

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

Response to the recommendations made

3. The Public Law Interim Report is divided into six groups. YLAL has set out its response to each of the groups in the tables below with references to the paragraph number in the report.

a. Local authority decision-making

Paragraph number	YLAL Response
31	YLAL considers that decision-making prior to birth is a subject currently underdeveloped. There is potential for better liaison with antenatal services and best practice across the country could be highlighted and spread.
32	YLAL agrees with this sentiment. YLAL notes however that there is a vital distinction between a family's compliance—i.e. whether they are good social work clients—as opposed to an understanding of risk—i.e. whether they are in fact good enough parents. There is a risk that social workers respond subjectively and negatively to any lack of compliance by families which can result in the risk being overestimated. YLAL considers that this distinction should be emphasised and may be a real training issue for social workers.
33	YLAL agrees but notes however that it is the lack of funding and cuts to front line services which impacts upon the provision of support.
35-37	YLAL agrees with these observations.

	YLAL suggests that training in the way described needs to be focused on managers as well as lower level staff. If the threshold is met, there must then be very careful consideration as to what action is required, including exploring what support is available, before concluding that the most draconian action is required.
38-39	YLAL agrees and notes that this is precisely how the system should work. However, YLAL queries how this can happen given it is apparently not happening already. The reality is that local authorities are under immense pressure, there are not enough social workers on the ground, social workers are given high pressure caseloads not long after qualification, and team managers are over stretched. It is difficult to see how the situation can improve without increased funding to provide for more social workers so that caseloads are manageable.
40	YLAL agrees that the IRO could be used more effectively to challenge decision making. There may also need to be a focus on the training and supervision of IROs. Filing statements from IROs in proceedings could also assist.
41	YLAL considers there are major issues with the use of section 20. In some areas there is a concern that s20 is regularly misused on the understanding that its use is simply to remove children from a risky environment without the need for an urgent application to the court. The 'voluntary' element of s20 is effectively removed if a parent is told to agree s20 accommodation or the child will be removed by the police. It is a concern that frequently parents will make this decision without having received legal advice. Once s20 is 'agreed' cases are often then left on the back burner whilst more 'urgent' cases are focused on. YLAL agrees that s20 could be used far more effectively if it is approached as a 'support' rather than a short cut.
43	Recommendation 1: Sharing good practice. YLAL agrees that this will assist however understands that similar guidance is already available within most local authorities and will broadly cover the same goals. YLAL considers that improved training for social workers regarding the decision-making routes would be beneficial.
44	Recommendation 2: A shift in culture to one of co-operation and respect that values and equally questions the contribution of all parties. A culture of co-operation may well be desirable, but YLAL is unclear from the report how this will be implemented in practice.
45	Recommendation 3: A renewed focus on pre-proceedings work and managing risk. YLAL notes that the PLO process intended to bring the focus upon pre proceedings, however this has not always worked in practice. In addition, it is not always helpful for 'all work' to be completed pre proceedings given there is no judicial oversight and the concern is that the process can feel one dimensional which may impact on the ability of the

	parents to properly engage. It is fundamental that parents are treated fairly given the serious nature of an interference in their private and family life.
46-49	Recommendation 4: Develop consideration factors to support decision-making prior to legal gateway meetings. YLAL's view is that this approach sounds positive but clarity is needed as to how this would work in practice. The emphasis on support is positive but this will require proper funding.
50	Recommendation 5: Re-focussing the role of the local authority legal advisers and the use of the legal gateway meeting. YLAL agrees with the proposal for the role of the legal adviser to shift so that support is considered at the legal gateway meeting. YLAL agrees that the legal adviser should be raising the ethos of <i>Re B-S</i> at all stages and reminding the social work team, if necessary, of the test that the court will apply.
54	Long Term Recommendations - Recommendation 1: Consideration of pre-birth support for families. YLAL agrees with the proposal for the Nuffield Family Justice Observatory report to inform long term changes to the social work approach to newborns and infants.

b. Pre-proceedings and the PLO

Paragraph number	YLAL Response
57	YLAL is concerned that the quality of pre-proceedings work varies across the 174 local authorities in England and Wales. It is vital that there is consistency and uniformity.
58	YLAL members are concerned that PLO meetings can be carried out with a lack of sensitivity. This may be reduced by emotionally intelligent training for social workers.
71	It is recognised in the report that ' <i>the PLO process should not be a response to a crisis that could have been avoided if the support and intervention was put in place at an early stage.</i> ' YLAL agrees with this principle but recognises that the destructive impact of austerity and cuts in local authority budgets has severely restricted the support and intervention available at an early stage.
77	YLAL endorses the view that communication and letters before proceedings should avoid jargon and the use of acronyms and must be capable of being understood by an unrepresented party.
81	YLAL considers that locating parents in proceedings is an area of particular weakness in social work practice and routinely this is not dealt with early enough. Enquiry agents are very often able to locate family members if given their name and date of birth. YLAL considers that the relatively modest cost of

	instructing such agents is an effective step in ensuring family members are engaged with proceedings from an early stage.
87	YLAL agrees that quality assessments are important. The difficulty however in pre proceedings is that the parents do not usually have a role in choosing or briefing by way of letter of instruction. YLAL considers it important that such decisions are made with the input of all parties to ensure an appropriate expert is instructed with appropriate terms of reference.
89	It is positive that the report identifies the need to establish the network of family and friends available to the parents and child. Some local authorities now use less formal family meetings which may be appropriate provided the lack of formality does not lead to poor practice.
101	YLAL welcomes the recognition that records compiled in pre proceedings should be of sufficient quality for use in proceedings and also to represent fairness. There are frequently difficulties with promptly obtaining hospital records following birth which may be fundamental to the court's decision-making in respect of whether or not there should be the separation of a new-born baby from the mother. YLAL considers that these should be sought in advance wherever possible to ensure that the parents are given a fair hearing.

c. The application

Paragraph number	YLAL Response
155-163	YLAL recognises that some emergency/urgent hearings cannot be avoided but many applications do not fall into this category. Wherever possible parents should be given advance notice of any hearings to ensure they can obtain legal advice and be able to participate fully in the hearing. It is concerning that there has been an increase in short-notice applications over the last five years.
165	YLAL endorses the suggestion that there is a national protocol for the early notification of Cafcass to ensure that a guardian can be allocated and attend the hearing.
168-170	It is difficult to comment on the new C110a without seeing it. However, YLAL agrees that it is important for the form to prioritise the most relevant information. YLAL considers that the 'grounds for the application' should be properly and clearly pleaded; too often this is copied and pasted from the social work statement. There should be numbered grounds setting out clearly the findings sought.
171-174	YLAL agrees that repetition in the SWET—or any documents before the court—should be avoided where possible. YLAL understands the reasoning for having a reduced SWET. The balance of drafting this will be to allow the local authority to adduce all evidence required to meet the test and limit the documentation. There is no draft of

	<p>this document to consider specific provisions, however the aim is eminently sensible and will likely assist. The concern would be the local authority not providing enough information for a court to make a decision in the reduced SWET, since this may be the sum of local authority evidence before the court. The document would need to be carefully drafted. If the social work team are expected to write in their document why legal tests are met, a layman's explanation of the test should be included in the questions.</p>
181	<p>YLAL recognises that where possible early directions should be made at ICO hearings. ICO hearings do however involve a high level of emotion and are frequently listed at the last minute and before a parent has met their representative, seen the papers or filed a statement; it can be difficult to focus on case management directions when advice has to be given about the removal. A case management hearing following an advocates' meeting gives the legal representatives the chance to take full instructions from the parents so that directions can then be agreed.</p> <p>Further hearings are often also required when expert applications are not made. This could be due to a case allocation issue and the parties having not considered / had time to consider their cases and what applications need to be made. However, YLAL does express caution at listing matters too late, given the assistance of judicial oversight in decision making and the bounds of the 26 weeks. A balance must be struck, and this guidance will need to be reviewed alongside statistics for an update.</p>
187-192	<p>YLAL agrees that local authorities should prepare cases prior to birth so that parents can be informed of the decision to issue proceedings in good time and can seek legal advice. YLAL considers this to be the most appropriate way to ensure that the parents are given a fair hearing. Wherever possible a mother should know before giving birth whether the local authority seek to remove the baby. YLAL consider there should be a protocol in place to ensure decisions are made in advance of the expected due date.</p>
201-214	<p>YLAL generally agrees with the recommendations proposed.</p> <p>The focus on wellbeing is welcomed. This must however be more than just a 'tick box' exercise and any protocol should reflect the needs of the practitioners working in the local area (after consultation with them). This can only work when there are sufficient resources in place and where there is adherence across the judiciary. A policy will mean nothing if short deadlines are set. This will require a long-term effort to ensure there is meaningful change.</p> <p>YLAL considers that a new IT system is appropriate. The use of 'Caselines' digital bundle system by all local authorities would be useful; it can be extremely difficult to work electronically when large PDFs in multiple emails are sent the day before the hearing.</p>

d. Case management

Paragraph number	YLAL Response
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223-225	<p>YLAL agrees that short form case management orders for all hearings following the case management hearing is a sensible idea. The templates should not change more than once a year as advocates will not be able to keep up with the changes.</p> <p>Listing a final hearing as early as possible is welcomed and usually ensures an earlier listing date. YLAL is concerned that in many court centres there is extremely limited court availability which results in delays to proceedings concluding.</p>
226-230	<p>YLAL agrees that a final care order must be proportionate and the disparity between different areas is a concern. The experience of YLAL members is that it is rare for a local authority to seek a care order at home.</p> <p>If care orders at home are not utilised, then there must be an alternative regime to allow 'higher risk' placements to take place which may include further work with the parents outside of proceedings.</p>
238	<p>YLAL is seriously concerned that in some family courts a strict adherence to the 26-week statutory time limit is resulting in final orders being made where there is insufficient evidence available to the court. In these circumstances neither the parents/carers nor the children are receiving a fair hearing which is inexcusable when the interference with their private and family lives is so serious. If cases need to go beyond 26 weeks to be justly resolved, then this must be sanctioned.</p>
241-245	<p>YLAL members do not agree that there are too many unnecessary hearings; it is unclear in the report what evidence is relied on to support this conclusion.</p> <p>It is suggested that there should be a greater use of video or telephone hearings. YLAL is concerned that many court centres do not have the facilities to allow hearings to take place in this way and HMCTS needs funding to put such measures in place.</p>
248	<p>YLAL echoes the concern raised in the report of the adverse impact of the Legal Aid Agency seeking to reduce the funding available for the efficient administration of justice in care cases; the fair disposal of proceedings in the welfare best interests of the child should and must be recognised.</p>
258	<p>YLAL is unsure that it is necessary to have new template position statements and case summaries. Furthermore, it is not clear of the benefit of tables being used as many of the sessions will contain long prose.</p>
261	<p>The suggestion that there will be renewed emphasis on judicial continuity is a welcome one. YLAL is of the view that this in practice is ambitious given the significant difficulties in listing in the family courts.</p>

e. Special guardianship orders

Paragraph number	YLAL Response
286-288	Recommendation 47: SGO assessments and SGSPs.

	YLAL largely agrees with the recommendations made. There is a concern that caring before a final decision risks prejudging the final outcome of the case. A final decision could be made in principle followed by an adjournment for placement and testing. YLAL questions whether the move to a special guardian when the parents are still an option is acceptable.
290	<p>Recommendation 49: A reduction in the use of supervision orders with special guardianship orders.</p> <p>YLAL agrees that save for when there are cogent reasons a supervision order should not need to be made alongside an SGO. This may be acceptable in cases where there are special circumstances i.e. a close relationship between the child and the family and a large number of children in the home and/or another child on the way who may become a part of that household. It may be more appropriate for a supervision order to support an SGO placement when the family is close, and contact is more fluid as opposed to a distant relation placement where the separation from birth family is larger.</p>
291	<p>Recommendation 50: Renewed emphasis on parental contact.</p> <p>YLAL considers that social workers would benefit from training specifically on contact and contact recommendations to ensure the factors identified in the report are considered carefully. There is a concern that too often contact at six times a year is recommended as ‘the norm’ without an analysis of why that is right for a particular child.</p>

f. S20/s76 accommodation

Paragraph number	YLAL Response
298	YLAL agrees that there has been a decline in the appropriate use of s20/s76 across England and Wales. YLAL’s members are concerned that many social workers are unclear about the appropriate use of s20, and it is vital that proper training is in place.
302	<p>Recommendation 51: Appended guides.</p> <p>YLAL welcomes the circulation and use of the guides referred to in paragraph 302 in the hope that this will simplify matters and lead to greater consistency.</p>
304	<p>Recommendation 53: Focus on independent legal advice</p> <p>YLAL is concerned that parents agree to s20/s86 without receiving independent legal advice. YLAL considers that rather than legal advice being given ‘where possible’, there should be a very strong presumption that any person considering a s20 agreement should have <i>independent</i> legal advice precisely because of the confusion that exists around s20 and the obvious possibility that the advice they are given is biased.</p>
306	<p>Recommendation 55: On-going training / education on the proper use of s 20 / s 76.</p>

	<p>YLAL agrees that ongoing training is welcome to ensure that all of the relevant professionals understand and apply the good practice guides correctly.</p> <p>The use of s20, where appropriate, is an obvious way of reducing the overwhelming increase in the issuing of proceedings but the misuse or overextended use of s20 must be avoided.</p>
308	<p>Recommendation 57: Further consideration of and guidance on s 20 / s 76 and significant restrictions on a child’s liberty.</p> <p>YLAL agrees that there should be clear guidance in respect of placements that significantly restrict a child’s liberty. In any event such placements must be carefully scrutinised, and the correct procedure applied (with an application to the court) if the placement is likely to amount to a deprivation of liberty.</p>
310	<p>Recommendation 15: A review of public funding for those with parental responsibility “signing up to” s 20 / s 76.</p> <p>YLAL echoes the urgent need for a review of the availability of legal aid for parents who are considering s20/s76. The decisions made by a parent in such cases are significant and it is vital that parents benefit from early independent legal advice so that the available options can be fully explored. There is a significant risk that without the provision of legal advice s20 will be wrongly used.</p>

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