

Uncovering private family law: What can the data tell us about children's participation?

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A child’s right to participate and have their voice heard in private law proceedings is acknowledged in legislation and guidance – both as a way of informing welfare-based decisions and upholding their rights. This report looks at what the data tells us about the ways in which children participate and how often.

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This report was written in partnership with:



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Overview

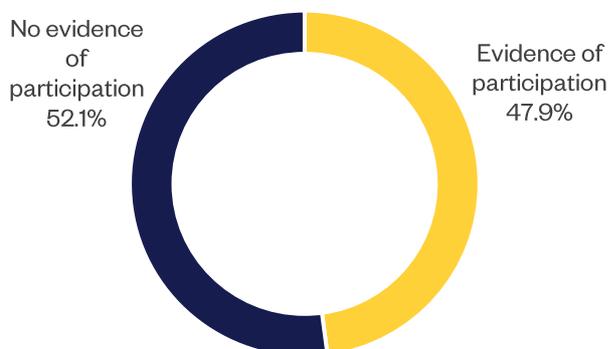
National and international legislation set the context for a family justice system where child engagement and participation are the default, both as a way of informing welfare-based decisions and upholding children's rights. While international research highlights the importance of children being involved in decision-making, there is limited research focusing on children's experiences of private law proceedings in England and Wales, and a lack of data about how children are involved (Roe 2021).

This report by the Family Justice Data Partnership – a collaboration between Lancaster University and Swansea University – asks what the data collected by Cafcass tells us about how children participate in private law cases.¹

What the study looked at and what it found

- The study looked at the Cafcass data from England relating to four of the main ways children can participate in private law proceedings – via a Cafcass section 7 report, local authority section 7 report, local authority section 37 report and rule 16.4 guardian appointment – referred to in this report as 'markers of participation'.
- Almost half (47.9%) of the cases that started in 2019/20 had one or more markers of children's participation within 12 months of the case start date. 33.6% of cases included a Cafcass section 7 report, 10% a local authority section 7 report, 2.9% a section 37 report and 4.6% a rule 16.4 guardian appointment. Consequently, over half of the cases in the period analysed did not involve any of the markers of participation.

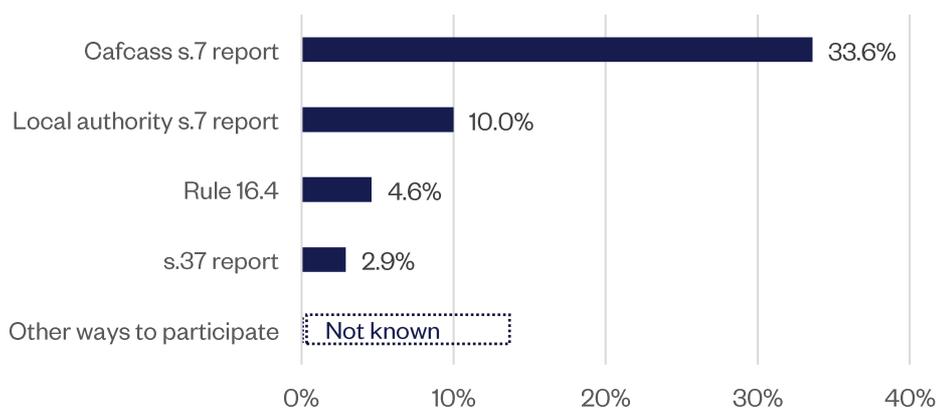
Figure 1: Evidence of child participation within 12 months of the case start date



¹ Cafcass represents children in family court cases in England, independently advising the court about what is safe for children and in their best interest.

- While considering these as markers of children’s participation, we do not know whether all the children within a case will have been directly involved, or the quality or duration of that involvement.
- The study was not able to explore the full range of ways that children might participate – such as writing to or meeting with the judge, giving evidence, engaging with experts such as psychologists and independent social workers, and the use of child-friendly judgments – because data is not routinely collected for these types of participation.²
- The data analysed for this study suggests that children formally participate in less than half of private law cases. While the data does not capture all types of engagement with the court process, it seems likely that, in the majority of cases, children have very limited opportunities to have their voices heard while the court makes important decisions about their future.

Figure 2: Evidence of child participation by marker within 12 months of the case start date



Note: Cases may involve more than one marker of child participation.

Future priorities

- There have been recent improvements in the collection of data by Cafcass around children’s participation. This includes greater detail about how and when children are seen, and the preparation of Re W reports (which include considerations relating to whether a child should give evidence). In the future, it would be helpful to analyse this more recent data to better understand the nature of children’s participation, including the means and extent of the participation, and the age of children involved.
- Moving forward it would be useful to see routine collection of administrative data on other ways children participate in proceedings. Some of this data collection may need to sit outside of Cafcass, but at a system level, there is a need for reliable, detailed data that gives us a better understanding of how children participate in private law proceedings.

²Cafcass started to systematically record the preparation of Re W reports (which involve direct consultation with the child and consider their ability to give evidence, their views, and the impact, or risk of harm that giving evidence may have on them) in 2020.

Key concepts and terms

Private law

Private law children cases relate to disagreements or disputes, usually between parents after relationship breakdown (although they may involve grandparents or other family members), about arrangements for a child's upbringing, such as where a child should live and/or who they should see. Where agreement cannot be reached privately, an application can be made to the court for an order under the Children Act 1989. The majority of applications are for a child arrangements order (under section 8 of the Children Act 1989), although a range of orders are available for different circumstances (see Cusworth et al. 2021a for a discussion).

Legal framework

As with public law, or child protection cases, the child's welfare is the paramount consideration in private law children cases. To guide the court on the factors to take into account, section 1(3) of the Children Act 1989 gives a list of considerations, commonly known as 'the welfare checklist'. Although the list is not in order of priority, it is of symbolic significance that the child's views appear first, with the court directed to have regard to 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)' (section 1(3) Children Act 1989).

In addition, the right of children to have their perspectives included and considered in legal proceedings that affect them is enshrined in Article 12 of the United Nations Convention on the Rights of the Child (UNCRC).³ Article 8 of the European Convention on Human Rights suggests that children should have the right to attend a court hearing where the case impacts on their right to family life.

The four markers of participation analysed in this report

This report looks at four key routes through which children may be consulted during private law proceedings. All usually involve direct consultation of or engagement with children. For the purposes of this report, we treat them as 'markers of participation'.

- **Section 7 (Cafcass)** – the court may order Cafcass to prepare a section 7 report (or addendum) on matters relating to the welfare of the child, which would include meeting with the child, where appropriate, according to their age, maturity and preference.
- **Section 7 (local authority)** – the court may order the local authority to prepare a section 7 report (as above) or undertake an investigation of a child's circumstances.
- **Section 37 (local authority)** – the court may order the local authority to consider whether to apply for a care or supervision order. This involves consideration of the welfare of the child and whether or not the child is suffering or at risk of suffering significant harm.
- **Rule 16.4 (guardian appointment)** – under rule 16.2 of the Family Procedure Rules 2010, children may be made a party to proceedings by the court, with a children's guardian appointed under rule 16.4 to independently assess the child's wishes and feelings, and welfare needs. The children's guardian is usually from Cafcass, but a caseworker from the National Youth Advocacy Service (NYAS) can provide representation for children and young people in certain circumstances.

³Article 12 states: Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child; and for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Introduction

Children involved in private law cases are not automatically party to proceedings as they would be in public law cases (care proceedings). They have been described as ‘by and large, completely invisible in court’ (Munby 2015), with their voices going unheard or ‘muted’ (Ministry of Justice 2020). A recent review of international research on children’s experiences of parental separation and court proceedings concluded that children overwhelmingly feel unheard, and that they have a limited understanding of the court process, the role of lawyers and judges, and their right to be heard (Roe 2021).

Research on children’s experiences of private law proceedings in England and Wales – and data about how they are involved and the extent of that involvement – is limited. It is important to understand how the current system is engaging children, and where improvements are needed.

This study is the first to use administrative data recorded and held by the Children and Family Court Advisory and Support Service (Cafcass) to investigate the proportion of private law cases that children are likely to have directly participated in.⁴ The report examines the proportion of private law cases that had a section 7 report (either from Cafcass or the local authority), a section 37 report, and/or a rule 16.4 appointment recorded in the administrative data within 12 months of the case start date.⁵ These markers all indicate that, depending on their age and understanding, children will have been directly consulted on their wishes and feelings by a family court adviser, local authority social worker, or a guardian. The study then reflects on these findings, highlighting the limitations of the data and how this might be improved, and the implications for children, their families and the family justice system.

See Appendix A for details of data sources and methodology.

How do children participate in proceedings?

In most cases, children’s views are presented by the adult parties – usually their separated parents – and sometimes also by a Cafcass family court adviser. When an application is issued, Cafcass (in most cases) undertakes initial safeguarding inquiries and prepares a safeguarding report for the court.⁶ The current framework

⁴ Cafcass is the organisation that represents children in family court cases in England, independently advising the court about what is safe for children and in their best interests.

⁵ In its annual report, Cafcass details the number of section 7 reports and rule 16.4 appointments ordered by the court to Cafcass during the course of the year. These figures will not match those reported here, as we have only counted such activity in cases that started in 2019/20, and occurred within 12 months of the case start date.

⁶ This is with the exception of some specific issue or prohibited steps cases, and some cases where the local authority is already involved with the family.

of the child arrangements programme (which sets out the processes followed in child arrangement cases) does not provide for direct work with children at this stage.⁷

There are various ways that children might participate and engage in proceedings after the first hearing – such as writing to or meeting with the judge, giving evidence, engaging with experts such as psychologists and independent social workers, and the use of child-friendly judgments. This study was not able to explore these types of participation as data is not yet routinely collected in the administrative data.⁸ Rather it focused on the following four markers of direct consultation or engagement with children, which are systematically recorded in the administrative data by Cafcass.

Section 7 welfare report (Cafcass)

At the first hearing, or indeed at any stage during proceedings, the court may order Cafcass to produce a section 7 welfare report ‘on such matters relating to the welfare of the child as are required’ (Children Act 1989 section 7(1)). In these cases, the Cafcass family court adviser investigates the family circumstances, including the wishes and feelings of the child(ren). This often includes talking to children alone, possibly at a neutral venue such as their school. They will also spend time with each adult party and may speak to other people such as family members, teachers and health care professionals. Having made these enquiries, the Cafcass practitioner prepares a report, advising the court on what they think should happen.

Section 7 welfare report (local authority)

A local authority is usually directed to carry out the section 7 report if it has current or recent involvement with the family. A family may be known to the local authority for a number of reasons – for example there may have been previous public law proceedings, or the child may be a ‘child in need’ (under section 17 of the Children Act 1989) or subject to a child protection plan.⁹ In these cases, there is likely to be an allocated local authority social worker who will have worked with the family before and carried out assessments. In preparation of the section 7 report, the local authority social worker will refer to previous records and work directly with the family, including the children, to provide advice to the court on the child’s welfare.

Where additional information comes to light, or is requested by the court, the court can direct an addendum section 7 report to be filed by Cafcass or the local authority.

Section 37 report

If the court becomes concerned about a child’s welfare during the course of proceedings, and it seems that it might be appropriate for a care or supervision

⁷ This involves checks with police and children’s service databases and separate 30-minute phone calls with the applicant(s) and respondent(s).

⁸ Cafcass started to systematically record the preparation of Re W reports (which involve direct consultation with the child and consider their ability to give evidence, their views, and the impact, or risk of harm that giving evidence may have on them) in 2020.

⁹ Section 17 of the Children Act 1989 places a general duty on all local authorities in England to safeguard and promote the welfare of children within their area who are in need. Fundamentally, a ‘child in need’ is a child who needs additional support from the local authority to meet their potential.

order to be made, then it can direct a local authority to undertake an investigation of the child's circumstances and prepare a welfare report under section 37 of the Children Act 1989.

Section 37 has been described as a 'jurisdictional bridge' between private and public law proceedings,¹⁰ and although the court cannot force the local authority to commence care proceedings, the section 37 report must state whether they intend to apply for a care or supervision order, provide services or assistance or take other action.

Rule 16.4 (guardian appointment)

In particularly complex or contested cases, the court can make a child party to private law proceedings if it is deemed to be in the child's best interests, under rule 16.2 of the Family Procedure Rules 2010. The rules state that making a child a party is exceptional and should only occur in a minority of cases involving 'an issue of significant difficulty'.¹¹ In these cases a guardian, usually from Cafcass, is appointed for the children under rule 16.4, to give the court an independent view of the circumstances, and a solicitor instructed by the guardian to represent the children in court. Sometimes the guardian and solicitor are appointed from the National Youth Advocacy Service (NYAS). In certain circumstances, older children may be given permission by the court to instruct their own solicitor.

¹⁰ *Re K (Children)* [2012] EWCA Civ 1549 (Court of Appeal).

¹¹ Practice Direction 16A.

Data gaps and limitations

- Children might participate in ways other than those examined in this study – such as writing to or meeting with the judge, attending court, giving evidence,¹² engaging with experts such as psychologists and independent social workers, and the use of child-friendly judgments. Data on these may be recorded in case notes but not systematically collected by Cafcass in the administrative data we studied.
- The Cafcass database records information during its involvement in a case. Children's participation after this point, even if the National Youth Advocacy Service (NYAS) or local authority involvement continues, will not be captured in the data. Involvement of the local authority is often used as a reason to close the case on the Cafcass system, hence information will not be available after the judge has ordered, for example, a local authority to undertake a section 7 report. As a result, figures presented here may be an underestimate of children's participation.
- We have only examined children's participation in the 12 months after a case started so as to be able to use the most recent data. It is possible that, for example, a section 37 report might be ordered, or a rule 16.4 appointment made, after the first year of proceedings. However, it is likely that a section 7 report was requested prior to this, within the first year, thus we will see child engagement, just not the full extent over time.
- This study reports at case level, as this is how most of the information relating to children's participation is recorded in the administrative data.¹³ When multiple children are involved in a case, we do not know whether such engagement relates to individual children, or all involved.
- We have not been able to consider the age of the child(ren) involved in each case, as hearings and reports are only linkable to a case in the administrative data, rather than an individual child.
- We do not know the extent, intensity, or duration of consultation with children, which may vary significantly from case to case.
- Further research is required to identify and understand any regional or court-level differences in children's opportunity to participate in proceedings. For example, in the Central London family court, it is common practice for a Cafcass practitioner to see all children over eight years old before the first hearing.
- Studies based on administrative data are necessarily limited by the scope and quality of available data, collected primarily for organisational rather than research purposes.

See Appendix A for full data source and methodology details.

¹² A Re W report considers the ability of the child to give evidence, their views, and the impact, or risk of harm, that giving evidence may have on them, and involves direct consultation with the child.

¹³ Hearing outcomes and reports are recorded at a case level in the administrative data, although children will have individual child plans and case files.

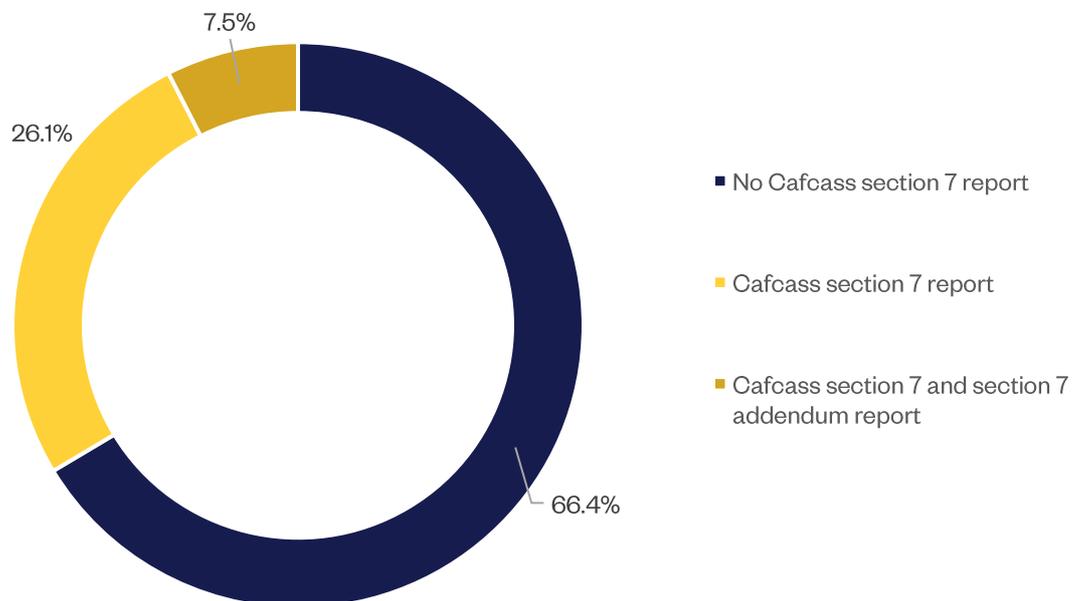
Findings

The study sample included 40,753 private family law cases that included a section 8 application that started in 2019/20.¹⁴ The following sections present an analysis of the proportion of these cases where children might have been directly consulted or participated in the 12 months after the case commenced using the four participation markers described above.

Section 7 welfare report (Cafcass)

The most common indication that children are likely to have had their views sought directly is through Cafcass being instructed by the court to undertake a welfare report. As shown in Figure 3, a section 7 report was completed by Cafcass within 12 months of the case start date in around a third (13,708, 33.6%) of cases. In a small proportion of these cases, 7.5% (3,073), an addendum section 7 report was also filed.

Figure 3: Proportion of cases in which Cafcass completed a section 7 report within 12 months of the case start date



¹⁴ Section 8 applications include applications for a child arrangements order (live with or spend time with), specific issue order and prohibited steps order.

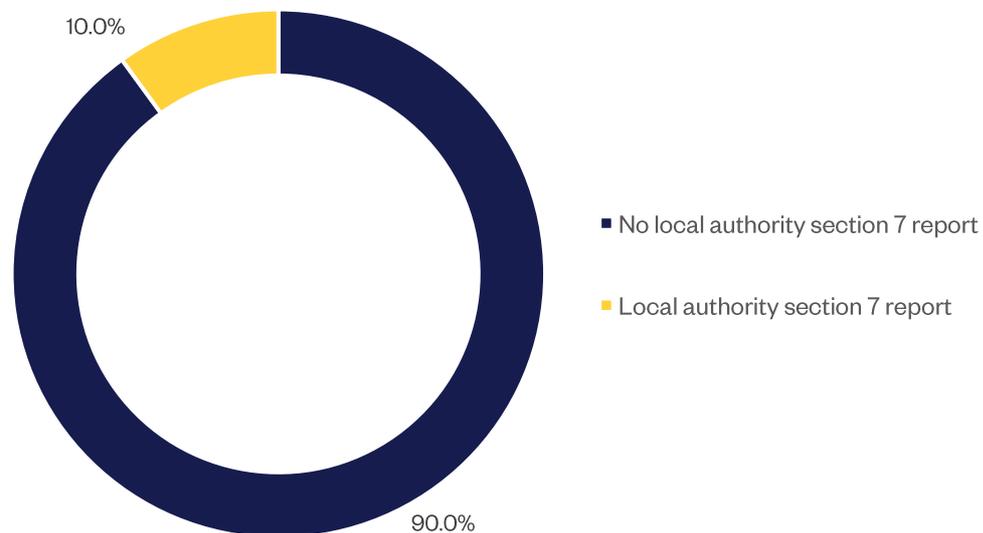
Section 7 welfare report (local authority)

As shown in Figure 4, a local authority was ordered by the court to undertake a section 7 report in 10% (4,067) of private law cases that started in 2019/20.

While this direction is recorded in the Cafcass data when Cafcass is present at the relevant hearing, it is important to note that in most instances where a local authority becomes involved in a private law case, Cafcass ceases its involvement and thus recording of data –so these figures may be an underestimate.

While we might know that a local authority was ordered to prepare a report, no information is available on whether and when it was filed, what it said, or what happened next in the case.

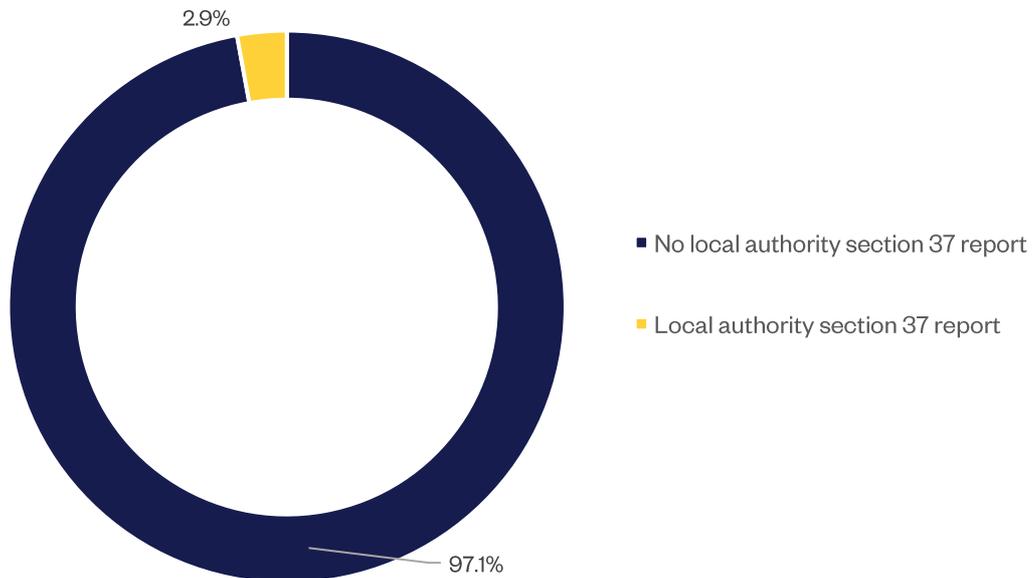
Figure 4: Proportion of cases in which a local authority was ordered by the court to undertake a section 7 report within 12 months of the case start date



Section 37 report

The court directed the local authority to investigate whether it might be appropriate for care proceedings to be issued in 2.9% (1,168) of private law child arrangements cases that started in 2019/20, as seen in Figure 5. Again it is worth stressing that we have no information on the findings of this section 37 report.

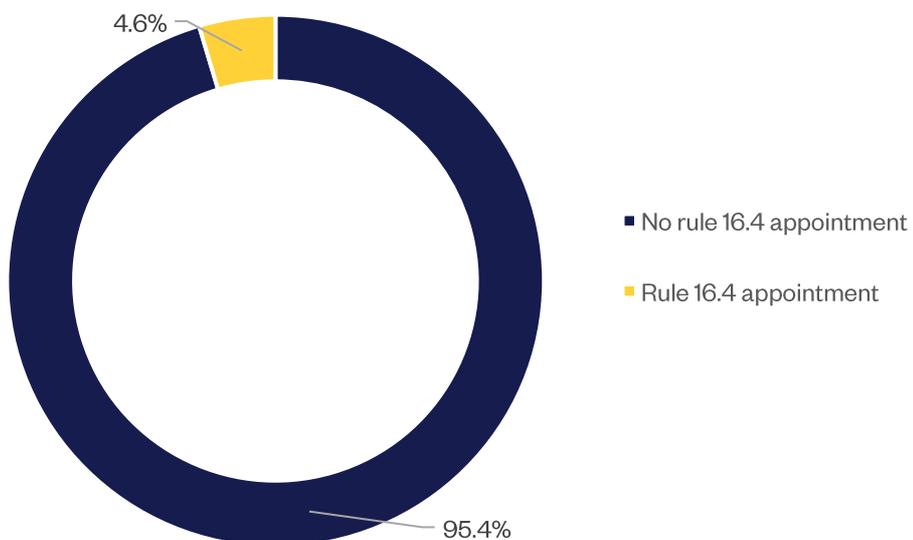
Figure 5: Proportion of cases in which a local authority was ordered by the court to undertake a section 37 report within 12 months of the case start date



Rule 16.4 (guardian appointment)

As shown in Figure 6, it is recorded that the judge made the child(ren) party to proceedings in around one in 20 cases (1,881, 4.6%), appointing a children's guardian under rule 16.4 within 12 months of the case starting.

Figure 6: Proportion of cases in which a children's guardian was appointed under rule 16.4 within 12 months of the case start date



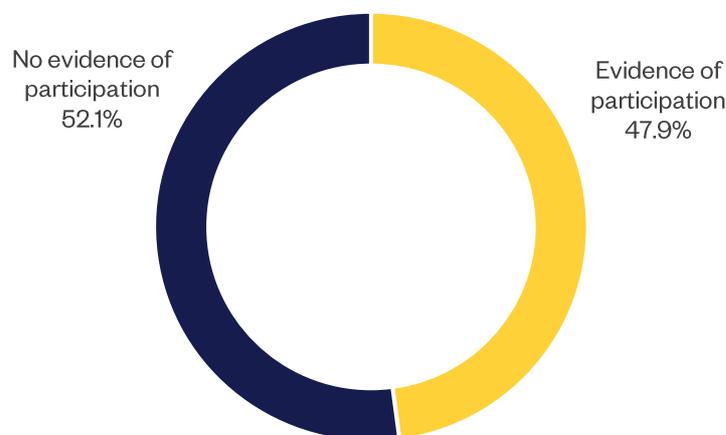
A Cafcass guardian was appointed in 4.5% (1,825) of cases and a NYAS guardian was appointed in 0.1% (48) of cases. In a very small number of cases (fewer than 5), it was recorded that the child had appointed their own solicitor.

Cafcass might not always record appointments to external parties, instead recording 'no further work for Cafcass' – thus figures may be an underestimate.

Overall indication of a child's involvement

A case might include one or more of the above markers that children might be expected to have been consulted directly or participated. Almost half (19,532) of child arrangement cases that started in 2019/20 had one or more Cafcass (section 7) welfare report, section 7 or section 37 report by the local authority, or rule 16.4 guardian appointment, within 12 months of the case start date. Again it is worth reiterating that although we have used these as indications of children's participation, we cannot know that all the children will have been directly involved, or the quality or duration of that involvement. Equally, as mentioned above, children may have participated in ways not recorded in the Cafcass administrative data.

Figure 7: Proportion of cases with one or more marker of child participation within 12 months of the case start date



Reflections

The national and international legislation and guidance sets the context for a family justice system where child engagement and participation are the default, both as a way of informing welfare-based decisions and upholding children's rights. By bringing together data on a number of markers where children might have been consulted directly during private law proceedings, this report intends to start to capture the extent of children's engagement and to provide a foundation for future research.

The data analysed for this study suggests that children formally participate in less than half of private law cases. This means that, in the majority of cases, they have no (or very limited) opportunity to have their voices heard while the court makes important decisions about their future. This may be because the children were considered too young, although this in turn raises questions about the age at which it is appropriate for children to participate. Given the lack of a clear consensus, further work is needed to explore this – particularly given that the wider evidence base suggests children largely want to be involved in decision making (Roe 2021).

In terms of what the analysis tells us more generally about private law cases, it is worth noting that the markers used to indicate children's engagement – Cafcass section 7 report, local authority section 7 report, local authority section 37 report and rule 16.4 guardian appointment – might suggest that there are welfare concerns necessitating in-depth exploration of the circumstances of the child and family. Just under half of cases required one or more of these interventions in the first year. This adds to an emerging body of evidence that highlights the complexity of private law cases and needs of families coming through the private law courts. Estimates of the prevalence of allegations of domestic abuse range from 49% to 62% of cases (see Barnett 2020). In addition, a recent study of Cafcass Cymru data linked with health data demonstrated that adults in private law proceedings in Wales had significantly higher levels of GP appointments and hospital admissions for mental health, substance misuse and domestic abuse than a comparable group of adults (Cusworth et al. 2021b).

A new approach to dealing with cases involving disputes between parents over arrangements for their children is being tested in the Pathfinder pilot sites in Dorset and North Wales. One of the aims for the Pathfinders is to amplify the voice of the child within proceedings, including through the preparation of a child impact report before first hearing. This involves direct or indirect (for example, via digital means or through a third-party) engagement with the child to determine their circumstances, preferences for engagement and initial wishes and feelings at the outset of proceedings. The evaluation of these pilots, and in particular the level and nature of children's engagement under the new arrangements, will be another valuable contribution to the growing evidence base around children's engagement in and experience of proceedings.

It is important to highlight the limitations to the use of the Cafcass administrative data to study children's involvement (see 'Data gaps and limitations' in Introduction). However, there is an obvious commitment by Cafcass to making improvements in the recording of data when its practitioners meet and engage with children. This includes markers of participation – such as where a Re W report has been prepared (to assist in deciding whether a child should give evidence), and the increased use of a specific 'child seen' table – which it started to record systematically in 2020. The child seen table contains information on direct engagement between Cafcass practitioners and the child(ren) in a case, and the mode of engagement, for example, at school, at home, by video call or sending a letter. Systematic recording of this data is in its infancy, and thus robust analysis was not possible at the current time, but will be useful in the future.

There are also a number of other important ways in which children might engage with proceedings that are not currently recorded systematically in the administrative data. It would be useful moving forwards for systematic data collection within the family justice system to include, for example, children writing to or meeting with the judge, giving evidence, engaging with experts such as psychologists and independent social workers, and the use of child-friendly judgments. Some of this data collection may need to sit outside of Cafcass, where for example they cease to be involved in the case before the case itself has concluded, but at a system level there is a need for reliable, detailed data that gives us a better understanding of how children engage and participate as they journey through the system.

Despite the limitations, the novel findings reported here are important, and begin to paint a picture of children's involvement in private law cases. There is an ongoing need to develop this area of research so that the family justice system has a greater understanding of how and when children's views are currently sought and represented. This enhanced knowledge is needed to inform more tailored policy and practice responses, and to ensure that children have the opportunity for their voices to be heard and considered in all legal proceedings that affect them.

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Appendix A: Methodology

Administrative data collected and maintained by Cafcass is held in the SAIL [Secure Anonymised Information Linkage] Databank (Ford et al. 2009; Jones et al. 2014; Jones et al. 2020). The study used this anonymised, population-level data on private law children cases in England, focusing on those that started between 1 April 2019 and 31 March 2020 and included a section 8 application.¹⁵ The cohort, which consisted of 40,753 cases, was followed for 12 months (see Bedston et al. 2020 for more information about the Cafcass data).

Data routinely collected by Cafcass is stored in a relational database – a collection of data tables (e.g. application table, hearings table, etc.), linkable through anonymised common data points (e.g. case ID, application ID). Cafcass records information into the database whilst they are involved in the case. In private law this often ends at the first hearing, unless concerns exist over child welfare and the court has directed further work or has decided to appoint a children’s guardian under 16.4 of the Family Procedure Rules.

The research team first explored the Cafcass relational database to identify which of the tables contained markers indicating that children in a private law case, according to their age and understanding, were likely to have been directly consulted on their wishes and feelings by a family court adviser, local authority social worker or guardian. Two tables were identified as appropriate: the ‘hearing reports table’, which holds information on individual reports within a case, and the ‘legal outputs table’, which contains details of individual legal outputs ordered by the court.

Data from these two tables were used to establish if a case had a Cafcass (section 7) welfare report, involvement of the local authority (local authority section 7 or section 37 report), and/or an appointment of a children’s guardian under rule 16.4 (and whether children were represented by a Cafcass guardian, National Youth Advocacy Service (NYAS) or someone else, which might include an independently appointed solicitor) – see Table 1 for more details.

This report describes the proportion of private law cases in which each of these markers of children’s participation occurred within 12 months of the case starting, and the overall proportion of cases with at least one of these features.

¹⁵ Section 8 applications include applications for a child arrangements order (live with or spend time with), specific issue order and prohibited steps order.

Table 1. Markers of child participation, their source and description

Child participation markers	Data location in Cafcass relational database	Description
Cafcass welfare report		The court may order Cafcass to prepare a section 7 report (or addendum) on matters relating to the welfare of the child, which would include meeting with the child, where appropriate according to their age, maturity and preference.
Section 7 report	Hearing reports table	
Addendum section 7 report	Hearing reports table	
Local authority involvement		The court may order the local authority to prepare a section 7 report (as above) or undertake an investigation of a child's circumstances, or file a section 37 report, to consider whether to apply for a care or supervision order (though the court may not compel the authority to apply for such an order).
Section 7 report	Legal outputs table	
Section 37 report	Legal outputs table	
Appointment of a children's guardian		Under rule 16.2 of the Family Procedure Rules 2010, children may be made a party to proceedings by the court, with a children's guardian appointed under rule 16.4 to independently assess the child's wishes and feelings, and welfare needs. The children's guardian is usually from Cafcass, but a caseworker from NYAS can provide representation for children and young people in certain circumstances.
Rule 16.4 Cafcass	Hearing reports table, legal outputs table	
Rule 16.4 NYAS	Legal outputs table	
Rule 16.4 Other (incl. solicitor)	Legal outputs table	

Nuffield Family Justice Observatory

Nuffield Family Justice Observatory (Nuffield FJO) aims to support the best possible decisions for children by improving the use of data and research evidence in the family justice system in England and Wales. Covering both public and private law, Nuffield FJO provides accessible analysis and research for professionals working in the family courts.

Nuffield FJO was established by the Nuffield Foundation, an independent charitable trust with a mission to advance social well-being. The Foundation funds research that informs social policy, primarily in education, welfare, and justice. It also funds student programmes for young people to develop skills and confidence in quantitative and scientific methods. The Nuffield Foundation is the founder and co-funder of the Ada Lovelace Institute and the Nuffield Council on Bioethics.

Family Justice Data Partnership

The Family Justice Data Partnership is a collaboration between Lancaster University and Swansea University, with Cafcass and Cafcass Cymru as integral stakeholders. It is funded by Nuffield Family Justice Observatory.

SAIL Databank

Cafcass England data used in this study is available from the Secure Anonymised Information Linkage (SAIL) Databank at Swansea University, Swansea, UK, which is part of the national e-health records research infrastructure for Wales. Approval for the project was granted by the Information Governance Review Panel (IGRP) under SAIL project O919. When access has been granted, it is gained through a privacy-protecting safe-haven and remote access system, referred to as the SAIL Gateway. Anyone wishing to access data should follow the application process guidelines available at: www.saildatabank.com/application-process

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