Consultation on Children Cases in the Family Court: Response to the Private Law Interim Report

About us

1. Young Legal Aid Lawyers (YLAL) is a group of lawyers who are committed to practising in those areas of law, both criminal and civil, that have traditionally been publicly funded. YLAL members include students, paralegals, trainee solicitors, pupil barristers and qualified junior lawyers based throughout England and Wales. We believe that the provision of good quality publicly funded legal help is essential to protecting the interests of the vulnerable in society and upholding the rule of law.

2. In Autumn 2018 the President of the Family Division invited Mr Justice Keehan (public law) and Mr Justice Cobb (private law), to lead two cross-professional Working Groups, to look at practices and processes in these two areas. This is our response to the Private Law Interim Report.

Response to consultation questions

a. SSFA: Do you support the formation of an alliance of services (the 'Supporting Separating Family Alliance')? Should this be overseen by the Local Family Justice Boards, or overseen/managed in some other way? Should the alliances have a local or national identity/organisational structure?

1. YLAL broadly supports the formation of an alliance of services, the SSFA. We are of the view that the alliance should have a national identity but with regional structures to allow for a more tailored approach for families going through the court system in their local area—much like Cafcass officers are local to the children themselves so that relevant services can be offered.

2. In YLAL's view, the creation of an alliance will assist in offering a multi-agency approach to families when they go through the court system. More information on funding will have to be provided, including in regard to whether parties are expected to fund these services themselves, whether there will be scope for parties' public funding certificates to cover costs, or whether it will be inclusive for all court users.

3. YLAL agrees that resources should be made available to separating parents and it would be of assistance for there to be a central, government website to provide access to resources online. It would be preferable to also have information online that splits information between general resources and local resources. However, it should not be taken for granted that every local area has a high number of free or low-cost resources for parents to access on a face-to-face basis. YLAL considers that there are areas where there is a little to no free or low-cost support is available. This is a particular problem in rural areas or large counties and face-to-face support and/or courses can therefore often be limited.

4. YLAL is not persuaded at this stage that Local Family Justice Boards should manage local resources: it is not clear how this would work in practice, not least because carrying out additional functions is reliant upon the goodwill of already very busy practitioners. Currently, there are vast differences between LFJBs, with some having websites and information available online and others having no online presence. Whist YLAL would not wish to dismiss matters being managed by LFJBs, YLAL considers that there needs to be further discussion with LFJBs as to if they feel able to 'manage' this and how such provision could be effective in their local area, and if there is capacity to do so.

b. MIAM: What more could be done to refresh or revitalise the MIAM to encourage separating parents to non-court dispute resolution?

5. YLAL recognises that LASPO has led to an unprecedented rise in litigants in person in the family courts. Unrepresented litigants do not have the benefit of legal advice to signpost them to mediation or other forms of dispute resolution. YLAL is of the firm view that early legal advice, even if only to cover a one-off initial consultation with a solicitor, ought to be available to redirect families into mediation and to explain the costs and benefits of court proceedings versus alternative dispute resolution.

6. YLAL members very often see cases where parties have not attended a MIAM because of allegations of domestic abuse or they have claimed exemption for other reasons. It is of some concern that the suggestion for the MIAM worker to suggest some other form of mediation when domestic abuse arises as an issue rather than suggest that the matter is dealt with by the court, conflicts with the guidance in Practice Direction 12J. It is recognised however that parties should explore the full range of alternatives to face-to-face mediation, such as shuttle mediation where the parties do not need to be in the same room, which may act as a way to manage risk appropriately.

7. MIAMs are usually only relevant where parties have narrow issues, which, in YLAL's experience, is the minority of cases. Encouraging parties to attend a MIAM therefore, when their cases involve disputes that are really unlikely to settle (i.e. relocation, change of residence), will only result in a failed MIAM. There needs to be a delineation between cases that, on the papers, appear to be appropriate. There are however cases that come to court that could be suitable for mediation, but this has not been explored properly thus undermining cases where there are genuine exemptions. In these cases, the court may need to be more willing to scrutinise why an exemption has been replied upon and to direct the parties to mediation if it is thought appropriate to do so. If one party attended the MIAM but the other did not, the reasons for non-attendance should be explored. YLAL's view is that a standard direction should be included at the FHDRA to make it clear that mediation has been considered as an option and it is or is not appropriate for the reasons recorded on the face of the order. In the President's standard family orders, a template direction is available:

> *"The court has considered the exemption claimed for attendance at a mediation information and assessment meeting (MIAM) and is not satisfied that it was properly clamed. Accordingly [name] must attend a MIAM and produce evidence at the next hearing that they have done so."*

8. YLAL suggests that judges and advocates should be more proactive in including this direction in the order at the FHDRA. Given the issues around securing continuity of tribunal, this would also assist future judges to consider and to review the MIAM requirement if the case is reallocated.

9. Andrew Moore and Sue Brookes of Mills and Reeve LLP have suggested that duty mediators are present at court on the date of the FDA or FHDRA to undertake MIAMs.[1] YLAL considers this to be a sensible proposal that would prevent any further delay and ensure that alternative dispute resolution is attempted in a controlled environment. The duty officer would then be available to report to the court if required around the suitability of mediation or recommendations around other forms of dispute resolution.

10. YLAL does not think that a re-branding exercise is what is required. YLAL's view is that changing the name of the MIAM to not include 'mediation' in the title would only be a surface change that in practice would not affect any increase in participants for MIAMs. However, YLAL agrees that rewording the invitation to emphasise that it is a child-focused exercise would be beneficial and at an early stage identify to litigants in person the approach that will be taken in proceedings.

11. The suggestion that the mediation document becomes an open document to encourage more parents to attend is one that YLAL thinks will require further thought as this is not consistent with usual mediation practice and there is no indication of how this will affect MIAMs required in financial remedies cases where the practice of 'without prejudice' is very important to the structure of proceedings in Part 9 of the Family Procedure Rules. It would be undesirable, in our view, for there to be a difference of approach with regards to MIAMs for children and financial remedies proceedings as this may have the effect of confusing parties rather than helping them, particularly given that it is common for parties to be involved in both types of proceedings.

c. GATEKEEPING AND TRIAGE: Do you support the changed arrangements for gatekeeping? And for triaging cases?

12. YLAL considers that the proposals for gatekeeping and triage seem sensible but much relies upon accurate and timely information gathering from third-party agencies. For instance, at the gatekeeping meeting, the district judge/legal adviser is required to ascertain what further information is needed from a local authority or other agency for the purposes of triaging. For CAFCASS to carry out the more focused role envisaged by the interim report, including making recommendations around the 'track' for each case, it will also require this information. The safeguarding and other information then needs to be available for the triaging judge at about 4-6 weeks after issue.

13. It is the experience of YLAL members that there are often serious delays in the receipt of information from CAFCASS, local authorities and the police. All three are creaking under the burden of a rise in private law (and public law) cases. YLAL agrees that the revised CAP needs to spell out the expectations upon police and local authorities to disclose information/documents. There are often delays in safeguarding letters being completed within 17 days of receipt of the directions upon issue and before the FHDRA[2], for instance because there was an administrative delay in CAFCASS being informed, or because the police or local authority information is yet to be received. The interim report suggests that *"[r]obust mechanisms within the court should be in place*

1 A. Moore and S. Brookes, '*MIAMs: a worthy idea, failing in delivery*', Family Law Week, 2017 Archive, accessed at: https://www.familylawweek.co.uk/site.aspx?i=ed182325

2 Private Law Working Group, '*A review of the Child Arrangements Programme', June 2019*, p37 (para. 77)

to ensure that safeguarding letters are placed on file by the target date and the file promptly referred to the triage team"[3] but does not set out what these mechanisms shall be. The report does not suggest any form of sanction for the late receipt of information, observing that if information is not available by the target date, *"Cafcass/Cymru should provide an explanation to the court as to reason(s) why, and the expected date of provision of information."* This is not a real departure from what is expected from CAFCASS at present if they don't provide their safeguarding letter; they would be expected to explain why and to inform the court when they can provide a letter. YLAL does not suggest that there should be sanctions given services are struggling under the pressure of the rising workload, but the concern is that there is no real impetus for services to comply with requests for further information in a timely manner given the lack of consequences.

14. YLAL is clear that early legal advice could bring huge benefits at the triaging stage. At the triaging stage, the information available to the judge shall be the application form, the form C1A, the acknowledgement form, safeguarding information and CAFCASS recommendations. The parties would be able to make representations around track in the application form and response. If the parties had the benefit of legal advice, the drafting of the preliminary documents could more clearly set out the issues in dispute which require the court's determination. In respect of 'returner' cases, legal representatives are more likely to signpost the court to the relevant previous orders and other papers in the application form. With the benefit of advice, the parties could make informed representations about the appropriate track for the case. Unrepresented parties are unlikely to be able to determine what track is appropriate; even applicants in relatively straightforward disputes may not see their cases as anything except "complex".

15. Parties are not going to be present at triaging. This means that the judge will be able to make a track allocation decision and other case management directions without the benefit of having oral representations from the parties. If the judge requires clarification around any of the issues in the safeguarding letter, they can speak to the CAFCASS officer via phone or Skype. YLAL is concerned around the lack of transparency at the triaging stage with the discussions between CAFCASS and the judge not being made known to the parties. The reasons why the judge has chosen to pursue or not to pursue the CAFCASS recommendations are also not known to the parties. Parties are unable to make representations around the CAFCASS recommendations or the safeguarding information.

16. If this option is pursued, YLAL's view is that the court will need to clearly set out on the face of a case management order: (i) what, if any, concerns are raised by the safeguarding information; (ii) what the CAFCASS recommendations are, whether they agree with CAFCASS and why; (iii) the reasons for the track allocation and for the case management directions, including any direction for a contact activity such as SPIP. If the judge has had any further conversation with CAFCASS, this should also be recorded on the face of the order with a brief summary of what was discussed. There should be provision in the order for parties to write to the court should they wish to vary the order and to make representations accordingly.

d. TRACKS: What are your views about placing cases on 'tracks' once in the court system? Do you agree with the distribution of work between tracks 1 and 2 based on complexity?

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[3] Ibid., p46

17. YLAL's view on tracks is that whilst they may seem a good idea to assist with allocation, they run the risk of having the same issues as the allocation and gatekeeping guidelines. Our experience is that often magistrates will refuse to re-allocate cases that fit with the criteria within the 2014 Guidelines. There will need to be consideration as to how there can be uniformity between court centres as there can be very different approaches in different areas. It is not suggested how easy the movement within the tracks will be once a case starts. It is also not always possible to identify all the issues before the case starts as, unfortunately more often than not, safeguarding checks and interviews are not completed until the FHDRA. If safeguarding checks were guaranteed to be completed in a timely manner, the use of tracks could be a positive step. Furthermore, it is not clear how the tracks will interact with the 2014 Allocation and Gatekeeping Guidelines. If work is distributed between tracks based on complexity, there needs to be an understanding that if the case becomes more complex over time there is a mechanism for proper review and for reallocation if necessary.

18. YLAL considers that the aim of resolving cases in 8-10 weeks is ambitious. Given busy court centres already struggle to list matters quickly, and with increasing public law cases working to a 26 week timetable, without a change in availability of resources it is unclear how this will operate in practice.

19. YLAL is, however, of the view that Track 3 for parties who are returning to court is a positive step. There should be judicial continuity here wherever possible.

e. SPIPs: Could/should we encourage more parents to attend SPIPs? If so, when and how?

20. The suggestion of pre-proceedings attendance at a SPIP is in principle a good one as the court environment can, inevitably, stoke tensions further and risks entrenching positions. YLAL is however of the view that this must mean that safeguarding interviews are completed on time to see whether attendance at the SPIP is relevant and would assist. There are a number of cases where the SPIP is not ordered as it would not be appropriate. Pre-proceedings orders requiring attendance at the SPIP may mean that parties are attending when it would not be appropriate to do so/would not be ordered after safeguarding has been considered.

21. The experience of YLAL members is that many clients have reported that the SPIP was useful to them in hearing other parents' experiences. However, we have also experienced clients who have used the SPIP to come back to court and inform us that their case is not being run as someone else's is being run. There does not appear to be uniformity about when parties have to attend a SPIP and so this has the effect of beleaguered parents sometimes passing on bad advice to parents just starting the court process. This is obviously an unintentional negative consequence.

22. Whilst it is positive that there is a resource available such as SPIP which encourages parents to put themselves in their children's shoes, the SPIP is very short at 4 hours (or 2 sessions at 2 hours) and it is a one-off session with no further input for the families. If CAFCASS is able to do so, consideration ought to be given to "follow up" sessions after the initial 4 hours throughout the proceedings. The allocated judge can regularly review whether any further input would be helpful. An alternative could be for the parents to have joint reviews one-to-one with a CAFCASS officer to discuss the next steps that they had set out at the initial SPIP session and any suggestions for moving forward. YLAL considers that given the degree of parental conflict faced by the

family courts, one-off sessions are likely to have a modest effect only and it would be more beneficial if the support available to parents was intensive and more consistent.

23. The parties are not required to attend the same SPIP as each other and whilst this is a helpful starting point, it seems counterintuitive for the parents to be kept apart when one of the aims of the SPIP is to improve communication. YLAL is of the view that consideration could be given to part of the SPIP being held with parents together so that the initial steps towards improved communication can take place in a controlled environment. This would of course only be appropriate in some cases where the risk has first been appropriately assessed. YLAL notes that the SPIP Plus pilot which was evaluated by Trinder et al. in 2014[4] included a 'Plus' session with both parents meeting together with a facilitator after the initial group session. This has the dual effect of bringing the parents together and of building on the work that was started in the original 4-hour session. In addition, the pilot included a MIAM and an online programme entitled 'Getting it right for children'. The Plus pilot put these various interventions together to propose a more intensive package of support for families rather than a single group session. Consideration needs to be given to what interventions can work alongside a SPIP to yield optimal results for each family; this is something for the triaging judge to address at the outset.

24. The interesting part of the feedback, in our view, is that only 45% of attendees thought that the SPIP would help with sorting out arrangements with their child's other parent. Surely that is the point of the course. The SPIP will need to be improved so that more parents have more confidence in the programme if, realistically, there is going to be a campaign to encourage parents to attend.

f. RETURNERS: What are your views on the arrangements for 'returner' cases, specifically, their early re-allocation to the original tribunal for triage?

25. At first glance, it seems entirely sensible for returner cases to be allocated to the original tribunal for triage. However, the current difficulties in securing continuity of tribunal both in private and public law are well-known. In his keynote speech to the Families Need Fathers conference in 2010, Sir Nicholas Wall observed that:

> *"[s]itting in the Court of Appeal, [he] still came across cases in which as many as nine or ten judges had all dealt with the same case. Each had had to read the papers: each had had to make a decision and, inevitably, the decisions are sometimes inconsistent… For a number of judges all to have to read the same bundle of papers is not only a waste of valuable judicial time: it is inefficient and leads to inconsistency".*[5]

26. He commented on why some of these difficulties had arisen: busy circuit and district judges rarely sit exclusively in the family jurisdiction, High Court judges go on circuit or sit in the Administrative Court, and so on. There is also a crisis in judicial hiring with the government topping up judges' salaries to combat recruitment issues.[6] Within this

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4 L. Trinder et al., 'Evaluation of the Separated Parent Information Programme Plus (SPIP Plus) Pilot', Department for Education, April 2014, p9

5 N. Wall, 'Is the family justice system in need of review?', Families Need Fathers Conference 2010, accessed at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Speeches/pfd-speech-families-need-fathers-19092010.pdf

6 M. Fouzder, 'Hiring crisis: High Court judges in line for £47k', The Law Society Gazette, 5 June 2019

context, the question remains: how viable is it for cases to be allocated to the original tribunal given crowded court listings and limited judicial availability?

27. Furthermore, continuity of tribunal may be criticised by any parent who has previously been handed an unfavourable decision by the same judge. A "fresh pair of eyes" is more likely to encourage a parent to accept any decision of the court, even if it is not what they wanted. If a parent has previously had a high-conflict relationship with a family court judge, their ability to "buy in" to any eventual judgment after a repeat application is likely to be affected.

28. The importance of "buy in" cannot be overstated. CAFCASS data suggests that "conflicted adults" was the most common reason for cases returning within 2 years and more likely to involve a repeated issue i.e. the new application concerns an issue which is substantially the same as the one that drove the previous application. These cases are characterised by high levels of mistrust between the parties.[7] As such, the importance of an impartial tribunal, and more importantly, a tribunal that is seen to be impartial, is crucial.

g. RECOMMENDATIONS: These are set out in Annex 3. Do you have any comments on any of these recommendations not covered elsewhere in your response?

29. YLAL is concerned about the availability of some provisions. For example, CCI services are fairly limited, and parents often don't agree without the benefit of legal advice. YLAL's experience is that in some local areas, Cafcass Officers are reluctant to use CCI services unless it has become apparent during proceedings that there is no other way. It may be quite difficult for Cafcass Officers to identify at the stage of safeguarding whether such a service is appropriate.

30. YLAL emphasises again that the decimation of legal aid for the majority of private family cases has had a devastating impact on the family courts. Early legal help would play a vital role in reducing the number of cases going to court, in encouraging alternate dispute resolution, and assisting courts to narrow issues and reducing the amount of time and resources spent on straightforward cases which are capable of being resolved either outside the court arena or at the first hearing.

[7] E. Halliday et al., 'Private law cases that return to court: a CAFCASS study', November 2017, pp2-3, 7

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