

Commission on Justice in Wales
Oral Evidence Session
9 April 2019

Present:	Commission members	Secretariat team
Ruth Henke QC (RH) Jake Morgan, ADSS Cymru lead on family justice (JM) Gareth Jenkins, Head of Children's Services, Caerphilly (GJ) Debbie Jones, CEO Voices from Care (DJ)	Lord Thomas of Cwmgiedd, Chair Professor Elwen Evans QC Juliet Lyon CBE	Katherine Thomas Martin Wade
Question area: Numbers of looked after children in Wales		
<p><i>Lord Thomas introduced the session, noting that the Commission is interested in whether we could do things better to ensure the best outcomes for children and whether that would involve as different system. He said that the Commission have seen the headline figures, with a much higher proportion of children coming in to care in Wales than in England (although we have also heard evidence that the discrepancy is reduced when looking at parts of England which are most demographically comparable with Wales. He asked why so many children are being taken into care.</i></p> <ul style="list-style-type: none"> • RH: There are several principal strands here and I don't think any one strand dominates. Section 31, which is the threshold condition in the statute, requires "reasonable grounds to believe". That is an objective test with a subjective element. I think in Wales we have a greater intolerance of children being treated badly. Then there is the issue of care planning and children who are looked after children (LAC) at home under a care order, which is a lesser intervention than a removal. This can be a proportionate approach, allowing children to remain at home. Not all LAC are in care. <p><i>Juliet Lyon and Professor Elwen Evans asked about the availability of disaggregated figures showing the number of LAC who are at home, as opposed to those removed from the family.</i></p> <ul style="list-style-type: none"> • GJ: The breakdown is available. • JM: The National Data Unit would hold the data. • RH: There is debate about the use of special guardianship orders and kinship orders. Kinship carers are paid more than special guardianship orders. Foster carers are paid more. • GJ: It can be quite hard to meet the criteria to have a family member approved as a foster carer; it can be easier to get a Special Guardianship Order. There are different standards. Often local authorities know that relatives wouldn't be approved under foster carer rules. The rules are Welsh. The better local authorities apply the same level of remuneration, whatever the order, but there is a perception with Cafcass and the courts that the level of support is not the same. • RH: The Code to Part 6 of the Social Services and Well-being Act states that no child should be in care just for the provision of services. The problem is the dissemination of the Code. • JM: Children at home could be at home, and supported at home, on either a Supervision Order or not on an order at all. The use of Care Orders for children who are at home is an unsatisfactory compromise which suggests a lack of confidence in effective supervision without a Care Order. If Cafcass believes that there needs to be a Care Order to ensure that the local authority is diligent in supervision then it can result in an increase in care orders. You do not always need a care order to monitor a child at home. • RH: There is a misconception that you get better services if there is a Care Order. A Care Order should only be used if it is proportionate to risk and that level of monitoring is required. There are many other options – a Supervision Order, a Special Guardianship Order, a Care and Support Plan 		

Lord Thomas expressed concerns about the costs of a system which is taking so many children into care and asked again what the reasons are for the numbers of children being taken into care.

- RH: It is a subjective but proportionate. What is tolerated in English sink estates would not be tolerated in Wales.
- JM: There are various factors governing the numbers. I agree to an extent with RH; there is a different approach to intervention in Wales. There are examples of areas where intervention becomes paternalistic. Some local authorities are more comfortable with intervention into family lives than others. There is debate in Wales but I think the debate in England is in a different place to Wales. *Lord Thomas asked whether the figures in Wales were therefore a result of a state interventionist role.*
- JM: There is a tendency for local authorities which are struggling (for example with recruitment difficulties or where social work practice could be improved) to take a more interventionist approach. You can see peaks of intervention in some local authorities depending on their circumstances. You need experienced people who are confident in their roles to support families and manage risk proportionately; where you don't have that you get increased intervention. You could track those numbers of interventions, for example in relation to authorities in special measures. No-one has done research in a Welsh context.
- GJ: ADSS/Cordis Bright work looked at peaks and troughs 4 or 5 years ago. Most local authorities accepted the recommendations and have LAC strategies based on that report.

Lord Thomas asked why, in that case, figures had continued to rise.

- JM: My LA has consistently dropped over the last five years. Others have also dropped. Some have risen. There is considerable variance. At present we don't have the evidence to explain this.
- GJ: Over 5 years in Caerphilly, during the first three years there was a steady reduction; in the last two it has shot up. This is due to deprivation, austerity, larger sibling groups, poor parenting and increased physical injuries. In spite of the increase, numbers are still consistent with the Welsh average.
- DJ: To give some context, I represent children and young people in the current system and focus on children's rights. Legislation and policy in Wales is different from that in England as we have adopted the UN Convention on the Rights of the Child. This is very different to England. There is a rights-based approach – and that can mean, in different circumstances, keeping children out of care or bringing them into care. Children sometimes put themselves into care. There are considerable pockets of deprivation in Wales. Another issue is children in care who later have children see their children taken into care. There is Cardiff University research on this. We need to understand the trends before we give one solution. The courts are not linked well enough to the corporate parenting agenda.
- JM: Paul Bywaters has carried out some interesting research into the impact of austerity on English local authorities, showing the impact of removing family support. Welsh Government supports the provision of family support but where local authorities have limited resources and have to make difficult funding decisions which reduce family support, the impact of this is seen down the line – maybe 3, 4 or 5 years after the reduction of services.

Lord Thomas asked about the consequences of care for children taken into care.

- GJ: It's not about going into care, it's about where the child has come from. Very often the damage has already been done and taking a child into care tries to improve the situation. The numbers are plateauing here in Wales and are similar to the North West of England.

Question area: Things that could be done differently within the existing system and available resources

Lord Thomas summarised the evidence so far – the witnesses had described a slightly different approach in Wales, with the state taking a more active role than is sometimes seen in England, based on empathy for children. Several reasons had been cited for increased numbers of children going into care, including times when local authority services are under pressure or where there are reductions in services which might otherwise address issues of deprivation and poor parenting. He asked whether that was a fair summary and what could be done differently within a context of financial restraint?

- JM: There is some variation in the approach taken by judges; this gives strong messages to local authorities on how they should intervene, driving practice and decision making.
- RH: I think the variation probably arises from inconsistencies in presentation of evidence by social workers. The removal of children is a huge intervention of the state into family life. So it needs to be evidence-based. Sometimes the evidence doesn't support the case, and sometimes the evidence has been sat on with the result that children have been living in circumstances they shouldn't. Is there judicial inconsistency? Of course they will have their subjective perceptions but S31 of the Children Act is the gateway (significant harm or risk of harm). That baseline doesn't change but it is a question of what happens if the baseline is met.
- JM: There are many children who meet the threshold and who are never taken to court.
- GJ: There is judicial inconsistency in respect of section 76. In the South East Region, we are directed to issue proceedings by week 16 of voluntary care. This results in care orders where a child could have been supported in other ways.

Lord Thomas asked why there is a need to intervene in this way at the 16 week period.

- RH: The 16 week period arose from a ruling in the Court of Appeal; it was about reducing 'drift' with children in voluntary care – children should either be in care or allowed to go home.
- JM: In the South West there is less pressure to work to an arbitrary 16 weeks.
- GJ: The Welsh Government statutory guidance refers to 16 weeks.
- JM: At 16 weeks you can also be working on a plan to move the child home
- RH: The guidance in Wales reflects the Court of Appeal ruling. The idea is to reduce 'drift' but you can depart from the 16 week period if you are doing so with good reason.
- JM: At the heart of this, there is a distrust of the ability of local authorities to look after these children. Sometimes that is justified; sometimes it is not. But it increases intervention and cost. There are children who have inappropriately drifted in care but the question is whether the court is the right place to intervene.

Lord Thomas said that the court is almost always the wrong place to go. It should be the place of last resort.

- RH: Sometimes there is really effective pre-intervention work. Some local authorities do better than others with pre-proceedings. Where this is done well there is a letter giving families 3

months to turn a situation round, and another letter before proceedings, and in these local authorities there are less care proceedings.

- JM: The court is often the wrong place to have those discussions. It is an adversarial system which is great at reaching decisions but sets parties against each other and makes it hard to work together. And one person's 'drift' could be another person's stability. Parents who may have multiple vulnerabilities are moved into a court system. There are other systems – we have permanency panels in my local authority which challenge arrangements to ensure that appropriate care arrangements are put in place. In court it is about winning and losing.

Lord Thomas asked why is the court used too frequently? What should happen?

- RH: What should happen is what JM describes. But sometimes you have to up the stakes because you can't sit back and let it carry on. The next step should be pre-proceedings, with the local authority and the parents of the child continuing to work together. You could also have a family group conference involving a wider network in finding solutions.
- GJ: All children involved in pre-proceedings work will have a parenting support plan.

Lord Thomas asked about the involvement of lawyers in pre-proceedings.

- RH: Lawyers are involved in a legal gateway meeting, where parents are made aware of the serious nature of the position and the potential to move to proceedings.
- GJ: The families will get a list of lawyers paid for through legal aid.
- JM: Representation is really key at this stage. A really good family solicitor will be vital at this stage, acting as an advocate and a mediator. But there are limits in the amount of time they are given. These families take 1 step back and 1 step forwards. There is need for professional judgement on their ability to improve and on the pace of change and sustainability.

Lord Thomas asked about how the decision of the pre-proceedings is recorded.

- JM: A plan with objectives is put in place

Lord Thomas asked what happens if improvement doesn't take place.

- JM: We are mostly talking about cases of neglect. When do you say enough is enough and decide on greater intervention? That point will vary within and across local authorities. In the past, voluntary arrangements were used more. The argument against that is that, if a local authority is driving a voluntary arrangement then it may not be very voluntary.
- GJ: The first step is using alternative family members who could step in. We help families find their own solution. This is treated as a voluntary care arrangement. There are regional variations.
- RH: There are regional variations. Pre-proceedings, if done well, work well and keep children out of the care system. But if they fail then you have an evidence base to go ahead with care proceedings. It is poor practice when there is drift and a lack of pre-proceedings.

Lord Thomas asked how you ensure that pre-proceedings work well.

- RH: Swansea do pre-proceedings well. They have done good work on making it quicker and cost effective.
- GJ: Local authority resourcing has a significant effect on the services they can provide.

Professor Elwen Evans noted the variation described by the witnesses and asked whether the number of local authorities in Wales adds to this, and about inconsistency between local authorities.

- JM: I don't think there are significant problems with 22 local authorities as such. Corporate commitment to children's services is a bigger factor than the size of the local authority. It is true that some smaller services are more brittle, in that they may be reliant on a team manager, rather than a critical mass of professionals. Good lawyers also make a difference. Commitment and resources are the key.
- RH: Some local authorities are better than others. But Wales as a whole is far ahead of England. The threshold is based on evidence and where the care process is going. When working in England, I have found that lack of disclosure is a problem. The quality of the evidence is much better in Wales. We were lucky enough to have the PLO¹ piloted in Swansea. There is an assertion here that things need to be backed by evidence.
- RH : We work in a small area where we all know each other so that leads to better practice because we are more observant of what happens around us.
- JM: When I was Head of Children's Services I knew all the judges and they would ask to see me personally if thematic issues arose. That works well and is not so often possible in the English context.

Question area: The voice of the child

- DJ: Even though I agree with Ruth, there is a community approach in Wales and probably a warmer approach, I still feel that the voice of the child and of the family can be lost. There is no role for an independent voice – for a young person that is very threatening. Young people lack control and often feel that they should not have been removed from their families; they feel that their parents(s) were not supported enough. If the young person used an advocate, that advocate does not have a role in the court, except to support the young person.
- RH: Article 12 of the UN Convention on the Rights of the Child states clearly that the child must be listened to. The Guardian is an advocate for the child and their welfare, and they have their own lawyer if Gillick competent.
- DJ: In our experience, a young person would trust an advocate over and above guardians and lawyers, but the advocate does not have an official role.
- GJ: The Welsh Government is actively supporting independent advocacy for children. There is a framework in place and advocacy kicks in at the child protection stage. If the child is looked after then there is an active offer of advocacy.
- RH: The Guardian plays that role in the court setting.
- GJ: The advocate provides support in care planning.

Lord Thomas asked what background the advocates have.

- GJ: It varies. They will have training for the role. They may be a youth worker, social worker or similar.

Lord Thomas asked DJ to clarify the concerns which young people have about the guardian representing them.

¹ Public Law Outline

- DJ: The guardian is not always seen as an independent advocate from the young person's perspective. Often the guardian would be seen as representing the court from the young person's perspective.
- JM: What we're describing is an extraordinarily crowded field - layers upon layers of personnel second-guessing and questioning local authority decisions. Cafcass, the judiciary, advocates, lawyers for the parents, parents, grandparents. For a child it is a baffling array. It's baffling for a social worker. More layers do not necessarily lead to better decisions for children. The system doesn't make the best decisions in the best way.
- RH: In court, it could be counter-productive to have an advocate as well as a guardian and the child's lawyer - you might have too many voices. A good solicitor will represent the child. If the child doesn't like the solicitor they can change. The structure is already there. How you use it is a different matter.
- GJ: There are good examples of judges engaging with young people directly, meeting them and writing to them at the end of proceedings.

Juliet Lyon asked about the age of children involved in proceedings.

- JM: Statistics are available nationally. The vast majority of children in care are pre-adolescent. The vast majority are from the younger age group.
- RH: Where older children are involved, the cases tend to be more exceptional cases, sometimes emergency cases.

Question area: Costs of care

Lord Thomas referred to the costs of such a complex system.

- JM: 50-60% of social service budgets are spent on LAC. Not enough is spent on prevention.

Lord Thomas asked about the availability of figures to show spending on LAC by local authorities.

- JM: Annual returns to Welsh Government show the overall spend.
- GJ: I'm struggling a bit with this discussion over the numbers of children in care. Just because the number is high or increased doesn't mean it's wrong. The threshold is met.

Lord Thomas asked about the availability of comparative figures.

- JM: There is a rate per 10,000 (child population) which you can compare with regions in England. You can get these figures from ADSS² and the National Data Unit.

Lord Thomas said that he was concerned about costs.

- JM: There is place for a debate politically about the cost of our care system. There is no question that Wales makes this a greater priority than England. The premise that we have to save money on this is not one that we in ADSS Cymru would accept. We would see it as the state prioritising social care and investing in the most vulnerable people in society.

Question area: Alternative ways of getting the right outcomes for children

² Association of Directors of Social Services

Lord Thomas reminded the witnesses that they had described a complex system and had been in some respects quite critical of judges. He said that what he wanted to know was whether there is a better way of getting the right outcome for children. He asked whether the current process is a sensible one and suggested a need to reduce costs.

- JM: I think there is an English-centric view which has defined the family justice system as expensive. The predominant cost relating to LAC is local authority costs for the care and support provided to children. The narrative in Wales around reducing LAC is not based on cost, but the narrative in England is frequently about cost. The driver in Wales for reducing the numbers of LAC is about supporting families to look after children who might otherwise become looked after. In the majority of cases, we are talking about parents who have problems and the best solution is to support children at home, where possible. The cost element is a decision politically based on speedy priorities.

Lord Thomas clarified that his interest was the best way of adjudicating in care cases. He asked whether there is a better system to get the best outcomes for children and whether we've got the best process? Professor Elwen Evans asked whether Wales as a jurisdiction could do things differently for better outcomes?

- GJ: It will be valuable to see the outcome of the Public Law Working Group established by the President of the Family Division.
- DJ: You've got to look at preventative work and resourcing that properly.
- GJ: No child should come into care if an alternative is available – they should be supported in other ways. But if that can't be achieved then, in those circumstances, it is not a bad thing to take action.
- JM: Going to court is not the best way to make a decision in most cases. It is adversarial and it is not child-centric. How do we design a system with judicial elements but which works better? It breaks down the adversarial approach when judges talk to children. We do need judicial oversight but we need consistent better decisions. In my opinion we could design a system that was more inquisitorial, to weigh up the difficult challenges.

Juliet Lyon asked about the role of family group conferences.

- JM: They are valuable when done well.

Professor Elwen Evans verified that the President's Public Law Working Group is covering England and Wales and asked to what extent it is focussing on the Welsh element of the system.

- GJ: It is England and Wales and I think it is widely acknowledged that there are differences between England and Wales.
- RH: I don't sit on it but I will be footnoting the report with the relevant Welsh legislation. Listening to the debate I think there are two things going on here, social care issues and the cost of the system. We have a system which is not perfect but I'm not sure I could design a new system. You have to advocate. The way we work is based on facts, but the facts presented can be wrong, so you need a court-based system to decide. We used to have merit based legal aid, the rules are now too rigid.

Lord Thomas asked about taking a more inquisitorial approach or an approach based on problem-solving.

- RH: There is always an inquisitorial element - a good judge will manage that.
- JM: A good judge cuts through the issues. But some cases run and run. In most cases you can be pretty confident what the outcome will be from the outset.
- RH: That's why you have an issues resolutions hearing. The system is there to case manage properly.

Lord Thomas asked the witnesses what they would like to do with the system.

- JM: I don't have a remit to redesign the court system. But I cannot feel that the current system is the best way to get the right decision. You need to protect the rights of parents and children. You need checks and balances. And you need a timely decision for the child.
- RH: In the current system, if there is proper case management and the issues resolution hearing is effective, then it works. In England, the Family Drug and Alcohol Court (FDAC) approach has been positive but we couldn't have it in Wales due to funding.
- GJ: According to research based on practice in London, you need a critical mass for the FDAC approach to be viable; at least 60 cases a year.

Lord Thomas said that the critical mass issue shouldn't be a barrier to operating such a system across Wales since the work of an FDAC could be part time alongside other approaches.

Professor Elwen Evans asked when the President's Public Law Working Group would report.

- GJ: The report should be in draft stage by April. Some key messages may be delivered in May.
- JM: There has been a steady divergence of practice between Wales and England in the 15 years I've been in Wales. We would not have been having the same conversation 10 years ago. The differences are growing inexorably, which to my mind means there is an inevitability to further devolution. The question is when rather than if.

Juliet Lyon asked whether further devolution would improve things.

- JM: Not by definition, but it would allow the alignment which would improve things.

Question area: Private law

Lord Thomas thanked everyone for their contributions and apologised that there had not been time to also focus on private law. He said he would welcome further views on that if any witnesses would like to supply information.

- JM: Our experience is that private law cases frequently involve local authorities. Where there are litigants in person, there is a greater incidence of local authorities becoming involved.
- GJ: It is a growing issue. When we become involved with private law cases, an order usually follows.
- JM: Cafcass would have figures relating to private law cases
- DJ: Young people need someone they can trust throughout the process. That is not the guardian or the solicitor. They are merely visitors to the situation.

