough review of the public funding scheme to ensure that all vulnerable women are able to gain access to legal

justice and are not barred from doing so due to income limits, cultural differences, disabilities, language barriers or simply even fear.

The Proposals

The paper states that the Government will restructure public funding in order to incentivise early dispute resolution. However, proposals that have been put forward for public funding are still not satisfactory and create a barrier to women accessing their legal rights. Our concern is that where an incentive is given to solicitors to settle a case before it goes to court, this could result in women being pressured into reaching an agreement where they may be unsure about doing so, or do not really want to. Due to the agreement being unsuitable and/or unsatisfactory, the case may ultimately end up in the courts anyway.

With reference to paragraph 8 of the paper that the Government will work with other parties to promote “judicial continuity”. For many women who phone our telephone advice line, we know that this is an important issue for them. They find it frustrating that they often see a different judge on each occasion that they attend court and aside from having to sometimes repeat painful experiences time and time again, perhaps more crucially, they feel that important factors and issues are lost in the process. We would therefore welcome any proposal that would try to ensure that judges, wherever possible, would preside over cases from the start to the end of that case. We would like to have seen proposals included in the paper regarding the funding of these issues.

We are encouraged that the Government is looking to develop guidance on case management (with a view to achieving quicker, better outcomes), although we would raise concerns that cases involving issues such as domestic violence are not brushed over just to achieve this target, at the expense of women’s justice.

We have noted and agree with the proposals in paragraph 42 which discuss “a presumption of contact”, and agree with the Government that an automatic 50:50 division of the child’s time is not always in the best interests of the child.

In a survey conducted by The Lord Chancellor’s Department in 2001, domestic violence only featured in 19% of child contact cases. However, we believe that this further emphasizes the fact that domestic violence is still an extremely hidden issue, which women feel unable to talk about for various reasons. Although we are in favour of and can appreciate that it may be better for a child to have a continued relationship with both parents, we do not think there should be an automatic presumption that “one size fits all”, without looking at ALL the facts of the case at hand. These facts could include issues of domestic violence, cultural issues when dealing with women from Black and Minority Ethnic communities and language barriers.

There has been substantial research undertaken and significant evidence to show that one in four women experiences domestic violence which often continues after the relationship is over. Contact is often used as the means to continue abuse or to exercise control over the mother.

In addition to this, it is often the case that where a mother has been abused, physically or sexually, the children of the relationship are undergoing the same. (30-40% Hughes et al,1989). The child herself may not wish to continue a relationship with her father for this reason.

We believe that there is a great need for substantial training in understanding domestic violence for ALL those officers involved in court proceedings including solicitors, barristers, judges and CAF/CASS officers. These officers need to be aware of the different forms it can take (ie the definition of domestic violence, should not simply include physical violence) and how it impacts on women.

The Need For A Definition of Domestic Violence

Many women themselves do not recognise their situation as domestic violence or are too frightened and or embarrassed to admit they are in a violent relationship. If court officers had specific training in domestic violence, this would help them to understand the signs of a woman in this situation and why she may, therefore, not want to go down the mediation or alternative dispute resolution route.

The implementation of Section 5 of the Adoption and Children Act 2002 in January 2005 will clarify the definition of harm and we see this as a big step in the right direction. We would also like to see alongside this definition of harm, a legal definition of domestic violence in this country. We would like to see a definition along the lines of the New Zealand definition as contained in section 3 of their Domestic Violence Act 1995.

We endorse the definition used by the United Nations Special Rapporteur on Violence Against Women, who in the United Nations Declaration on the Elimination of Violence Against Women in Article 2, defines violence as encompassing but not being limited to 'physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices, harmful to women, non-spousal violence and violence related to exploitation.

We believe that a unified and agreed definition would ensure that domestic violence is dealt with in a uniform way by statutory organisations. We would like to see a comprehensive definition of domestic violence within these proposals.

Without such a definition, it is extremely difficult for the courts to consider the impact of domestic violence has had on a woman in the past and the reasons

why she may appear to be extremely resistant and have strong reservations to contact between her child and the child's father in the future.

We would like to see all these proposals substantiated further by the Government committing to providing adequate training to judges and officers. The Government's plans to monitor and evaluate the effects of their clarification of the definition of harm alongside the fact that mothers will soon have the opportunity to raise concerns they may have about a father having contact with their child, are welcomed and seen as a positive and long awaited step. Although in theory, women should have the opportunity to do so now, we have found from the experiences of many of our callers to our advice line that this is not the position. These guidelines which will require judges to consider a mother's concerns at the earliest stage in proceedings, may subsequently prevent a lot of time wasting, costs in addition to emotional trauma for women.

With regards to the issue of information sharing between courts and the establishment of an integrated domestic violence court, Rights of Women would view this as a very positive step and one that brings to an end the inconsistency that currently exists between courts.

One of our greatest concerns regarding these proposals is the funding to implement them. Most of these proposals will only work and be successful if other related organisations are involved and can work alongside the parents. We would suggest the Government provides financial support to the existing information and advice providers in order for these proposals to succeed. There are limited voluntary sector avenues for women who need assistance with legal matters and where in existence, funding has been significantly cut. As an organisation we are able to provide free, confidential advice and information to women nationwide on such issues but do not provide casework. Without funding, it is unlikely that these partner organisations will be able to provide the level of support required to ensure a high success rate.

The Role of CAFCASS

The idea of "parenting plans" to help parents reach agreement would appear slightly formulaic. No two cases are identical and this proposal again tries to presume the "one size fits all" assumption. We also believe that it could result in giving false hope to women about how a judge may deal with a case just because the template has provided a certain example. If the child's views are also to be heard, this cannot be done through a parent. CAFCASS officers will be responsible for providing the child's input. However, CAFCASS are already extremely overstretched in their workload and are not always able to deal thoroughly with their existing duties. This new proposal could increase their workload further and we are unable to see how CAFCASS will be able to cope efficiently. At present CAFCASS already has a significant role to play in the court process by preparing numerous reports. If CAFCASS are unable to provide this

service, there will, therefore be a need for another independent, fully trained body to do. Significant funding will be required for this to be successful.

Access To Legal Advice & Information

Many of the proposals within this paper are linked to parents being able to access the advice which the Government says is or should be available. The telephone helpline service which would provide general legal advice to callers may be a useful tool but it could never be a substitute for legal representation.

The issue of contact between parents and children is a highly emotive, sensitive and legalistic subject. Whether or not a telephone service and/or a website is the correct way to convey advice and information will need to be subsequently evaluated. Once again we believe that the fundamental problem lies with the limited availability of publicly funded legal advice and representation. The number of solicitors firms offering legal aid is decreasing yearly. From the Legal Services Commission's own statistics the number of CLS providers had fallen to only 4,715 nationwide. Our own experience of signposting women from our advice line, is that there are areas of the country (and not only in rural and provincial areas) where women are simply unable to access legal advice. Women are being denied access to justice by this lack of availability of public funding aid and are having to "make do" with helpline services which do not cover all the options.

We will never have a situation where we will be able to tell the courts how to decide upon a particular case but we want to try and ensure that any issues of domestic violence are taken into consideration and looked at thoroughly when deciding whether a contact order is in fact beneficial and in the best interest of the child involved.

We would like to see safeguards around the helpline service put into place such as thorough uniformed training for all advisers on the same basis as that which the judges and other legal officers would be provided with.

We would also like to know how women who have English as a second language or have a hearing disability would access services such as these.

Funding Of The Proposals

We are also anxious to learn how the government intends to redefine and redistribute public funding to promote earlier resolution of disputes. We would hope that in doing so, women who do not wish to enter into mediation with an abusive partner are not unfairly discriminated against and deprived public funding because they have not felt able to face their ex-partner. We would again like to see an exemption enforced for cases which involved any element of domestic violence.

We have already stated above that the number of solicitors providing family legal aid is extremely low. If the Government intends to introduce a system of accreditation for solicitors, we would be interested to see how this will work without a form of financial incentive being provided to them. Subsequently, if the public funding system is planning to reward solicitors who help settle problems without going to court, our concern would obviously be, that we want to avoid the situation where women feel pressured by their solicitors to making arrangements that they are unhappy with, but feel it is the right thing to do because their solicitor has advised it. Furthermore, even when a woman does agree to making arrangements without the court becoming involved, the fact that solicitors have already become involved, may be proof that the parties involved were not within the 90% of separating couples who could come to an agreement on their own initiative. There is, therefore a higher likelihood that any arrangements that are made will ultimately break down after a short period of time and end up in court regardless. It is important to accept that some cases will never be able to be fully settled out of court and will need to be determined by a judge. We ask whether another new accreditation scheme is really necessary. At present, we already have the Family Law Panel and the Solicitors Family Law Association Specialist Accredited Panel. Will these be abolished? The fact is this. If there is insufficient public funding, women will still be unable to access these newly accredited solicitors, as many will still be unable to afford the services of these expert family lawyers.

The Need For Safeguards

Our overriding concern is that there will always be certain cases which despite all safeguards being implemented with respect to the proposals in this paper, cannot or should not be resolved by mediation. We would be extremely concerned about any proposals where a woman felt forced or compelled into mediation or having to try alternative dispute resolution. In a domestic violence case, mediation will almost certainly not be the chosen route for women. There can often be serious power imbalances in relationships that are not instantly or immediately recognized by courts and/or others as domestic violence. It may lead to a situation where there is a power imbalance for women. Women may feel as though they are not on a "level playing field" whilst sitting opposite their abuser trying to negotiate an agreement about contact with a person who they have fears about for themselves as well as for their children.

Callers to our advice line tell us they already feel pressured into reaching agreements outside of court for fear of being viewed as unreasonable. With the trend of mediation being encouraged by these proposals, it is likely to mean that in many cases where there exists an element of domestic violence, this will not be disclosed and will remain hidden for the fear of repercussions from service providers. Any agreements which are made, in such an environment of fear, will not be conducive to the welfare of the child.

We believe that the implementation of Consent orders which could clarify arrangements and ensure the enforcement of agreements could be a beneficial tool to parent arrangements.

Implementation Of The Proposals

We are pleased that the Paper has taken into account some of the difficulties in implementing these proposals regarding cases which have an element of “harm” involved in them. As previously stated, in cases such as these, it is extremely important that a woman is not forced into attempting in-court conciliation. If she wants to pursue this option, (perhaps eg where the father has only ever been abusive to mother and not to the child, and therefore the mother wants the child to maintain contact with its father), we would like to see this done without face to face contact. We would have serious concerns and reservations about any proposals which involve a woman having a face to face meeting with the perpetrator of domestic violence.

We have already stated that we believe that all officers involved with the facilitation process would need to be fully trained in domestic violence. Regarding in-court conciliation, we need to ask the question who will provide the facilitator role? If it is CAFCASS, can they do this effectively and efficiently with an already overstretched workload?

Our concerns regarding CAFCASS who play an extremely important role in preparing reports for the court have already been raised. If judges are encouraged to commission reports less often, it is of paramount concern that adequate safeguards are implemented to ensure that cases where domestic violence and safety of women before (eg on picking up and returning child to mother’s home) and during contact (safety of the child) are ensured. At present the CAFCASS reports provide some form of investigation into the circumstances. Without these reports, women may once again feel their needs and safety issues are being ignored.

We are pleased to see that the Government wants to improve case management by the courts and welcome the proposal to promote this further. However, this must not become a statistic governed exercise where in order to meet targets, important aspects of cases are overlooked and rushed over in cases where a much more thorough approach is required. We note that the Paper has stated that cases vary so much in complexity that they will not place an absolute completion target on all cases and Rights of Women welcome this sensible approach.

The courts and officers of the courts are extremely over burdened and stretched by their numerous duties and workload. We are encouraged by the proposals which the Government has put forward but are concerned as to how in practice these will be actually implemented by a work force which is already substantially overworked. We wish to avoid the situation where in theory we have a system

which adequately protects mother and child and enables both parents to enjoy contact but in reality is failing either the mother and/or child due to the inability to actually check that Orders are being adhered to.

This problem arises again with regards to Family Assistance Orders and flexibility in their use. This is due to the fact that they are reliant on CAFCASS or local authorities, and neither of these parties have sufficient resources to follow up FAOs.

The pressure these proposals will place on the Courts and officers of the courts is extremely great. We would like a guarantee that extra funding and resources will be provided by the Government otherwise it is highly unlikely that these proposals will work efficiently.

Contact centres play an important role in enabling contact between a parent and child whilst safeguarding both mother and child. More funding and more centres are required with specialist 1:1 supervision available.

Having new enforcement provisions which judges could impose where there has been a failure to comply with an order appears to be a good idea but only where this is done in conjunction with a definition of domestic violence being implemented and training for all court officers in domestic violence. This is essential, as women may often refuse contact where they are threatened with and are victims of violence when a father comes to their home to pick up the child for contact visits, or fear for their child's safety once the child has left her home. It is essential that the reason for failing to comply with a Court order is understood and looked at within the context of domestic violence and not just simply viewed as the woman failing to respect the Courts order. Where training has been provided to Officers of the courts, they will be able to adequately and fairly judge the case and impose and or enforce Orders appropriately.

Summary

Crucial to the success of this paper is the question of Government funding. We believe that there needs to be a standardised accreditation procedure that includes training on understanding domestic violence, child protection issues, investigating domestic violence and abuse. The Government must ensure that there are sufficient resources to implement and enforce these proposals. In paragraph 7, it states that In-court conciliation will be implemented **as resources permit**. Will it therefore be a "lottery" as to whether women can gain access to this provision depending on where in the country they live?

Rights of Women recognise that there is (all be it limited) existing information and advice available for women who are going through a relationship breakdown and are trying to make child contact arrangements. The problem has always been that women have found it extremely difficult to access these outlets due to lack of

availability in their area, language barriers, cultural differences or being above the income level. We would like to see a system which allows all women regardless of their status, have access to and the opportunity to obtain an just and safe agreement.

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