

Cafcass and Independent Reviewing Officer

Protocol for Public Law Work

The Protocol has been developed in response to the need to agree a clear understanding of the statutory roles and interface between Cafcass and the Independent Reviewing Service. *A copy of the protocol Cafcass and LA Social Worker Protocol for Public Law Work is attached for information.*

The key regulations and guidance are:

- a. The Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004 ("the Cafcass Regulations")
- b. Statutory guidance for IROs and Local Authorities on their functions in relation to care management and review for looked after children (known as the IRO Handbook).
- c. Care Planning, Placement and Case Review (England) Regulations 2010
- d. The Arrangements for Placement of Children by Voluntary Organisations and others (England) Regulations 2011
- e. Revised Public Law Outline 2013

Cafcass		Independent Reviewing Officer
	Pre Proceedings	
When Cafcass becomes aware of significant risk to children subject to Private Law Section 8 Applications, a referral will be made to the Local Authority (which may require a Section 37 report from the Local Authority). Cafcass will consider notifying the IRO service.		When the IRO has concerns relating to Care proceedings not being issued in a timely manner by the Local Authority these will be dealt with through the locally agreed dispute resolution process. If the concerns are unable to be resolved consideration should be to notifying the local Cafcass Service Manager.
	Pre Case Management Hearing	
<p>At the point of Case Allocation Cafcass business support or Service Manager will inform the IRO manager of the named Cafcass officer including direct contact details on the agreed template. See Appendix 1.</p> <p>When a child is added to ongoing Care proceedings the Cafcass officer will notify the appointed IRO.</p> <p>The Cafcass officer will establish contact with the IRO prior to the CMH as appropriate. The level of any ongoing consultation will be at the discretion of the Cafcass officer in order to promote the best possible care planning process for each child.</p> <p>The Cafcass officer will consult with the IRO prior to the CLA review as Cafcass attendance is generally not required.</p> <p>All discussions between the IRO and Cafcass Officer should be recorded on the child's file.</p>		<p>At the point of case allocation IRO Business Support or IRO Manager to Inform Cafcass of the named IRO and contact details</p> <p>IRO to ensure the Guardian is advised of Children Looked After Review (CLA) arrangements and sent a copy of the statutory review recommendations and decisions as well as the report. This is an ongoing arrangement during the proceedings.</p> <p>During proceedings, legal department of the local authority to ensure that the IRO is sent copies of</p> <ul style="list-style-type: none"> • interim and final court care plans, • court timetable/Directions, • expert reports (if any) • Cafcass officers interim and final report. • Facts and reasons, or judgements (if any) <p>Throughout all IRO and Cafcass officer contact, the IRO will maintain a comprehensive record of discussions on the child's file.</p>

	Up to the IRH/Final hearing	
<p>When the Cafcass officer has a concern about the Local Authority's management of the child's case they have the discretion to consult with the named IRO or IRO manager. The Cafcass officer will, in the Initial Assessment Report, seek the permission of the Court to have all assessments, expert reports, Cafcass officer's Report and Care Plan disclosed to the IRO and multi-agency group in preparation for the Professionals Decision Making Meeting.</p> <p>The Cafcass officer will, if at all possible, attend the Professionals Decision making Meeting and contribute to the scrutiny of the Care Plan. Should the Cafcass officer be unable to attend then suitable instructions can be given to the Solicitor for the child/children.</p>		<p>The IRO will alert the Cafcass officer to any significant issues that arise in planning and review meetings</p> <p>As it no longer a requirement for the Cafcass officer to attend all review meetings, IRO to ensure that standing apologies are given for Cafcass when not in attendance whilst a child is subject to proceedings and ensure distribution of minutes and papers</p> <p>At any stage during the proceedings the IRO can contact the Cafcass officer to convey any significant developments or concerns in relation the child's case.</p> <p>The LA solicitor will inform the court of any area of dispute resolution.</p>
	Completion of Proceedings	
<p>At the conclusion of proceedings the Cafcass officer is to ensure the final court care plan is provided to the IRO and discussed with them at completion of proceedings and provide written handover on a standard template. See Appendix 2.</p> <p>The Cafcass officer should send a letter to the child, giving details of the end of their involvement and reintroducing the IRO as the person who will oversee their care plan.</p>		<p>IRO will record written handover information from the Cafcass officer on the child's case file and identify any outstanding issues on a particular case.</p> <p>Following the withdrawal of the Cafcass officer the IRO remains the only independent scrutiniser of the local authority's actions</p>
<i>If a meeting is required between the Cafcass officer and the IRO (e.g. where there are contentious issues or the care plan has been significantly changed in the Final Hearing), this will be at the conclusion of proceedings and include the Local Authority Team Manager and the social worker.</i>		
	Post Proceedings	
Section 25 B(3)(a) of the Children Act 1989 and DoF guidance states that the IRO should refer the case of any looked after child to Cafcass where the IRO considers it appropriate to do so. Referrals should be sent direct to Cafcass Legal.		
<p>A Cafcass lawyer is on duty every working day and is available to give guidance (but not legal advice) to IROs about the matters identified (see full 2011 practice note embedded below)</p> <p>Unless there are overriding child protection concerns, Cafcass Legal will instigate no action on the basis of informal telephone discussions unless requested to do so by the IRO. Any record will remain confidential unless and until the IRO makes a formal referral to Cafcass. If a formal referral is made, the record will be shared with the relevant Cafcass officer as part of the case</p> <p>All cases referred in accordance with the Practice Note should be sent to Cafcass</p>		<p>The IRO must consider the impact on the child of a referral and make a decision based on the timetable for the child. There will be some cases where there will be time available to pursue the full dispute resolution process but this may not always be the case.</p> <p>The DoF Guidance also states that cases should only be referred by IROs to Cafcass as a matter of last resort, where all other attempts to resolve a problem within a local authority have failed or are failing.</p>

<p>Legal (contact details below)</p> <p>On receipt of a referral, Cafcass Legal will immediately refer the case either to the local Cafcass manager for allocation to a officer who has previously been involved or to the Cafcass High Court Team for allocation.</p> <p>Cafcass Legal will also notify the Local Authority Legal Department.</p> <p>In consultation with his or her manager and with Cafcass Legal, the Cafcass officer will seek, within two weeks of the referral, to make decisions about the most appropriate action to take, based on the questions in Appendix 3.</p>		
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Examples of cases to be referred by IROs to Cafcass. In each example, the child could be either accommodated or subject of a care order or placement order This is not intended as an exhaustive list:

- Unreasonable failure by a local authority to meet the statutory requirements for the looked after child – for example, lengthy delays in allocating a social worker; failure to make timely visits to the child.
- Unreasonable failure by a local authority to implement an important element of a care plan – for example sibling contact, or a foster placement for an asylum seeking child.
- Unreasonable failure by a local authority to implement an important element of a care plan due to conflicts in decision making outside of the review process – for example, funding of a specialist placement or therapy.
- Unreasonable decision to move a child to a placement

Examples of cases more suitable for the Official Solicitor:

- A personal injury claim against a local authority
- A claim for the harm a child has suffered through a local authority’s negligence in failing to bring care proceedings.
- Dispute in the case of a 17 year old young person who is incapable of managing his or her affairs due to mental disability, and likely to remain so after attaining his or her majority

Cafcass Legal Duty Advice Line
0844 353 3392
Monday - Friday
9.00 - 5.00 PM

For Officer s who have no legal representation, Cafcass Managers and IROs who want to discuss referrals.

The Official Solicitor
020 7911 7121

Agreed by:

Head of Service, Cafcass.

Senior Manager IRO Service.

Date:.....

Local Review Date: (at least annually)



Independent Reviewing Service
Children's Services
Unit 1, Norwich Business Park
Whiting Road
Norwich
NR4 6DJ

Rosebery Court
Central Avenue
St Andrews Business Park
Norwich
Norfolk
NR7 0HS

Tel 0844 353 3750

Fax 0844 353 3751

[Click here to enter date](#)

Dear Sir/Madam

Re: Application under section 31 (Children Act 1989) in respect of y children.

I am writing to advise you that I have been appointed by the court as children's guardian in relation to the above proceedings.

I look forward to working with you to promote the best possible care planning process for the child(ren). The duties of the children's guardian are set out in the Family Procedure Rules (2010: rule 16.20) and Practice Direction 16A. These duties include having regard to: the principle set out in section 1(2) of the Children Act (1989) - delay is likely to prejudice the welfare of the child; and to the matters set out in section 1 (3) of the same act – the welfare checklist. Close liaison with the IRO will be central to enabling me to fulfil my duties. I anticipate that it will also prove helpful to the IRO in adhering to the 'IRO Handbook', specifically chapter 8 relating to Cafcass.

I should therefore welcome timely contact with the IRO. This will enable me to set out, and refine, my case plan. I can be contacted on (telephone number) or by (email).

Baroness Tyler of Enfield Chair
Anthony Douglas CBE Chief Executive





I should be grateful if the IRO and/or the allocated social worker (copied into this letter) would keep me informed as to any material changes to the delivery of the child(ren)'s care/permanence plan that occur during the proceedings.

Please acknowledge receipt of this letter by providing the name of the IRO who will be dealing with this.

Yours sincerely

(Name)

Children's Guardian

c.c.

local authority social worker

local authority legal team

Baroness Tyler of Enfield Chair
Anthony Douglas CBE Chief Executive



Cafcass, the Children and Family Court Advisory and Support Service, is a non-departmental public body of the Department for Education
Cafcass National Office, 6th Floor, Sanctuary Buildings, Great Smith Street, London, SW1P 3BT



Independent Reviewing Service
Children's Services
Unit 1, Norwich Business Park
Whiting Road
Norwich
NR4 6DJ

Rosebery Court
Central Avenue
St Andrews Business Park
Norwich
Norfolk
NR7 0HS

Tel 0844 353 3750

Fax 0844 353 3751

[Click here to enter date](#)

Dear Sir/Madam

Re: Proceedings under section 31 (Children Act 1989) in respect of y children.

I am writing to advise you that the above care proceedings concluded on (date of final hearing), the outcome of which was (insert). As the proceedings have concluded my work has now ended, other than one final visit to the child(ren) to say 'goodbye' (delete if not applicable).

(Insert a paragraph if there are any matters to be brought to the attention of the IRO).

Please do not hesitate to contact me if there is any further information I can provide to help you in your role. The court bundle and judgments are available from the local authority legal team.

Yours sincerely

(Name)

Children's Guardian

c.c.

local authority social worker

local authority legal team

Baroness Tyler of Enfield Chair
Anthony Douglas CBE Chief Executive



This is the final version of the Cafcass IRO Practice Note issued April 2011. This replaces the Practice Note dated May 2007.

CAFCASS PRACTICE NOTE 2011 CAFCASS AND THE WORK OF INDEPENDENT REVIEWING OFFICERS

1. Introduction

- 1.1 The purpose of this Practice Note is to explain the functions and duties of Cafcass in relation to cases which involve Independent Reviewing Officers ('IROs'). There are two instances when Cafcass practitioners¹ come into contact with IROs: as part of family proceedings when a child is looked after or when a referral is made in accordance with section 25 B (3)(a) Children Act 1989. Guidance on what to do in the former is detailed in section 2 and for the latter in section 3 below.
- 1.2 This replaces the previous Cafcass Practice Note, dated May 2007.
- 1.3 This Practice Note applies to Cafcass in England. It is issued for Cafcass personnel (including self-employed contractors). It will be of interest to IROs, local authorities and other relevant professionals but does not replace or contradict in any way the DCSF guidance. It will be reviewed in 2011 and annually thereafter.
- 1.4 Separate arrangements apply in Wales. Enquiries relating to Wales should be directed to: the Social Care Team, Legal Services, National Assembly for Wales, Cathays Park, Cardiff CF10 3NQ, telephone 02920 826813.

References

- 1.5 The key regulations and guidance are:
 - a. The Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004 ("the Cafcass Regulations")
 - b. Statutory guidance for IROs and Local Authorities on their functions in relation to care management and review for looked after children (known as the IRO Handbook). www.dcsf.gov.uk/everychildmatters/safeguardingandsocialcare.
 - c. Care Planning, Placement and Case Review (England) Regulations 2010
 - d. The Arrangements for Placement of Children by Voluntary Organisations and others (England) Regulations 2011

¹ In this practice note, 'Cafcass practitioner' is used to represent the statutory roles of "officer of the Service" as defined in the Criminal Justice and Court Services Act 2000 and "officer of the Children and Family Court Advisory and Support Service" as referred to in the Review of Children's Cases (Amendment) (England) Regulations 2004.

2. IROs and Cafcass in Care Proceedings

2.1 IROs monitor the performance by local authorities of their functions in relation to children who are looked after by them. The regulations in “d” (above) confirm that voluntary organisations and private children’s homes will also have to appoint IROs to monitor their functions in relation children placed with them. Because IROs work with all looked after children, some of their work will be with children who are the subject of current care proceedings or placement proceedings. These children will also have a Cafcass practitioner, appointed to act as children’s guardian. In these cases, both the children’s guardian and the IRO will need to consider what communication is necessary in order to promote the best possible care planning process for this individual child. As a minimum, the children’s guardian will:

- a. identify who is the named IRO within the local authority, with responsibility for the child;
- b. contact the IRO and provide the IRO with the children’s guardian’s name and contact details;
- c. read copies of all review documentation;
- d. consult with the IRO as part of the ongoing analysis and ascertain whether the IRO has any concerns about the care planning process in this case. For example: where one exists, have any stages of the local dispute resolution process been triggered, or have any complaints or representations been received about the child’s case?
- e. ensure they are informed of review meetings and be aware of any planning meeting that take place and liaise with the IRO following such meetings to discuss any decisions that are made. The IRO will alert the children’s guardian to any issues that arise in planning and review meetings
- f. liaise with the IRO if appropriate on the wishes of child, the care plan, and issues which may have been raised at court and ensure that there is an independent assessment of the child’s best interests.

2.2 In all cases where the child is expected to remain looked after following proceedings, the children’s guardian should confirm that all the relevant documents have been forwarded to the IRO.

2.3 In all cases where the child remains looked after following proceedings, the children’s guardian should have a final discussion with the IRO about the case with a view to identifying any outstanding issues on particular matters that should be kept under review. It will be important that this is part of the closing of cases by the children’s guardian and not a drift into extended involvement. (Practitioners should refer to the Cafcass Safeguarding Framework paragraph 2.55.)

3. Referrals to CAF/CASS

3.1 Section 25 B(3)(a) of the Children Act 1989 and DCSF guidance states that the IRO should refer the case of any looked after child to Cafcass where the IRO considers it

appropriate to do so. The IRO must consider the impact on the child of a referral and make a decision based on the timetable for the child. There will be some cases where there will be time available to pursue the full dispute resolution process but this may not always be the case.

3.2 A Cafcass lawyer is on duty every working day and is available to give guidance (but not legal advice) to IROs about the matters dealt with in this Practice Note. (See paragraph 5.1 below for contact details). Unless there are overriding child protection concerns, Cafcass Legal will instigate no action on the basis of informal telephone discussions unless requested to do so by the IRO. Any record will remain confidential unless and until the IRO makes a formal referral to Cafcass. If a formal referral is made, the record will be shared with the relevant Cafcass practitioner as part of the case.

3.3 A Cafcass practitioner is only authorised to bring judicial review proceedings or free standing applications under the Human Rights Act 1998 by virtue of section 25 B(3)(a) of the Children Act 1989 and the supporting regulations referred to above.

3.4 Cafcass may only take such action against local authorities on referral from an IRO in accordance with the Cafcass Regulations and the IRO Regulations, or the Adoption Agencies Regulations. Other interested parties concerned about the actions of local authorities should continue to use the established procedures to make their concerns known to the local authority. They cannot refer cases directly to Cafcass.

Responsibility for Cases in Cafcass

3.5 All cases referred in accordance with this Practice Note should be sent to Cafcass Legal whose contact details can be found in paragraph 5.1 below. Some examples of the types of cases which may be suitable for referral can be found in the Annex to this Practice Note.

3.6 On receipt of a referral, Cafcass Legal will immediately refer the case either to the local Cafcass manager for allocation to a practitioner who has previously been involved or to the Cafcass High Court Team for allocation. Cafcass Legal will also notify the Local Authority Legal Department.

Documentation

3.7 The documents to be sent to Cafcass Legal are set out in paragraph 8.15 of the IRO Handbook.

3.8 It is not necessary to obtain permission of the court to disclose documents to Cafcass. Cafcass will need the court's permission to disclose any documents filed in family proceedings in connection with judicial review or freestanding Human Rights proceedings.

- 3.9 Where the documentation is for any reason not complete, the referral should still be made without further delay so that the Cafcass practitioner can begin his or her enquiries, but the IRO should stipulate a date when the documentation will be provided.
- 3.10 It is critically important that where the child is of sufficient age and understanding, the IRO conveys the child's wishes and feelings, including his or her views in relation to potential court proceedings.
- 3.11 In addition to the documentation listed at paragraph 8.15 of the IRO Handbook, the following documentation should be sent to Cafcass:
- a. names of relevant staff and contact details in relation to any other agencies involved such as the local education authority or an NHS Trust.
 - b. relevant information about diversity issues for this child and family, including whether the child or family members will need additional assistance to aid communication.

Procedure

- 3.12 The Cafcass practitioner will gather information through the following processes, which are not set out in any order of timescale or importance.
- a. reading the documentation provided by the IRO, any information held by Cafcass, and any further documentation that may be requested by the practitioner;
 - b. meeting the child if appropriate;
 - c. discussing the case with the IRO;
 - d. discussions with any relevant person including staff from the local authority. If such discussions are to take place with persons who were not party to any previous family proceedings, the lawyer from Cafcass Legal will advise whether permission of the court is required;
 - e. discussion with the previous children's guardian, where he or she is not the same person now allocated to the case;
 - f. discussion with people with parental responsibility and wider family members (where appropriate). Again, if such discussions are to take place with persons who were not party to any previous family proceedings, the lawyer from Cafcass Legal will advise the practitioner on whether permission of the court is required
- 3.13 Whether or not proceedings have been issued, Cafcass may seek to settle the case with use of negotiation or mediation. The aim is to ensure that the local authority or other responsible authority (as defined in The Arrangements for

Placement of Children by Voluntary Organisations and others (England) Regulations 2011) makes good any breach of its duties towards the child and/or any defects in the implementation of the care plan.

3.14 In consultation with his or her manager and with Cafcass Legal, the Cafcass practitioner will seek, within two weeks of the referral, to make decisions about the most appropriate action to take, based on the following questions:

- a. is there evidence that the child's human rights are being compromised by the actions (or inaction) of the local authority or the responsible authority?
- b. if so, are there further opportunities for dispute resolution? By whom should this be initiated? By the IRO, by the family or by Cafcass?
- c. could the problem be solved by other proceedings (for example an application under the Children Act for contact) and, if so, should Cafcass initiate these? Should the child be encouraged to initiate court proceedings?
- d. are judicial review proceedings necessary or should there be a free-standing human rights application?
- e. What are the ascertainable wishes and feelings of the child

3.16 Where it is not possible to submit a written report with a decision on the action to be taken within the two week period, the Cafcass practitioner will write to the persons included in the list at paragraph 3.22 below explaining the reasons for delay. A report will be provided as soon as reasonably practicable thereafter.

3.17 If further action is needed, Cafcass will decide who should take that action. The following questions should be considered: where there is a need for court proceedings, is the child able and willing to instruct lawyers to start proceedings? Or is there an adult able and willing to initiate proceedings? Only if neither of these applies will the Cafcass practitioner initiate proceedings.

Involving the Child

3.18 The Cafcass practitioner will involve the child in the case to the extent that is appropriate in the light of his or her age, understanding, needs and circumstances and if appropriate will:

- a. meet with the child to ascertain his or her views about his or her case, the role of the local authority (or "responsible authority") and the referral to Cafcass.
- b. provide information to ensure that he or she knows how to contact Cafcass.
- c. respond promptly to any representations from the child. If at any time the child wants to take over the conduct of the case from Cafcass and is competent to

do so, the Cafcass practitioner will give as much help as possible including supplying a list of solicitors whom the child might wish to instruct.

Legal Proceedings

3.19 If, on referral from an IRO and having consulted with his or her manager and taken legal advice, the Cafcass practitioner decides it is necessary to bring civil proceedings such as judicial review, or a free-standing application under the Human Rights Act 1998, he or she will take steps to secure appointment as the child's litigation friend.

3.20 The Cafcass practitioner must seek to start any such civil proceedings within six weeks of receipt of the referral. In some cases, the timetable will need to be much shorter due to the urgent nature of the concern. Even after proceedings have been issued, the Cafcass practitioner will continue to try to settle the case.

Timetabling and Sharing Information

3.21 The Cafcass practitioner will at all times have in mind the principle that delay may be harmful to the child and will have regard to relevant limitation periods. He or she will write a report detailing with reasons the course of action to be taken in the case including, where appropriate, reasons for not taking any action requested by the IRO. The practitioner will seek to prepare the report within two weeks of the referral³. At the conclusion of the case whether by judgment of the court or after the case has been settled, the practitioner will provide a further report within six weeks of judgment or settlement⁴. That report will include the reasons for the decision to bring proceedings to an end, the reason for any delay in the time limits, the detail of any settlement and any other comments or recommendations

3.22 The reports will be sent to the following people:

- a. the child, depending on his or her level of understanding.
- b. the IRO.
- c. the Chief Executive of the local authority and the Director of Children's Services or equivalent.
- d. the Chief Executive or equivalent of the voluntary organisation of private children's home
- e. the social worker and their team manager with day-to-day responsibility for the case. .
- f. any other person the officer of the Service considers should be informed. The officer of the Service will take advice from Cafcass Legal for instance in relation to persons with parental responsibility.

4 Cases which are not appropriate for a referral to Cafcass

4.1 The following are situations where a referral to Cafcass will not be appropriate :

- a. where the child is of sufficient age and understanding to bring proceedings himself or herself without the need for an adult to act on his or her behalf. In such cases the IRO should ensure that the child has access to a suitably experienced solicitor and an explanation about legal aid.
- b. where a suitable adult is able and willing to bring the proceedings on behalf of a child.
- c. Where the timescales for the child permit the full dispute resolution procedures to be exhausted. This will depend on the particular circumstances of the case. For example, an immediate placement issue might require curtailment of the process while a dispute about an educational placement provision planned for the following school year would not. Some situations (for example, an issue about sibling contact) could be resolved by proceedings under the Children Act. It is not appropriate to pursue non-family litigation such as a judicial review if a remedy may be available in current or new Children Act proceedings.

4.2 Cafcass will not deal with compensation claims, which will continue to be the responsibility of the Official Solicitor.

4.3 The Official Solicitor conducts a wide range of civil litigation on behalf of children. Cafcass Legal will pass on to the Official Solicitor any cases that are felt more appropriate for him. (See the Annex to this Practice Note.) IROs should therefore refer any suitable cases directly to the Official Solicitor whose contact details can be found in paragraph 5.2 below. In any case where it is anticipated that such a referral may be warranted, the IRO should ask for the permission of the court to disclose papers to the Official Solicitor.

4.4 In some cases it may be unclear which course of action to take. Lawyers in Cafcass Legal and the Official Solicitor's Office are available for discussion or to give guidance to IROs about potential referrals.

5 Useful contact details

5.1 Cafcass Legal's address is:

^{6th} Floor, Sanctuary Buildings, Great Smith Street, London, SW1P 3BT DX: 157050 Westminster
Tel no: 08444 353 3350 Fax no: 0844 353 3395

5.2 The Official Solicitor's address is:

The Official Solicitor and Public Trustee, 81 Chancery Lane, London, WC2A 1DD DX: 0012
LondonChancery Lane
Tel No: 020 7911 7121 Fax No: 020 7911 7105

Anthony Douglas
Chief Executive
April 2011

CAFCASS PRACTICE NOTE 2007

ANNEX

A. Examples of cases to be referred by IROs to Cafcass. In each example, the child could be either accommodated or subject of a care order or placement order. This is not intended as an exhaustive list:

- i) Unreasonable failure by a local authority to meet the statutory requirements for the looked after child – for example, lengthy delays in allocating a social worker; failure to make timely visits to the child.

- ii) Unreasonable failure by a local authority to implement an important element of a care plan – for example sibling contact, or a foster placement for an asylum seeking child.

- iii) Unreasonable failure by a local authority to implement an important element of a care plan due to conflicts in decision making outside of the review process – for example, funding of a specialist placement or therapy.

- iv) Unreasonable decision to move a child to a placement

B. Examples of cases more suitable for the Official Solicitor:

- i) A personal injury claim against a local authority

- ii) A claim for the harm a child has suffered through a local authority's negligence in failing to bring care proceedings.

- iii) Dispute in the case of a 17 year old young person who is incapable of managing his or her affairs due to mental disability, and likely to remain so after attaining his or her majority