

Written evidence submitted by the Coram Children’s Legal Centre (CSWB 60)

Children and Social Work Bill Committee Stage

Written evidence on New Clauses 2 and 3

Coram Children’s Legal Centre (CCLC), part of the Coram group of charities, is the UK’s leading children’s legal charity. Founded in 1981, CCLC works in the United Kingdom and around the world to protect and promote the rights of children in line with the UN Convention on the Rights of the Child through the provision of direct legal services, the publication of free legal information online and in guides, research and policy work, law reform, training, and international consultancy on child rights. CCLC has offices in London and Colchester. CCLC holds Legal Aid Agency contracts in family law, community care law, immigration and asylum law and education law – CCLC is one of two providers nationally through the Civil Legal Advice telephone gateway. As part of CCLC’s work to promote the implementation of children’s rights, CCLC has undertaken amicus curiae interventions in a number of significant cases in the European Court of Human Rights, the Supreme Court and the Court of Appeal, providing assistance to the court on matters of children’s rights and best interests. Funded by the Department for Education, CCLC runs a national helpline providing free legal advice on education law and child and family law.

CCLC’s lawyers and researchers have worked in over 40 countries to promote the implementation of the UN Convention on the Rights of the Child, specialising in child protection and juvenile justice. Working in partnership with United Nations agencies, local and international bodies and non-governmental organisations, as well as a wide range of donors, CCLC conducts research and analysis, provides technical expertise, implements reform programmes, delivers training and delivers our own projects.

1. We write to highlight the lack of access to legal remedies for children and families who are within areas of innovation as set out in new clauses 2 and 3 to the Children and Social Work Bill. In introducing the new clauses to the Bill at second reading, the Minister for Vulnerable Children and Families wrote to stakeholders on 7 December 2016 to explain the new clauses as well as provide a factsheet titled *Powers to test different ways of working*. This factsheet myth-buster stated:

“Children will have no legal means to recourse during a trial

All of the local authority’s statutory duties would continue to apply in exactly the same way, except for the specific change they have been granted, which must demonstrate it will improve outcomes for children. In the case of the specific exemption or modification, a local authority would set out its proposals for what will be provided to children in the explanatory report that is provided to parliament alongside the regulations. This will set out what a child can expect from a local authority for the duration of the trial. If this is not fulfilled there will be several ways a child can complain, including through the local authority’s complaints procedure, as well as direct notification to the department. The department will also closely monitor trials and if it receives evidence a trial is not having its intended effect, it will act

swiftly to repeal regulations and end the trial. Ultimately a child could challenge a local authority legally through judicial review or a damages claim if appropriate.”

2. As the specialist centre for legal advice for children, CCLC is concerned that children will not have sufficient recourse during a trial period. The assertion that children will have recourse to judicial review suggests a failure to consider the changes to access to legal advice following LASPOA 2012. In particular, our experiences demonstrate that:
 - There are insufficient legal aid providers to ensure that children in areas that are undertaking a trial of different ways of working will be able to access legal advice.
 - Amendments to remuneration for judicial review mean that this work is undertaken at risk, pending a successful outcome in court.
 - Difficulty in bringing proceedings against the local authority.
 - There is no legal aid available for a general damages claim.
3. In addition to these four points, it is axiomatic that a claim for damages can only be commenced once damage has already occurred. Similarly, a judicial review claim requires the claimant to show a detriment. Therefore, where children are concerned about the adverse impact of an innovative working strategy, they will only be able to use the courts to address this after the fact. During the debate in relation to Clause 1 of the Bill, Lord Nash stated

“I believe that it may risk introducing an unhelpful adversarial dimension to the relationship between children and young people and their local authority as corporate parent”

These clauses seem very likely to lead to the sort of adversarial relationship that the Government stated they wished to avoid during the passage of the Bill.¹ The opposition to an amendment to promote access to legal advice as a corporate parenting duty and the assumption that children will be able to challenge innovative working practices are contradictory.

4. The legal system in England and Wales is not child friendly, and children who navigate it may require a litigation friend to assist them. Although the UNCRC article 12 makes provision for children to have their views heard, there is no mechanism within civil legal procedures for this.

Legal aid providers

5. There are limited legal aid providers around the country, with contracts to undertake community care and public law (the areas of expertise required to challenge a local authority in these circumstances) are among the lowest numbered. The number of legally aided community care judicial reviews is fewer than 50 a month, with only 220 granted in the first six months of the current financial year.² There are 137 legal aid providers with community

¹ Lord Nash, Children and Social Work Bill [HL], 18 October 2016 Hansard vol 774, col 2256

² Legal Aid quarterly statistical release, Ministry of Justice, 16 December 2016

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/577475/legal-aid-statistics-bulletin.pdf

care contracts, and 193 with either community care or public law contracts³. This covers all work that engages community care whether for children or adults, including access to services, specialist housing and other provisions.

6. There are for example no providers in Bath; a child in Exeter would need to travel a minimum of 27 miles to Somerset in order to access legal advice. There are no providers in Norfolk; the closest provider being in Colchester, which would mean travelling over 50 miles for a child living in Norwich. A child in Stockton would need to travel over 20 miles to Sunderland or Newcastle in order to see a community care/public law legal aid provider. The added concern is that where there is only one provider for a region (for example Cornwall) then when that provider reaches capacity a child or young person will be travelling even further in order to seek advice. The fact that a provider with the relevant contract area specialism may exist in a particular area is a guarantee of nothing. That mere fact does not indicate how many fee-earners are engaged in that sort of work, how many are solicitors or less experienced caseworkers or what volume of work that provider may generally undertake in the relevant area of law.
7. Coram Children's Legal Centre holds a contract in both categories (community care and public law). In our experience, is not uncommon for a case to last for a calendar year, and there is limited capacity within the sector to take on challenges to local authorities under the innovation clauses. In addition, the number of specialist providers who have a child centred practice is lower still. Legal aid lawyers are not required to have a particular specialism in working with children, but looked after children will not necessarily be accompanied by an adult, and may need further support. In the not-for-profit sector, one in six law centres has closed.⁴ We have experience of real challenges in securing the agreement of an appropriate person to act as litigation friend for the child client, especially of late where many organisations who provide independent advocacy services to children and young people who are looked after, are not willing to act as litigation friend; it strictly being outside the terms of their local authority funding contracts to provide advocacy services.

Legal aid funding

8. In addition to the limited number of providers with contracts, the funding for judicial review limits the scope of providers to take on cases as payment is essentially at risk. The Legal Aid Agency will make payment for a judicial review where:
 - Permission to bring proceedings is granted by the court; or
 - The court neither grants nor refuses permission and the Lord Chancellor considers it reasonable to pay remuneration, taking into account:
 - i. The reason why a costs order was not obtained
 - ii. How far the legally aided person has obtained the outcome sought

³ From find-legal-advice.justice.gov.uk

⁴ Evidence to the Justice Select Committee, Eighth Report, March 2015

<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/31108.htm>

- iii. The strength of the application at the time on the facts the provider knew or ought to have known.⁵

This has had a chilling effect on provision of judicial review legal aid, with the number of cases funded through legal aid continuing to drop. In 2014, Just Rights set out concerns that the number of children accessing social welfare legal advice had fallen 65% following LASPO, and were lower than the Government's own estimates.⁶

Other issues with legal proceedings

9. Children and young people in care are some of the most vulnerable, and often require support to find a solicitor, explain their issue and to attend the appointment. Where the case is against the local authority, this may lead to a position of conflict between the local authority and the child or young person. We know from working with young people who have been subject to age disputes with the local authority looking after them that for many young people court proceedings are damaging to their relationship with a social worker, and that the length of time in bringing proceedings can be considerable and lead to a pause in a young person's life.⁷

Unclear for children

10. It is important that children and parents themselves understand that they may be part of an innovative trial. Children are unlikely to understand that they may have previously been owed duties that have been altered by innovative practice. The Government has acknowledged a lack of advocacy available for children,⁸ advocacy services are only available in limited circumstances, and the Children's Commissioner's review found that 55% of children in care were not aware of their entitlement to independent advocacy.⁹ This may mean that young people who wish to challenge innovative ways of working do not have this additional support and so cannot rely on an independent advocate to either assist them to challenge the local authority or to instruct a legal representative should they wish to pursue a claim.

Suitability of alternative funding for a claim

11. The factsheet further stated that children may be able to make a claim for damages – implying a free-standing case against the local authority. There is no civil legal aid for a case relating to damages. Alternative funding would require a child to enter into a conditional fee agreement with a lawyer, or to obtain legal insurance.

⁵ Civil Legal Aid (Remuneration) (Amendment) Regulations 2015, Regulation 5A

⁶ Just Rights: Legal Aid snapshot,

<http://www.justrights.org.uk/sites/default/files/Justice%20for%20young%20a%20snapshot.pdf>

⁷ Happy Birthday? Disputing the age of children in the immigration system, Coram Children's Legal Centre, 2014, chapter 4.2

⁸ Lord Nash, Children and Social Work Bill [HL], 18 October 2016 Hansard vol 774, col 2255

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<http://www.childrenscommissioner.gov.uk/sites/default/files/publications/Helping%20children%20get%20the%20care%20experience%20they%20need.pdf>

There are likely to be cases where a child does not understand a conditional fee agreement; where the local authority has parental responsibility for the child, this causes a lacuna as to who can enter into such an agreement to enable the child to pursue a claim for damages against the corporate parent.

Unclear challenges

12. Finally, it is unclear what, if anything, children would be able to challenge. The aim of the innovative practice is to remove legal obligations from local authorities, therefore the only arena for challenge would be where this was done without following the procedure set out in statute and in secondary legislation. Without sight of the secondary legislation, it is difficult to anticipate whether challenges would be possible. This is a different form of redress than children who are currently able to challenge a local authority for failure to comply with their obligations under primary legislation because the legislation sets out the duties a local authority owes to children. This is therefore a clear ground of challenge where children are failed by those who are not adhering to the law, a challenge based on a removal of legal duties may be less clear, and this would directly impact on the availability of lawyers to assist a child.

13. It is possible that the innovative trials will be under sufficient scrutiny so that children will not require a legal remedy, but the reality of access to legal advice means that a remedy through the courts is likely to be merely illusory.

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