



Association of **Lawyers for Children**

Promoting justice for children and young people

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Anthony Douglas, Chief Executive, Cafcass,
Nigel Brown, Interim Chief Executive, Cafcass Cymru

Only by email

28th September 2017

Dear Anthony Douglas and Nigel Brown,

Guidance on the use of professional time to benefit children

1. We write to express our concerns about the recent practice guidance issued to all Cafcass practitioners on the 1st July 2017, entitled 'Guidance on the use of professional time to benefit children'. In this letter we propose to address some of our most pressing concerns about the changes to practice envisaged by this guidance in public law cases. We intend to write to you separately about the proposed changes in private law proceedings.
2. We consider that this guidance, if followed, will significantly erode the service provided by children's guardians (CGs), and will also undermine the statutory independence of the CG who is appointed by the court to act as the child's representative in proceedings. If it is followed, Cafcass will not be able to fulfil the promise in the document to "*ensure that the service we provide to children and to courts is not diluted*". On the contrary, we believe that this guidance will further reduce the quality and standard of the service given to the child, his/her family and the court.
3. We understand that this document is regarded by Cafcass and Cafcass Cymru as a dynamic rather than static document, and therefore that your organisations are willing to consider representations and further amendments to it. If this is correct, then we seek to make those representations now, in order to try to make good the absence of any prior consultation on it with family lawyers, or other stakeholders within the family justice system.

Preliminary points

4. This guidance is not described as being discretionary in nature, and it appears to us that there is a clear policy intention that it will be followed by all Cafcass practitioners in all cases, as well as other unspecified individuals: "*This guidance applies to **all staff across the family justice system** who are making decisions about how Cafcass... professional time is used, **including the decisions taken by Cafcass and Cafcass***"



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Cymru staff themselves” (our emphasis). Assuming that you do not regard the judiciary and magistracy as staff, can you please clarify which other staff in the family justice system you intend should be bound by this guidance, other than CGs and family court reporters?

5. The clear policy intention does not sit comfortably with the repeated emphasis on “flexibility” in the document. We have to assume that if a CG or family court reporter failed to abide by this guidance, or her manager’s interpretation of it, she could potentially be disciplined by Cafcass for failure to follow it, and/or for failing to obey a managerial instruction to follow it. Is this correct?

Public law: the work of the children’s guardian

6. The guidance marks a clear change in policy and practice which, if implemented, will override the statutory framework, duties, and independent exercise of judgment by the CG about what the particular case requires. That exercise of judgment is, by virtue of section 41 of the Children Act (1989), Rule 16.20 and PD16A of the Family Procedure Rules 2010, vested in the CG appointed by the court. The following specific criticisms of the public law provisions of the guidance are not intended to be exhaustive:
 - a) suggesting that position statements drafted by children’s legal representatives can be elevated to the status of evidence in the case. A position statement filed on behalf of the child is a legal tool designed to assist the court and other parties by giving advance notice of the CG’s position, and to shorten oral submissions by the child’s advocate. It is a lawyer’s document which is required to be filed with the court by PD 27A of the Family Procedure Rules 2010. It does not form part of the evidence in the case, and cannot do so. It is not a document signed by the lay or professional party; nor does it carry a statement of truth, as witness statements and reports do. Only a written or oral report by the CG is evidence in the case. If there are no written analyses or oral evidence given by the CG, then the CG has not provided any evidence on behalf of the children whom she represents;
 - b) attempting to set a new standard or criterion for the need for an initial analysis in contravention of the FPR 2010, with the presumption that they will not be needed unless there is e.g. a contested removal issue; and
 - c) suggesting that the CG will be able to carry out all of their statutory functions without attending interim hearings. This is, on any view, highly unlikely to be the case, and must continue to be a matter for the judgment of the individual CG in consultation with the child’s solicitor.

Public law: Working with local authorities outside the framework of specified proceedings

7. Paragraph 2 of this guidance seeks to introduce and/or promote an extra-statutory role for the Cafcass CG, or for Cafcass the organisation. This is in respect of the



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proposal, where local arrangements exist, for the allocation of a Cafcass officer to become involved in local authority's pre-(care) proceedings work. It proposes that Cafcass and the local authority should "*work together in pre-proceedings*" to identify whether there is a "*safe community-based alternative*" for the child before care proceedings are commenced. This is described in the document as "*good case management*".

8. We note in passing that the phrase "*safe community-based alternative*" presupposes that a move of the child (namely 'the alternative') is necessary and that that issue has already been determined. We also note that the phrase indicates a highly reductive approach to the child's welfare. Such an alternative may exist, but not be in the best interests of the child, when all of his attributes, needs, wishes and feelings are taken into account.
9. We agree that local authorities need to exercise "*good case management*" and should divert cases from court wherever possible. We do not agree that there is, or can be, any role for Cafcass or its officers to work with local authorities pre-proceedings, in order to assist local authorities in carrying out their functions. Such work falls entirely outside the provisions of section 12 of the Criminal Justice and Court Services Act 2000. It is not only outside the statutory role of Cafcass, it also fatally undermines the independence of the CG who is appointed in any subsequent care proceedings, particularly if she, or a fellow employee of Cafcass, has already approved a particular local authority plan for the future of the children, and that plan is then contested in court by the parents or family members, by an older competent child, or indeed by the local authority (if there is a change of plan). We understand that, where this practice is already underway, it is often the same Cafcass practitioner who is appointed in the subsequent role of CG, if care proceedings are commenced. Whether or not this is the case, the individual CG, or your organisation, will already have taken a position in collaboration with the local authority, outside the context of court proceedings, and cannot then demonstrate independence in representing the child within the proceedings.
10. Within pre-proceedings work, the Cafcass practitioner and the child will also not have had any independent legal advice on the statutory framework for care proceedings, the application of the Children Act 1989 or Adoption and Children Act 2002 welfare checklists, the European and UN Convention rights of the child, the statutory duties of the local authority towards the child, the position of older competent children, or the full range of possible legal outcomes in the case. They will presumably have to rely on the legal advice provided by the local authority's legal advisers. This is another irremediable flaw in the scheme, which ignores the statutory framework for the protection of children, their rights and welfare. We wish to emphasise, however, that even if this serious deficit could be rectified, e.g. by changes to the legal aid system, this could not cure the fact that the independence of the CG and of Cafcass is vitiated by engaging in pre-proceedings work with the local authority.
11. Cafcass's duty in public law cases is to provide sufficient qualified and experienced CGs to represent the child in specified court proceedings. It includes ensuring that the voice of the child is heard in those proceedings, evaluating the work and decision-making of the



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local authority, and acting as the independent 'eyes and ears' of the court. There are, according to Cafcass, already insufficient CGs to meet the rising public law demand. This is indeed the rationale for this guidance: that it is necessary to reduce yet further the time spent by CGs investigating each child's case. The guidance refers to focusing time on "*cases the cases that matter most*"; which rather suggests that some cases matter more than others. We are concerned about that message. Even if the independence of your organisations and their individual CGs were not at stake, we are surprised that Cafcass considers that it has the spare capacity to involve its practitioners (or other employees of Cafcass) in this extra-statutory work.

12. The child must have a CG in court proceedings because he is under a technical disability, owing to his age and understanding. The previous title of 'guardian ad litem' is the key to understanding that Cafcass is a court service, not a public body which can involve itself in the work and the decision-making of local authorities, either pre- or post-proceedings. Once a final order is made in care proceedings, whether it is a public or private law order, the CG is legally deemed to be 'functus officio' and can have no further role in the case. This applies equally to any work pre-proceedings.

13. We seek your assurance that paragraph 2 will be withdrawn from the guidance, and that you will instruct your respective services to cease their involvement in pre-proceedings work, where these arrangements are already apparently in place.

Yours sincerely

Martha Cover and Debbie Singleton
Co-Chairs, Association of Lawyers for Children