



Llywodraeth Cymru  
Welsh Government

# Commission on Justice in Wales:

**Supplementary evidence of the  
Welsh Government to the Commission  
on Justice in Wales – Family Justice**



# Family Justice

## Introduction

This paper is supplementary to the Welsh Government's submission of 4 June 2018. It focusses specifically on current and emerging challenges relating to the operation of the family justice system in Wales.

## Context

Family justice is the branch of the justice system that deals with legal disputes about care arrangements for children. This may involve parents who have separated or interventions by local authorities to protect children who have or are suspected to have been subjected to significant harm or abuse. It is an area of law, policy and administration that straddles the devolution settlement. Although the administration of the courts themselves is the responsibility of the UK Government, the key agency tasked with looking after the interests of children in Wales, the Children and Family Court Advisory Service (Cafcass Cymru) is devolved and part of the Welsh Government. Furthermore much of the relevant law in the area, in particular in relation to social care, is devolved. This law often confers functions on local authorities, important participants in the youth justice process, which also fall within devolved responsibility. As is often the case in Wales, therefore, there are divided responsibilities and interconnections within the family justice system which can cause complexity and conflict.

## Operation of the family justice system in Wales

The family justice system is generally classified by reference to whether it involves a 'private law' case or a 'public law' case. A private law case relates to

divorce and separation and involves parents or other guardian or carers who can't agree on arrangements for their children. A public law case concerns the intervention of local authorities to protect children where there are child welfare issues. The distinction between the two types of case can, however, become blurred with some private law cases having public law elements and vice versa (and it has been argued that the classification is not helpful<sup>1</sup>).

The distinction is, nevertheless, useful for the purposes of exploring the peculiarities of the Welsh devolution settlement. In a public law case the courts themselves are not devolved and neither is the specific law under which care applications are made (the Children Act 1989). However, the public entity intervening (a local authority) and the public entity (Cafcass Cymru) which represents the interests of the children are devolved, as is much of the legislation that underpins the early support and intervention offered to families in Wales (the Social Services and Well being Wales Act 2014). This is an example of the existence of the single legal jurisdiction of England and Wales dictating what should be devolved, rather than deciding what is the most coherent means of dividing responsibilities. The protection and well-being of children is devolved, but this is subject to anything involving the courts ("family law") not being devolved. This is, in itself, illogical.

In a private law case the courts and the relevant law are not devolved but Cafcass Cymru is. Cafcass Cymru provides expert child-focused advice and support, safeguard children and make sure their voices are heard in family courts across Wales. Its purpose is to ensure that decisions taken by the courts in family justice matters are made in the best interests of the child. Cafcass Cymru is formally part

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<sup>1</sup> A Bainham, 'Private and public children law: an under-explored relationship' (2013) 25 Child and Family Law Quarterly pp 138-158 [https://fourteen.co.uk/wp-content/uploads/2014/02/CFLQ\\_CFLQ\\_2013\\_2\\_Articles\\_2\\_sys.pdf](https://fourteen.co.uk/wp-content/uploads/2014/02/CFLQ_CFLQ_2013_2_Articles_2_sys.pdf)

of the Welsh Government and exercises functions conferred upon the Welsh Ministers by Part 4 of the Children Act 2004.

Section 35 of that Act provides as follows:

### **35 Functions of the Welsh Ministers relating to family proceedings**

- (1) In respect of family proceedings in which the welfare of children ordinarily resident in Wales is or may be in question, it is a function of the Welsh Ministers to:
  - (a) safeguard and promote the welfare of the children
  - (b) give advice to any court about any application made to it in such proceedings
  - (c) make provision for the children to be represented in such proceedings
  - (d) provide information, advice and other support for the children and their families.
- (2) The Welsh Ministers must also make provision for the performance of the functions conferred on Welsh family proceedings officers by virtue of any enactment (whether or not they are exercisable for the purposes of subsection (1)).
- (3) In subsection (1), “family proceedings” has the meaning given by section 12 of the Criminal Justice and Court Services Act 2000 (c. 43).
- (4) In this Part, “Welsh family proceedings officer” means:
  - (a) any member of the staff of the Welsh Government appointed to exercise the functions of a Welsh family proceedings officer
  - (b) any other individual exercising functions of a Welsh family proceedings officer by virtue of section 36(2) or (4).

The primary legal duties of Cafcass (in relation to England) and Cafcass Cymru (in relation to Wales), though derived from different sources, are largely similar. Section 12 of the Criminal Justice and Court Services Act 2000 sets out Cafcass’ principal functions in family proceedings in which the welfare of children is or may be in question. These are also to safeguard and promote the welfare of the children, give advice to any court about any application made to it in such proceedings, make provision for the children to be represented in such proceedings and provide information, advice and other support for the children and their families.

However, the functions set out in Section 12 of the 2000 Act for England and Section 35 of the 2004 Act for Wales are very broad in nature and allow for considerable discretion in the functions that can be undertaken by both organisations within family proceedings. (And in both cases, “family proceedings” include, where the context allows, family proceedings which are proposed or have been concluded. In principle, this allows for both organisations to carry out work with children both prior to, and following, family court proceedings.)

### **Problems with the family justice system**

The Family Justice System has been subject to significant reform and improvement following the Family Justice Review chaired by Sir David Norgrove that reported in November 2011. The review was established in recognition of the increasing pressure on the family justice system, and concerns about delays and its overall effectiveness. The review was highly critical of the family justice system in England and Wales, concluding that it was:

**“...a system that is not a system, characterised by mutual distrust and a lack of leadership, by incoherence and without solid evidence based knowledge about how it really works.”**

A number of the review's recommendations, and indeed the nature of the review itself, highlight the complex nature of the system and the fact that it straddles the "jagged edge" of the devolution settlement. It is notable first of all that the review was jointly sponsored by the (UK) Ministry of Justice, the (UK) Department for Education, and the Welsh Government. Also of note is the Review's conclusions that:

**"organisational structures are complicated and overlapping, with no clear sense of leadership or accountability. No one looks after the performance for the system as a whole" and**

**"there is no set of shared objectives to bind agencies and professionals to a common goal and to support joint working and planning between them."**

This diagnosis is not uncommon in large systems which involve a number of interested parties, and the goal of joined up working is difficult to achieve. However, in a system which is partly devolved and partly non-devolved, clear accountability and effective leadership for the whole system is almost impossible to achieve. This impedes the scope for joined up working and makes shared objectives more difficult to agree. Although it is of course feasible to agree on a common goal of improving the services provided to children, deciding **how** to do this across England and Wales is, in practice, problematic both for practical reasons and because of differences in the policy approach taken.

It is significant that a number of the Review's recommendations had to be tailored to England or to Wales depending on the extent to which they involved a devolved function. Similarly, the implementation of some of the Review's recommendations has differed for the same reason.

It is widely acknowledged that the Family Justice System currently faces new and immediate challenges given the significant and continued increase in both public and private law applications. Responding to these challenges in a coherent and systematic way is complex given that some services are devolved and others not.

**The Family Justice Board** was set up in 2011 to take forward the recommendations of the Family Justice Review. The purpose of the Board is to improve the performance of the family justice system across England and Wales and ensure the best possible outcomes for children who come into contact with it. Its membership includes senior representatives from key stakeholders within the family justice system of England and Wales and, as observers, senior Judiciary. The Board is co-chaired by Ministers from the UK Ministry of Justice and the UK Department for Education and recently met on 6 June 2018 after an interlude of 17 months (during which time the UK Government has had three Secretaries of States for Justice).

The Welsh Government is not represented on the Board at the political level, however the Welsh Government Director of Social Services, the Chief Executive of Cafcass Cymru and the Head of Children's Services at the Association of Directors of Social Services Cymru are members. The Board is, however, weighted towards non-devolved functions such as HMCTS and the Department of Work and Pensions, and English based organisations such as the Department for Education, Ministry of Justice, Chief Social Worker for England and Ofsted.

**A Welsh Family Justice Network** has been established, co-ordinated by the Welsh Government to bring together the key players within the family justice system at an all-Wales level. It is intended to foster a common purpose and understanding

of what is needed to improve services and outcomes for children and families in Wales. The Network was created in response to a recommendation of the Family Justice Review to help monitor performance of the family justice system in Wales. The Network is intended to complement, support and inform the work of the Family Justice Board, and particularly the Welsh representatives which sit on it. It was established to advise on specific Welsh issues and undertake specific actions in relation to the devolved aspects of family justice in Wales. The Network is led by the Welsh Government and, significantly, of its membership nine represent devolved organisations and three represent non-devolved organisations. Whilst members of the judiciary attend officially as observers, they play a key role in discussions, particularly when considering working relationships between the judiciary and local authority children's services in Wales.

**Local Family Justice Boards** were established across England and Wales to support the work of the Family Justice Board by bringing together the key local agencies, including decision makers and front-line staff. They exist across England and Wales but their role has not been fully developed. In Wales, all stakeholders who attend the Local Family Justice Boards, with the exception of the HMCTS, are devolved.

## Ongoing and emerging challenges

The reforms put in place in consequence of the Family Justice Review mean that there are now systems in place that seek to bring together the numerous public bodies, agencies and two governments involved across England and Wales.

There is continued and growing pressure placed on the family court system in Wales, with workloads remaining at high levels and resources being increasingly constrained. Over the past decade the number of looked after children in Wales has risen by 25%<sup>2</sup>. This trend, also seen in England, is placing increasing pressure on the budgets and resources of local authorities as well as the justice system. The number of children involved in public law proceedings (under section 31 of the Children Act 1989) in 2016-17 was 3,012; an increase of 17% on the previous year. There were 1,039 section 31 (care) applications in 2016-17; a 25% increase on the previous year. Similarly, private law applications have increased with 1,680 referrals in 2016-17 up 26% on the previous year.

The rates of looked after children vary across local authorities in Wales and whilst they generally correlate to levels of deprivation there are some local authorities with significant levels of deprivation that have relatively low rates of looked after children. This issue is one of the areas which the Welsh Government's Improving Outcomes for Children Ministerial Advisory Group, which reports to the Minister for Children, Older People and Social Care, are considering as part of their work programme. The Advisory Group, whose members comprise all key stakeholders in Wales with an interest in looked after children, aims to improve outcomes for looked after children and identify what early intervention and preventative action could be taken to help reduce the numbers of children taken into care.

### 'Public law' cases

In the public law field there is growing divergence in applicable legislation between Wales and England,

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<sup>2</sup> As of March 2017, there were 5,954 looked after children in Wales. Almost three quarters of these children are accommodated in foster care placements, at an estimated cost to local authorities of around £100m a year.

most notably as a result of the Social Services and Well-being (Wales) Act 2014. Wales also has increasingly different policies in areas which directly or indirectly impact on family justice. Therefore working across an England and Wales family justice system is becoming more challenging.

Welsh Government officials have periodic meetings with Ministry of Justice officials. The intention in these meetings is to discuss and share knowledge of developments and issues in the family justice field to inform policy development and respond to emerging issues. However, the Welsh Government always have to take the initiative in pursuing these meetings and are often only included in matters at a late stage and are left trying to catch up with England.

Engaging effectively in England and Wales forums such as the Family Justice Board and the Family Justice Council (aimed at promoting an inter-disciplinary approach to family justice and to monitor the system), is becoming more and more difficult. Whilst such forums have always tended to focus more on England only issues, this is becoming even more pronounced because of the differing legislative and policy landscapes.

### **‘Private law’ cases**

Cafcass (England) have recently piloted initiatives intended to improve private law cases. However, due to poor uptake and lack of evidence of any real impact these have been discontinued. To make real improvements, the emerging consensus is that legislative reform is required not minor changes to systems and processes. There are concerns that such are now overdue as legislation has been put on hold by the UK Government due to the United Kingdom’s withdrawal from the European Union. If legislative proposals do emerge they will need to be tailored to take account of the different constitutional arrangements that exist in Wales, but it is almost inevitable that the position in England will dominate.

## **Implications of divergent Welsh Government and UK Government policy across Public Law and Private Law**

Supporting separating families to make safe and appropriate arrangements for caring for their children is critical to improving outcomes for children in Wales. This complements Welsh Government policy to minimise the occurrences and impact of what are referred to as ‘adverse childhood experiences’.

The Welsh Government’s policy is to target early support and intervention and this is fundamental to our approach to supporting families who separate. This, however, is also where the greater divergence in policy between Wales and England occurs. It is not surprising, therefore, that early support and intervention suffers from a lack of joined-up working and the absence of a coherent approach between devolved and non-devolved services. This problem is likely to worsen in coming years.

An example of this lack of joined up working includes the (UK) Department for Work and Pensions having a key role in providing advice and support to separating parents. There are instances where funding for services that has a direct impact on families and children who may become involved in private law family proceedings has been made available in England but not in Wales. Similarly the (UK) Department of Education funds services in England that support separating parents which are not available in Wales. A whole system approach to supporting separating parents in Wales is needed which is currently not possible due to an illogical devolution settlement.

## **Targeted Family Justice Review**

Complementing the recent Care Crisis Review undertaken across England and Wales by the Family Rights Group, the Ministry of Justice commissioned

a 'Targeted Family Justice Review' in March 2018. Its purpose is to address the impact of rising levels of demand on the family justice system and significant variance in the levels of demand across local authorities.

The review is scoping future work needed in this area with the intention of establishing a clear and deliverable action plan – including implementation, testing and evaluation of interventions in local areas in both public and private family law.

In so far as public law cases are concerned, the review is seeking to understand whether there are differences in practice that are driving variance in the number of cases at a local level and whether there is good practice that could be shared more widely. To help inform this part of the review there has been collaboration with local family justice board areas to better understand regional variation by considering data and associated case management practice.

This aspect of the review will present a significant challenge in Wales as the Ministry of Justice has to date mainly focused on English Local Family Justice Boards, and have been working closely with the UK Department of Education to collate performance data for the local authority areas that make up those Boards. The South East Wales Local Family Justice Board is likely to provide Welsh representation in the hope that the position in Wales is reflected and learning shared. The differences in how data is collected in Wales may involve the review team taking additional time and resource to find a way to appropriately link and compare data between England and Wales.

The review will also examine how best to address the increasing number of children involved in new private family law applications, while seeking better outcomes for children and their families. When developing proposals the review will recognise

the overlap between public and private family law ensuring the proposals in these respective areas dovetail with each other.

The review is being led by a Task and Finish Group consisting of senior officials from UK government departments with an interest in family justice. A senior Welsh Government official and a senior Cafcass Cymru official are associate members of the group. The review is intended to be completed by the end of the summer of 2018 with advice submitted to UK Government Ministers on their findings.

## **Conclusions and the way forward**

The family justice system in England and Wales performs a vital role in protecting our children, in particular vulnerable children. It is clear, however, that the system – despite the best efforts of those who work within it – is struggling to cope with the demands placed on it. It is clear also from the reviews that have taken place that a lack of co-ordination and co-operation at times between the numerous parties involved can often make the process dysfunctional. Much of the focus of the reviews has been on encouraging joined up thinking and working and better communication. A lack of accountability is also clearly a problem. Repeated use of the word “crisis” and a conclusion that it is a “system that is not a system” suggests deep-rooted problems.

The artificial and arbitrary division between what is devolved and what is not exacerbates these problems. Firstly the family justice system itself sits on the jagged edge of the devolution settlement and is in many ways a perfect illustration of the problems experienced with the settlement. And secondly, modern society and government dictates that the justice system does not work in isolation – in fact it is clear that it does not work in isolation. In reforming



the family justice system it is clear that a wide range of public services need to assist the process, services that are almost all devolved. This means that public bodies accountable to different political masters have to work together, something that is already difficult without accounting for differences in policy and political philosophy.

The various forums and networks put in place since 2016 may suggest that there is a means of developing inter-governmental machinery that can resolve these problems. There is evidence emerging that the reforms have led to improvements, and indeed in so far as reducing delays is concerned Wales is currently performing better than the English regions. However, this is in spite of the system not because of it and it is already clear that the process is dominated by the UK Government and by their concerns in relation to England. Wales is largely represented but not heard and has little influence on a process that is being designed for England with perhaps a supplementary hope that it could be made to work for Wales by the Welsh Government and devolved bodies.

This is not the way we should be looking to improve the lives of children in Wales. There must be accountability, transparency and clear and effective decision making. That is not possible in the hybrid and anomalous “system” that we have. Rather, family justice must be devolved to Wales and the Welsh Government should become fully responsible for the children of Wales and accountable in this respect to the people of Wales. It is a glaring example, therefore, of why the Welsh Government’s wider proposals for reform of Wales’ constitutional arrangements are the right thing to do.