

# Newborn babies in urgent care proceedings in England and Wales

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# About this report

The report provides updated data and analysis on:

- the number and incidence rate of newborn babies and infants in care proceedings at national and regional level
- the share of urgent interim care order (ICO) hearings involving newborn babies that are held at short notice (defined in the report as within seven days), as an emergency (less than three days), and on the same day (zero days' notice)
- the number of emergency protection orders (EPOs) made for newborn babies and infants, and the proportion of these cases that progress to s.31 proceedings.

The report covers the period 1 April 2012 to 31 March 2020. It is the fifth report in the *Born into Care* series and follows:

- Broadhurst, K. et al. (2018). *Born into care: Newborns in care proceedings in England*. London: Nuffield Family Justice Observatory.
- Alrouh, B. et al. (2019). *Born into care: Newborns and infants in care proceedings in Wales*. London: Nuffield Family Justice Observatory.
- Griffiths, L.J. et al. (2020). *Born into care: One thousand mothers in care proceedings in Wales. Maternal health, well-being and pregnancy outcomes*. London: Nuffield Family Justice Observatory.
- Griffiths, L.J. et al. (2020). *Born into care: One thousand mothers in care proceedings in Wales. A focus on maternal mental health*. London: Nuffield Family Justice Observatory.

All reports and summaries are available from: [www.nuffieldfjo.org.uk](http://www.nuffieldfjo.org.uk)

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## Acronyms

ASP	assessment and support phase
CMH	case management hearing
EPO	emergency protection orders
ICO	interim care order
NWIS	NHS Wales Informatics Service
PLO	Public Law Outline
PLWG	Public Law Working Group
TTP	Trusted Third Party

# Foreword

The *Born into Care* research series has revealed the sharp rise in the number of newborn babies being taken into care across England and Wales. This has raised serious questions about why so many babies are subject to this level of intervention and what could be done to prevent such steps being necessary.

This report provides the latest picture and also places a spotlight on the practice of local authorities requesting urgent hearings in relation to these cases. Where there is an immediate need to protect a baby from harm, urgent action may be both necessary and proportionate. But hearings held at short-notice—and hearings held on the same day the care application is issued—appear to have become common practice, which raises serious concerns about whether decisions are being made hastily, without due preparation, and with insufficient time to ensure that the process is fair and just.

Nuffield Family Justice Observatory is dedicated to improving life for children and families by putting data and evidence at the heart of the family justice system. The publications in the *Born into Care* research series help to inform discussions at local and national levels about the needs of families whose infants are at risk of being taken into care and what might be necessary to better meet them.

I am very grateful to the teams at the Centre for Child and Family Justice Research at Lancaster University and Population Data Science and the SAIL Databank at Swansea University for continued ground-breaking data analysis.

A handwritten signature in black ink, appearing to read 'Lisa Harker', with a stylized, flowing script.

Lisa Harker  
Director, Nuffield Family Justice Observatory

# Executive summary

This report provides new evidence about the number of newborn babies and infants in care proceedings in England and Wales, as well as the frequency of urgent hearings in these cases.<sup>1</sup> New evidence is also provided about the use of emergency protection orders (EPOs). The report responds to calls from the President of the Family Division's Public Law Working Group for further data analysis and research with this focus (PLWG 2019; 2021).

Analysis of infant cases is based on data collected by Cafcass and Cafcass Cymru in the eight-year period between 2012/13 and 2019/20 (fiscal years).<sup>2</sup>

## Children and Family Court Advisory and Support Services (Cafcass) categorisations

In cases where local authorities require swifter decision-making following the issue of care proceedings, an application can be made for an urgent interim care order (ICO) hearing. Cafcass offers the following categorisation of these hearings.

Short-notice hearings: first hearing takes place less than seven days from the care application issue date.

Emergency hearings: first hearing takes place less than three days from care application issue date. [Note that the research in this report measures one or two days.]

Same-day hearings: first hearing takes place on the day the care application is issued, that is, with zero days' notice.

## Key findings

- In England, the average **number of infants** in care proceedings between 2012/13 and 2015/16 was 5,305 per year, compared to 5,899 per year between 2017/18 and 2019/20. In Wales, the average number of infants in care proceedings per year was 366 between 2013/14 and 2015/16, compared to 455 between 2017/18 and 2019/20.
- The number of **newborn babies** in care proceedings in England increased from 2,425 in 2012/13 to 2,914 in 2019/20. In Wales, numbers increased from 145 to 241 over the same period, although falling to 203 in 2019/20. Newborn babies account for a growing proportion of all infant cases—just over half of them in 2019/20.
- The number of newborn babies in care proceedings has also increased when measured as an incidence rate (that is, the number of newborn cases per 10,000 live births in England and Wales). In 2019/20, 47.7 newborn babies per 10,000 live births were subject to care proceedings in England, up from 34.9 per 10,000 in 2012/13. In Wales, the rate is even higher—68.3 per 10,000 live births in 2019/20, up from 41.1 in 2012/13.
- In 2019/20, 86.3% of cases involving newborn babies in England and 74.8% of cases involving newborn babies in Wales recorded a short-notice hearing. That is, there was less than seven days between the application being issued by the local authority and the first hearing. In the majority of cases, there was between one and two days' notice between the application and first hearing.
- In a sizeable and growing proportion of newborn cases in both England and Wales, cases are issued and heard the same day (i.e. there are zero days between the application and hearing). In 2019/20, approximately one in every six newborn babies was the subject of a 'same-day' hearing. In Yorkshire and the Humber, this rises to one in four.

<sup>1</sup> In this report, the term 'infants' applies to children under 52 weeks old and the term 'newborn' applies to babies under two weeks old.

<sup>2</sup> Note that the report covers the period to 31 March 2020 and is therefore broadly 'pre-COVID'.

- Incidence rates clearly vary by region.
  - London differs very significantly from both Wales and many regions of England, particularly, the North West, North East, and Yorkshire and the Humber. It has the lowest incidence rates (24.9 newborn babies per 10,000 live births in 2019/20), and both London and the South East have the lowest proportion of same-day hearings (9.3% and 11.4% respectively). Practitioners contributing to earlier research suggested that the greater availability of preventative services in London, such as mother and baby placements and the quality of legal advocacy, had resulted in fewer infant cases being issued at birth (Mason and Broadhurst 2020).
  - At the opposite end of the spectrum is the North East, where incidence rates have doubled over the last eight years, increasing from 34.0 per 10,000 live births in 2012/13 to 83.1 per 10,000 in 2019/20. Over time, the proportion of same-day newborn cases has also doubled in the region (to 41.3%)—by far the highest rate across England and Wales.
  - In Yorkshire and the Humber, although the proportion of same-day hearings is lower than in the North East, at 26.8% in 2019/20, it is growing and higher than the national average.
  - There are marked similarities between Wales and the North West of England in terms of incidence rates—68.0 and 66.2 newborn cases per 10,000 live births in 2019/20 respectively. Alongside the North East, and Yorkshire and the Humber (and unlike other regions of England), Wales evidences a statistically significant upward trend in the proportion of same-day hearings.
- In England, infants are more likely to be subject to applications for an emergency protection order (EPO) than older children. Both infants and older children who had been the subject of an EPO application were highly likely to appear as subjects in care proceedings within a 28-day period (or within the same case). Between 2012/13 and 2019/20:
  - 86.1% of all cases subsequently recorded a s.31 application
  - 89.0% of cases involving a child under a year old subsequently recorded a s.31 application
  - 90.4% of cases involving a newborn baby subsequently recorded a s.31 application.

This data refutes concerns that children who appear in EPO applications do not subsequently appear in care proceedings.

- Overall, however, most infants and children do not start their journeys through the family justice system because an EPO application has been made. Regarding all children, only 6.5% of all cases for care proceedings, were preceded by an EPO and for newborn babies the frequency was equally low at 7.7%.



## Recommendations

- If short-notice, emergency or same-day hearings are now the norm in newborn care cases in England and Wales, then this suggests that wholesale review is needed of how care proceedings are conducted at birth. Urgent action significantly compromises parents' Article 6 rights, and is not in the best interest of infants where there has been insufficient assessment and planning. Many of the important recommendations set out in the final report of the PLWG—including better and more timely use of pre-proceedings/Public Law Outline (PLO), a new information form that requires the grounds for an urgent ICO hearing to be made clear, early notice to Cafcass and Cafcass Cymru pre-birth, and a review of parents' access to legal advice pre-proceedings—may deliver improved practice, enabling more timely and inclusive decision-making for infants and children where they are sufficiently implemented. But further consideration to parents' ability to meaningfully participate in the immediate postpartum period.
- We would recommend further examination of local area practice in order to better understand the distinct regional variations in the data.
  - Although urgent decision-making for newborn babies can be both necessary and proportionate, the rising number of same-day hearings is particularly concerning in the North East, and noteworthy in Yorkshire and the Humber. A number of interrelated factors are likely to be at play, including the level of poverty, the availability of services to support vulnerable mothers and babies, and hospital discharge policies. A comparison of local authorities with similar demographic profiles, but very divergent use of urgent hearings, would throw light on the drivers of urgency and what might be done to bring proceedings to court in a more planned and family-inclusive way.
  - Given the historically high incidence rates in Wales, the 2019/20 drop should be monitored and investigated further. As the reduction only applies to a single year we cannot say decisively that new preventative projects are reducing the need for infant removal, but it will be important to investigate this relationship further, over time.

# 1. Introduction

This report is the fifth in the *Born into Care* series. The research was designed and completed by the Family Justice Data Partnership (FJDP)—a collaboration between Lancaster University and Swansea University. The series focuses on infants and newborn babies in care proceedings in England and Wales, and aims to build a robust evidence base to inform policy and practice regarding the very youngest children in the family justice system.<sup>3</sup>

Speaking directly to questions raised by the Public Law Working Group (PLWG) led by Mr Justice Keehan (PLWG 2019; 2021), the specific focus of this report is on cases of care proceedings issued under s.31 of the Children Act 1989, in which local authorities request urgent decision-making for newborn babies.<sup>4</sup> The Public Law Outline (PLO) allows local authorities to request an urgent interim care order hearing (ICO) hearing (and/or preliminary case management hearing (CMH)), where safeguarding concerns are so great that swifter decision-making is needed. Decisions made at urgent ICO hearings can result in the interim removal of infants from their parents' care.

Although action at short notice will in some cases be needed to safeguard infants, both the interim and final PLWG reports (2019; 2021) raise searching questions about the volume of cases in which such requests are being made in England and Wales. In addition, anecdotal concerns are that there is marked regional variation in this respect. An urgent ICO can take place on the same day that the local authority makes an application to court (zero days' notice), or within seven days of the application (short notice). Not all urgent ICO hearings will result in the removal of an infant from his or her parents' care, but the majority will, and as the PLWG has pointed out, such decisions can be based on limited evidence.<sup>5</sup>

Given care proceedings cannot be started until an infant has been born, we might expect greater urgency in the case of newborn babies. However, there are widespread concerns that some newborn cases are being issued on an urgent basis as a result of insufficient planning and preparation during pregnancy (Mason and Broadhurst 2020). In contrast, robust pre-birth assessment and effective family group conferencing can avert the need for interim removal because caregivers are found within extended family networks before an infant is born. The following extract from the PLWG's interim report captures this concern:

*On issue, the application and statement in support frequently provide insufficient evidence of the urgency, together with the steps taken by the local authority to avoid the need for the application being made on an urgent basis (para. 164, p.76, 2019).*

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<sup>3</sup> In this report the term 'infant' refers to a child aged under 52 weeks old and the term 'newborn' refers to a baby under two weeks old.

<sup>4</sup> In 2018, the President of the Family Division, Sir Andrew McFarlane, established the interdisciplinary PLWG to examine the functioning of public children law. This was in large part in response to the steep rise in public law proceedings. The PLWG was tasked to make recommendations to current practice and procedures that might enable more children to be brought up safely within their family networks and avoid more intrusive family court proceedings.

<sup>5</sup> In the first report in the *Born into Care* series, we estimated that between 12% and 14% of infant cases result in a return to parents' care (Broadhurst et al. 2018). Practitioners have shared with the research team that usually an urgent ICO is requested when concerns are such that immediate removal of a baby from parents' care is sought.

The current context of practice in the family courts in England and Wales is of considerable demand that exceeds resources (Family Rights Group 2018). Cases that require the scheduling of hearings at short notice place additional demands on overstretched courts. In addition, short-notice (or indeed same-day) hearings raise questions of procedural fairness, because there is little time for parents to instruct a solicitor. Equally, there is insufficient time for the children's guardian to make his or her own enquires and advise the court (for a recent case see: *Re G (Children: fair hearing)* [2019] EWCA Civ 126).<sup>6</sup> In cases where the guardian has been involved previously with an older child, continuity of professional involvement can mitigate some of the difficulties of short-notice hearings. However, as evidenced in an earlier report from the *Born into Care* series for Wales, almost half of newborn cases involve parents the court has not seen before (Alrouh et al. 2019). Where short-notice hearings concern newborn babies there are also very particular questions about the ability of birth mothers to meaningfully engage in court proceedings in the immediate postpartum period.<sup>7</sup> For all these reasons the final report of the PLWG called for further research with this focus.

This report therefore aims to provide updated data and analysis on:

- the number and incidence rate of newborn babies and infants in care proceedings at national and regional level
- the share of urgent interim care order (ICO) hearings involving newborn babies that are held at short notice (defined in the report as within seven days), as an emergency (less than three days), and with zero days' notice (held on the same day)
- the number of emergency protection orders (EPOs) made for newborn babies and infants, and the proportion of these cases that progress to s.31 proceedings.

## Using harmonised Cafcass and Cafcass Cymru data within the SAIL Databank

This is the first report to use harmonised Cafcass Cymru and Cafcass England data curated by the FJDP within the secure environment of the Secure Anonymised Information Linkage (SAIL) Databank at Swansea University.<sup>8</sup> Administrative data collected and maintained by Cafcass [England] and Cafcass Cymru was acquired by the Databank (Ford et al. 2009; Jones et al. 2017; Lyons et al. 2009) to support the work of the FJDP and Nuffield Family Justice Observatory (Nuffield FJO). By harmonising this family court data we have been able to examine differences and commonalities in practice both within and between the two nations. Although social care policy and legislation has diverged in Wales, regarding family justice legislation, England and Wales continue to (largely) share the same legal and statutory frameworks.<sup>9</sup> The total sample of infants included in the study is 47,955, concerning s.31 applications issued between 1 April 2012 and 31 March 2020 in England and Wales. Regarding

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<sup>6</sup> Informative analysis of this case can be found at: <https://www.parklaneplowden.co.uk/news/the-importance-of-interim-removal-hearings-family-case-note>

<sup>7</sup> Concerns about parents' capacity to participate in care proceedings are given further weight by new evidence of the scale of maternal mental health (Griffiths et al. 2020a; 2020b; 2021).

<sup>8</sup> By 'curation' we refer to the process of converting raw data into usable data for secondary analysis. Dr Bachar Alrouh has led on the curation of the data for this report, Dr Rebecca Pattinson is the lead analyst. Professor Karen Broadhurst drafted the report.

<sup>9</sup> The Children Act 1989 and Practice Direction 12 continue to authorise family justice practice in Wales. However, the implementation of the Social Services and Well-being Act 2014 means that social care provision, such as accommodation of a child under s.76 of this act, is now authorised by Welsh specific legislation.

applications for s.44 EPOs between 1 April 2012 and 31 March 2020, the sample was approximately 3,652 infants (England only).

## **Evidence standards: The Family Justice Data Partnership**

All FJDP reports are based on full service populations or nationally representative cohorts of infants, using data produced routinely by the Children and Family Court Advisory and Support Services (Cafcass) in England and Wales. The same applies to studies that link Cafcass or Cafcass Cymru data to other data sources. In line with the evidence standards adhered to by the FJDP, this report describes in brief for policy and practitioners, all measures, analytic decisions and data quality issues.<sup>10</sup> Further academic publications expand on methodology. All main research reports completed by the FJDP are subject to independent ethical approval, SAIL governance processes, and peer review.<sup>11</sup>

## **COVID-19**

Due to COVID-19, March 2020 ushered in a period of highly atypical local authority and family court practice, coupled with highly atypical family stress. Although there is no doubt that the pandemic exacerbated pressures on the system and on families that pre-dated the pandemic, the move to remote or socially-distanced practice coupled with the closure of schools means that 2020 must be treated as an unusual year. For example, new forms of case prioritisation were introduced, and care proceedings lengthened during 2020. In this report we have therefore restricted our analysis to applications made prior to March 2020. Moving forward we will be analysing in detail how the fiscal year 1 April 2020 to 31 March 2021 differed from previous years.

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<sup>10</sup> The Family Justice Data Partnership: Evidence Standards: <https://popdatasci.swan.ac.uk/centres-of-excellence/family-justice-data-partnership/>

<sup>11</sup> All research undertaken within the SAIL Databank is subject to scrutiny by the Independent Research Governance Panel (IGRP) as an essential safeguard in the research ethics and governance process.

## 2. Background

### Care proceedings and short-notice hearings

Under Practice Direction 12A, when a local authority issues care proceedings, the court must also be notified of the need for an urgent contested ICO hearing or a preliminary CMH.<sup>12</sup> Both requests by the local authority are for swifter decision-making on the part of the court.

According to practitioners, by far the majority of urgent hearings are for ICOs. The local authority applies for an urgent ICO where safeguarding concerns are of such magnitude that this level of intrusion in family life is warranted. The local authority may also seek the interim removal of the child from his or her parents.

Usually, the local authority will ask the court's allocation team to list the ICO hearing to allow parents three days' notice. The local authority can apply to abridge notice for the ICO hearing, but such applications are not routinely granted because insufficient notice can severely compromise the parents' right to a fair hearing (Article 6 rights, Human Rights Act 1998).<sup>13</sup> In this report we have used the following Cafcass [England] categorisations to differentiate urgent hearings according to the number of days between issue and application:

- short notice – first hearing takes place less than seven days from the care application issue date
- emergency – first hearing takes place less than three days from care application issue date [Note that this research measures one or two days]
- same day – first hearing takes place on the same day the care application is issued.

Local authorities can also request a preliminary CMH. This will take place before the standard timeframe of 12–18 days after the initial s.31 care application. According to practitioners, preliminary CMH are few in number. Practice Direction 12A states that an urgent preliminary CMH will only be necessary 'to consider issues such as jurisdiction, parentage, party status, capacity to litigate, disclosure and whether there is, or should be, a request to a Central Authority or other competent authority in a foreign state or consular authority in England and Wales in an international case'.

### Short-notice hearings and infants: specific considerations

Concerns about rising numbers of local authority applications for an urgent ICO hearing feature centrally in PLWG's interim and final reports (2019; 2021). Evidence was provided by Cafcass to the PLWG for the calendar year 2018, which indicated an increase on the previous year, in the use of short-notice hearings for all children. In an earlier report in the *Born into Care* series (Alrouh et al. 2019) we identified that a far higher proportion of infant cases involved short-notice hearings than for older children (p.31). Referring to the removal of a baby at birth as 'especially draconian', the PLWG's interim report makes clear that in such instances, the 'highest standards of evidence, planning, and support should apply' (para. 97, p.56, 2019).

<sup>12</sup> Practice Direction 12A provides guidance on case management in care and supervision proceedings: [https://www.justice.gov.uk/courts/procedure-rules/family/practice\\_directions/pd\\_part\\_12a](https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a).

<sup>13</sup> ICO removal hearings are explained in the following blog from Rehana Begum (St John Street Chambers, Manchester): <https://www.18sjs.com/covid-19-ico-removal-hearings>. Although focused on remote hearings, the points made are very useful in considering the basics of a fair trial and Article 6 rights, which include right to have all the relevant information and to be legally represented.

However, there are widespread concerns that urgent decision-making can compromise evidence, planning, and support, as well as the legal rights and entitlements of both parent and child. Among lawyers and judges in particular, concerns are that many cases presented as ‘urgent’ are not in fact urgent. Rather, urgency results from a lack of proper assessment and planning pre-birth on the part of the local authority. Concerns regarding wide variation in local authority guidance regarding pre-birth assessment are long-standing (Lushey et al. 2018). In the absence of effective pre-birth work, the default decision is to issue care proceedings at birth because hospitals are demanding discharge, and kin carers or other preventative solutions have not been organised.

The key role of the children’s guardian is also compromised in short or same-day cases, and this also impacts on decision-making. Where the children’s guardian decides a case ‘on the papers’ (i.e. without seeing the child or family on account of insufficient time), anecdotal evidence is that the guardian feels less able to challenge the local authority’s plan for interim removal.<sup>14</sup> Both Cafcass and Cafcass Cymru have shared with the research team that such instances are fairly frequent. From frontline practitioners we have heard anecdotal evidence that urgent decision-making has led to faulty decisions to remove infants who could have been placed directly within the extended family network. Such anecdotal concerns resonate with insights drawn from workshops with professionals following the publication of the original Born into Care report for England (2018), which highlight variable pre-birth practice and resources (Mason and Broadhurst 2020). In the case of newborn babies, the possibility of compromising the rights of parents to a fair trial (Article 6, Human Rights Act 1998) is particularly acute. In the immediate postpartum period, mothers are in no position to find or instruct a solicitor. Again, the interim report of the PLWG makes clear the absolute importance of ensuring that the requirements of the PLO are adhered to pre-birth, and that all options for support are fully explored.

*Where it is apparent that there is a real risk of care proceedings being necessary upon birth, it is essential that the ASP [assessment and support phase] of the PLO is commenced as soon as possible. It will be crucial to identify family support for parents. In general, local authorities should also be mindful of the special considerations relating to the health of the mother and how quickly it might be thought to be appropriate postpartum to expect her to make sound decisions about her child (para. 99, p. 56, 2019).*

For all these reasons it is important to ascertain the proportion of infant cases that involve short-notice hearings, to capture trends over time and any differences in practice at both local and national (England and Wales) levels.

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<sup>14</sup> Cafcass practitioners have shared their concerns confidentially as part of the advice provided to the research team during the production of the report. Systematic data collection is however underway as part of a related study, which is developing inclusive guidelines to inform humane and effective safeguarding practice at birth. Details of this study are available at: <https://www.lancaster.ac.uk/sociology/news/born-into-care-towards-inclusive-guidelines-when-the-state-intervenes-at-birth>



## Emergency protection orders

The PLWG also raised questions about the use of EPOs, referring to concerns that not all children subject to EPOs would subsequently appear in care proceedings. Where emergency action is needed, the local authority can apply for an EPO under s.44 of the Children Act 1989. An EPO lasts for eight days but can be extended by a further seven days. For the duration of the order, the local authority acquires parental responsibility, although this is shared with parents. The parents should be given one day's notice of the hearing of the EPO application, although local authorities can ask the court to agree to hear the case without notice. However, the use of EPOs is low in England and extremely low in Wales. In 2015, Sir James Munby described the use of EPOs as an 'extremely harsh measure' (*X Council v B (Emergency Protection Orders)* [2004]) and stressed the necessity of ensuring parents are given notice when an application for an EPO is made, save for 'wholly exceptional' cases. For a fuller discussion of case law see Ryan and Cook (2019).

The final report of the PLWG (para. 90, 2021) describes the continued debate among judicial and professional colleagues as to the respective use of EPOs compared to short-notice interim removal under an ICO in emergency or urgent situations (para. 90. p.41, 2021). At present, this debate continues in the face of limited empirical evidence. There has been scant empirical examination of the usage of these orders since the work of Judith Masson some 15 years ago (Masson 2006; Masson et al. 2007). Paragraph 91 (p.41, 2021) of the final report of the PLWG refers to anecdotal evidence that 'there are cases in which EPOs are made but care proceedings do not follow'. Therefore, in this report, we have included analysis of EPOs in England to establish their usage since 2012 for infants and children, and to directly address the question of whether an application for care proceedings follows an EPO application.

## Voluntary accommodation

The voluntary accommodation of infants as a family support service is an important option in England and Wales. The relevant section of the Children Act 1989 is s.20 (England) and for Wales, s.76 of the Social Services and Well-being Act 2014. Delegation of parental responsibility in this way must however be truly voluntary, and parents must be fully informed of their rights. Again, local authorities are more reluctant to seek voluntary agreements from parents, because of a series of high-profile judgments that have been damning of local authority (mis)use of this option within the Children Act 1989. The judgments in the matter of *N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 and [2016] 2 WLR 713 are consistently viewed as contributing to reduction in the use of voluntary accommodation across England and Wales. Overall criticisms of the use of s.20/s.76 include perceived coercion on the part of the local authority, failure to inform parents fully of their rights, and children languishing in voluntary care.

The use and misuse of voluntary accommodation in the case of infants remains subject to considerable debate in practice. The final report of the PLWG refers directly to continued reluctance and confusion over the use of s.20/s.76 (para.44, pp.28–29) on the part of local authorities. This is confirmed by recent Department for Education (DfE) and Welsh Government statistics, which report a decline in the proportion of children looked after under these arrangements since 2014/15 (DfE 2020; StatsWales 2021). In 2018, the Chief Social Worker, commenting on the reduced use of s.20 in England, argued that 'the court is frequently seen as the *only* natural home for negotiations between family and state, with families legally represented and no stone left unturned' (Trowler et al. p.13, 2018). At the same time, however, it was recognised that permanency decisions for children, particularly where family members are

not able to provide long-term care, require the oversight of the court. The Supreme Court judgment in *Williams v LB Borough of Hackney* [2018] is instructive. The judgment confirmed that it is acceptable to use s.20/s.76 arrangements provided that the parents, and child if old enough, properly understand what the implications are, and that the child's return home can be requested at any time. The judgment also confirmed that there are no time limits to how long an agreement under s.20/s.76 can be in place provided that the local authority is complying with all its duties for a looked-after child. However, the PLWG is cautious about the use of s.20/s.76 where local authorities intend removal of an infant from his or her parents' care (PLWG 2021).

The PLWG refers to the need for review of the current legal aid regime in respect of pre-proceedings. Where parents can access robust independent legal advice, this may mitigate concerns about coercion and parents' ability to provide informed consent. However, there are concerns that funding cuts introduced with the 2012 Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), coupled with the further shock of the current pandemic, have further diminished the pool of family law firms in England and Wales.<sup>15</sup> The recommendations of the PLWG need to be considered in the context of uneven and depleted family law provision in England and Wales. In this report it has not been possible to examine the use of s.20/s.76, or permanency pathways beyond what has been said above, on account of major obstacles to linking children's social care and family court records. Regarding options for infants at birth, this leaves an important piece of the jigsaw missing.

The FJDP and the SAIL Databank are working with government departments to examine how future linkages might be achieved and datasets improved in scope.<sup>16</sup>

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<sup>15</sup> As yet, there has been no systematic analysis of the impact of the pandemic on the financial viability of family law firms, however concerns have been publicly expressed by The Law Society. For an excellent discussion of the impact of LASPO pre-pandemic, see the 2017 special issue of the *Journal of Social Welfare and Family Law* devoted to this topic: Mant, J., and Wallbank, J. (2017). The post-LASPO landscape: challenges for family law, *Journal of Social Welfare and Family Law*, 39:2, 149–151. DOI: 10.1080/09649069.2017.1306340.

<sup>16</sup> Further details of the work of the partnership can be found at: <https://popdatasci.swan.ac.uk/centres-of-excellence/family-justice-data-partnership/>



## 3. Methodology

### Data source

The primary source of data is electronic case management data produced routinely by Cafcass [England] and Cafcass Cymru. All cases of s.31 care proceedings that started between 1 April 2012 and 31 March 2020 (fiscal years) were included in the study as were all s.44 applications for EPOs issued over the same period (England).<sup>17</sup> Relevant case information for this study included: child's week of birth, date of issue, and date of the final order for all s.31 (care and supervision) cases, date of first hearing (following the s.31 application issue date) and local authority. Data resource profiles for England and Wales are available from the FJDP (see Bedston et al. 2020 and Johnson et al. 2020).

### Analytical samples and timeframe

We created two specific datasets to address the study objectives. The datasets comprised de-identified individual child-level records. The overall rationale for sampling was to retain as many usable records as possible, for each specific analysis.

**Sample 1:** Comprised all infant and newborn cases of care proceedings issued between 1 April 2012 and 31 March 2020 (47,955 infants, including 21,774 newborn babies). This provided an eight-year (fiscal years) retrospective observational window. This sample was used to quantify numbers, proportions, and incidence rates of newborn babies in care proceedings, over time and by region. This sample was also used to capture the proportions of newborn cases recording the range of short-notice hearings over time and by region. To enable subsequent pathways work, we eliminated data prior to 2012, as legal order (hearings) data is less reliable prior to this date.

**Sample 2:** Comprised all children, including infants and newborn babies in England subject to applications for EPOs between 1 April 2012 and 31 March 2020 (fiscal years). This sample included 13,119 children, 3,652 of whom were infants and 1,731 of whom were newborn babies. This sample was used to capture volumes of applications for EPOs, but also to establish the proportion of EPOs that progressed to s.31 proceedings within a 28-day period.

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<sup>17</sup> Regarding the completeness of EPO data in Cafcass [England], we have been advised by the organisation that because the child is automatically a party in all EPO applications, this data should be recorded by Cafcass routinely. However, there may be a very small number of applications where only the solicitor represents the child, and the case is not logged onto the system. Given this advice, we have taken a decision that the data is sufficiently complete for the purposes of this report. In Wales, although Cafcass Cymru routinely collects EPO data, we found the number of applications for EPOs so small that we cannot use this data for research.

## Definitions and further data manipulation

**Age of child:** The age of a child at the start of care proceedings was calculated using the child's week of birth and the date the s.31 application was issued.

- An **infant** was defined as a child aged less than 52 weeks old.
- A **newborn** was defined as a child **aged less than two weeks** old at the issue of proceedings.<sup>18</sup>

It is important to note that in this project and given SAIL's approach to data anonymisation and data privacy protection, the team had access to the child's week of birth only (i.e. date of the Monday of the child's week of birth) instead of the child's actual date of birth.<sup>19</sup> This could mean that a child's calculated age is up to six days older than his or her actual age. For this reason, a decision was taken to use 'less than two weeks' as the cut-off point for the category 'newborn' in our harmonised England and Wales dataset.

**Short-notice first hearings:** We captured all earliest hearing dates that took place after the issue of a care application. We did not distinguish hearing by type. We used the approach to categorisation developed by Cafcass [England], classifying first hearings as short-notice, emergency or same day (zero days between issue and hearing).

We restructured data to enable children who were subject to a s.44 (EPO) application followed by a s.31 (care) application to be identified. We searched for these two types of applications in sequence within the same child case or allowed a follow-up period of 28 days beyond the initial s.44 application.

**Regions of England:** For this report we used the nine regions of England as defined by the Office for National Statistics (ONS), comprising groups of local authorities (2019).<sup>20</sup> The reason for using these regions is that they map onto the live births data produced by the ONS, which we have used to calculate incidence rates. However, it would also be possible to provide data by court circuit or individual local authorities, subject to standard disclosure controls.

**Missing data:** The list of variables and levels of missing data for the study are detailed in relevant data tables in the report.

## Analytical process

Descriptive statistics were produced in the form of volumes, percentages, and crude incidence rates for newborn babies in care proceedings. We calculated a three-year moving average across our eight-year observational window to more accurately capture trends in volumes over

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<sup>18</sup> In our earlier reports for England, we included infants in the newborn category if they were less than one week old. However, for this report, given the research team worked with harmonised Cafcass and Cafcass Cymru data, together with the approach within SAIL to de-identification of date of birth, we have categorised all infants as newborn babies if they were less than two weeks old.

<sup>19</sup> The NHS-based Trusted Third Party (TTP), which manages the identities of an individual's records in the SAIL Databank (the NHS Wales Informatics Service (NWIS)), replaces the commonly-recognised identifiable items (including name, postcode, and date of birth) for each person with an encrypted code and sends this, along with minimal information (gender, area of residence, and week of birth) to SAIL.

<sup>20</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths>

time, given some fluctuations within the data.<sup>21</sup> To calculate incidence rates, we used ONS live births data as the denominator.<sup>22</sup> That is, we asked the question: for every 10,000 live births, what number of newborn babies appeared in care proceedings?

To test for statistical significance, regarding both changes in the proportions and rates of newborn cases over time, we applied methods of simple linear regression and Poisson regression, respectively (Madsen and Thyregod 2010). Data was assumed to be missing completely at random, thus not included in the statistical analysis.

In the regional analyses there was a negligible number of records where Cafcass Cymru or Cafcass England either did not record a local authority, or recorded a local authority outside of their respective national boundaries. Where we detected these errors, the records were excluded.

All statistical analyses were conducted in the statistical software R (Grolemund and Wickham 2011; R Core Team 2015; Wickham et al. 2019).

## Study limitations

Studies based on administrative data are necessarily limited by the scope and quality of available data, which is collected primarily for organisational rather than research purposes. Data for this study has been provided by Cafcass [England] and Cafcass Cymru and is restricted to care proceedings under s.31 of the Children Act 1989. Both organisations record all cases of s.31 care proceedings but neither captures the voluntary accommodation of children under s.20 of the Children Act 1989 or s.76 of the Social Services and Well-being Act (Wales) 2014 because they are not involved with these cases.<sup>23,24</sup> In addition, we have not been able to access police protection data, although emergency action can be taken by the police using their powers under s.46 of the Children Act 1989. To address such limitations, the FJDP provides regular feedback to data providers on the scope and quality of the data and makes suggestions about potential changes to data collection.<sup>25</sup>

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<sup>21</sup> The method works by calculating a three-year average. In this study, the method captures the 'middling' average for a given three-year subset of data. It is a useful approach for trend analysis when the data shows some fluctuation in annual numbers.

<sup>22</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths>

<sup>23</sup> Infants and children can enter public care on a voluntary basis or through court order. A strict focus on s.31 applications will underestimate the total volume of newborn babies separated from parents within two weeks of birth, because a proportion of infants in England and Wales will enter care on a voluntary basis (s.76 of the Social Services and Well-being Act (Wales) 2014; s.20 of the Children Act 1989).

<sup>24</sup> In Wales, although care proceedings are still governed by the Children Act 1989, because the general responsibilities for the well-being of children are devolved to Welsh Government, the voluntary accommodation of children falls under the Social Services and Well-being Act (Wales) 2014, s.76. Prior to the passing of this act, children in Wales would have been accommodated under Part 3, s.20 of the Children Act 1989.

<sup>25</sup> A review of population-level datasets relevant for family justice research was completed as part of the scoping study for Nuffield FJO: Jay, M.A., Woodman, J., Broadhurst, K., and Gilbert, R. (2017). *Who cares for children: population data for family justice research*. Available from: <http://www.nuffieldfoundation.org/towards-family-justice-observatory>

## 4. Findings

### Numbers, proportions, and incidence rates of newborn babies in care proceedings

#### Numbers

In the eight years 2012/13 to 2019/20, 47,955 infants were subject to s.31 proceedings across England and Wales. England recorded 44,635 of these infants across 43,511 cases, of whom 20,306 were newborn babies aged under two weeks old. Wales recorded 3,320 of the infants across 3,204 cases, 1,468 of whom were newborn babies.

Table 1 presents the frequencies and percentages for infants in the following age categories: under 2 weeks, 2 to 3 weeks, 4 to 12 weeks, 13 to 25 weeks, 26 to 38 weeks, and 39 to 52 weeks. The frequencies appear to be increasing, despite fluctuations year-on-year. The calculated three-year averages however, smooth over this fluctuation to reveal:

- consistent growth in the average number of newborn babies in care proceedings in both England and Wales since 2012/13
- a more general growth in the number of all infants under 52 weeks in care proceedings per year in England and Wales since 2015/16
- the average number of infants in care proceedings in England from 2013/14 to 2015/16 was 5,305 per year, compared to 5,899 per year across 2017/18 to 2019/20. Similarly, for Wales, the average number of infants in care proceedings per year from 2013/14 to 2015/16 was 366 compared to 455 across 2017/18 to 2019/20.

Table 1: Numbers and proportions of infants in s.31 care proceedings, by age and year

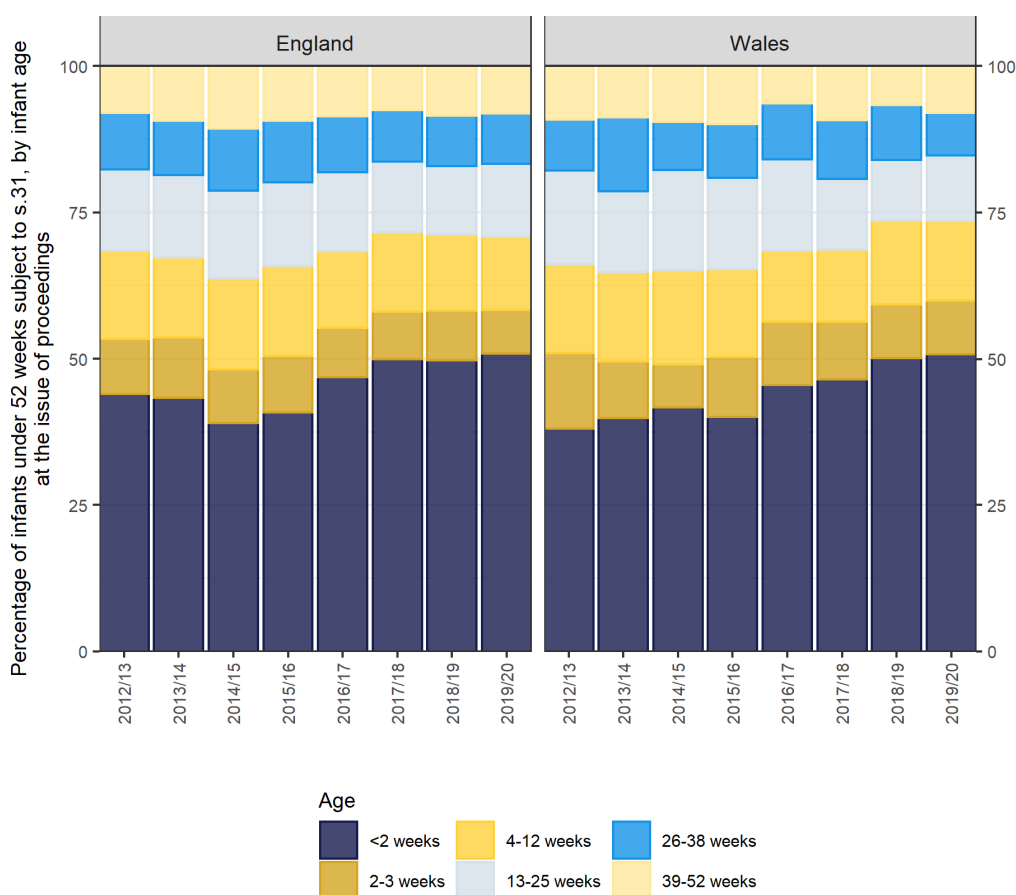
Country	Fiscal year	<2 weeks		2–3 weeks		4–12 weeks		13–25 weeks		26–38 weeks		39–52 weeks		Missing
		n	%	n	%	n	%	n	%	n	%	n	%	n
England	2012/13	2,425	44	521	9.4	831	15.1	768	13.9	533	9.7	439	8	95
	2013/14	2,208	43.3	528	10.4	696	13.6	718	14.1	476	9.3	474	9.3	54
	2014/15	1,984	39	467	9.2	795	15.6	759	14.9	543	10.7	541	10.6	59
	2015/16	2,187	40.8	522	9.7	824	15.4	763	14.2	566	10.6	501	9.3	65
	2016/17	2,733	46.8	493	8.4	765	13.1	790	13.5	556	9.5	500	8.6	65
	2017/18	2,960	50	481	8.1	801	13.5	716	12.1	520	8.8	447	7.5	72
	2018/19	2,909	49.7	500	8.5	758	13	684	11.7	501	8.6	498	8.5	72
	2019/20	2,914	50.9	431	7.5	716	12.5	714	12.5	494	8.6	461	8	49
Wales	2012/13	145	38.1	49	12.9	58	15.2	61	16	33	8.7	35	9.2	7
	2013/14	136	39.9	33	9.7	52	15.2	47	13.8	43	12.6	30	8.8	<5
	2014/15	153	41.7	27	7.4	59	16.1	63	17.2	30	8.2	35	9.5	<5
	2015/16	157	40.1	40	10.2	59	15.1	61	15.6	36	9.2	39	9.9	<5
	2016/17	215	45.6	51	10.8	57	12.1	74	15.7	45	9.5	30	6.4	0
	2017/18	221	46.4	47	9.9	59	12.4	57	12	48	10.1	44	9.2	5
	2018/19	241	50.1	44	9.1	69	14.3	50	10.4	45	9.4	32	6.7	<5
	2019/20	203	50.8	37	9.2	54	13.5	45	11.2	29	7.2	32	8	0

## Proportions

By examining proportions, we can better understand whether local authorities are issuing care proceedings earlier or later in an infant's life over time. What we can see from both Table 1 (% column) and, from Figure 1, is that a greater proportion of infant cases are being issued for newborn babies over time.

Figure 1 displays the results from application of simple linear regression to capture the trend in the proportion of infant cases issued for newborn babies within the first two weeks of life. This figure reveals a statistically significant increase each year for both England and Wales.<sup>26</sup> Both countries show a growing preference for issuing care proceedings closer to birth. In 2012/13 in England, 44% of all infant cases were issued for newborns, but by 2019/20 this had increased to 50.9%. Similarly, in Wales (but evidencing a larger increase) in 2012/13, 38% of all infant cases were issued for newborn babies, but by 2019/20, this had increased to 50.8%.

Figure 1: The proportion of infants subject to s.31 proceedings within the first two weeks of life, by infant age band



<sup>26</sup> Linear regression estimated the proportion of newborns against country, time as the number of years since 2012/13, and the interaction between country and times. Regression coefficients: intercept 40.00, Wales -2.99, time 1.43, Wales: time 0.52; with standard errors 1.51, 2.13, 0.36 and 0.51; t-values 26.54, -1.40, 3.98 and 1.01; and p-values <0.005, 0.185, 0.002 and 0.331, respectively.



- Local authorities are issuing care proceedings at birth for a greater proportion of infants in both England and Wales.
- For the most recent year, in both England and Wales, just over half of all infant cases are issued for newborn babies.

### Rates of newborn babies in care proceedings

Changes in the number of newborn babies subject to s.31 proceedings may reflect changes in the population size, namely the number of live births. Therefore, in Table 2, we present the incidence rates for newborn cases (i.e. the number of newborn babies in care proceedings per 10,000 live births). In the most recent year, newborn babies were subject to care proceedings at a rate of 47.7 per 10,000 live births in England, and 68.3 per 10,000 live births in Wales.

Table 2: Incidence rates for newborn babies subject to s.31 care proceedings per year

	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
England	34.9	33.2	30.0	32.9	41.2	45.8	46.5	47.7
Wales	41.1	40.3	45.6	47.2	65.3	68.7	77.1	68.3

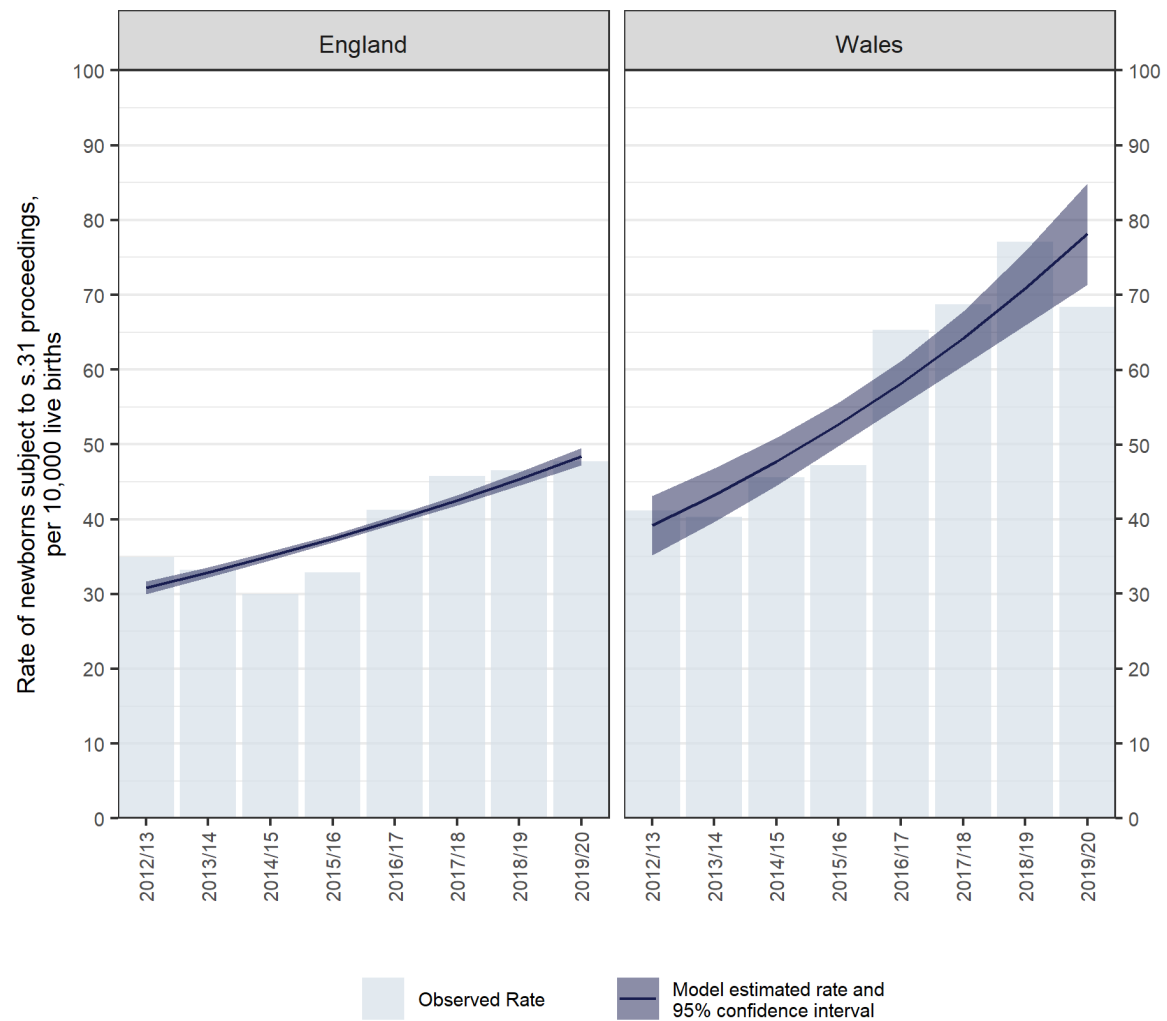
Across our observational window, both England and Wales record a significant rise in incidence rates, with an average relative increase every year of 6.6% and 10.4% respectively. In terms of a forecast, if the incidence rate in England continues to rise at the same pace (i.e. 6.6% on the previous year) then in 2020/21 we estimate that for every 10,000 live births, 50.9 newborn babies will appear in care proceedings.<sup>27</sup> Figure 2 shows the model estimated trend over time resulting from a Poisson regression. The trend line (coloured in blue) overlays the annual observed (actual) rates, which are depicted by the grey bars.<sup>28</sup>

As can be seen from Figure 2, the rate for newborn babies subject to care proceedings in Wales is significantly higher when compared to England and when viewed across our observational window. In addition, the rate has been increasing faster in Wales in recent years when compared to England. However, in the latest year (2019/20) the rate was much lower in Wales, perhaps suggesting that the trend is slowing. The rate has fallen from 77.1 per 10,000 (2018/19) to 68.3 per 10,000 (2019/20). Given this deviation is only evident in the most recent year, it will be important to monitor the trend for Wales, rather than draw immediate conclusions.

<sup>27</sup> We know that COVID-19 has had a significant impact on the courts, however, by examining the trend, we will be able to assess 2020/21 against our projections.

<sup>28</sup> Poisson regression of the number of newborn babies subject to s.31 proceedings, offset by the number of live births, against country, time in years since 2012/13 and the interaction between time and country. Regression coefficients: intercept -5.78, Wales 0.24, time 0.06 and Wales: time 0.03; standard errors 0.01, 0.05, 0.003 and 0.01; z-values -426.97, 4.44, 20.85 and 2.88; p-values <0.005, <0.005, <0.005 and 0.004, respectively.

Figure 2: Incidence rates for newborn babies in s.31 care proceedings over time



## Short-notice, emergency, and same-day hearings

The vast majority of cases of newborn babies included in our dataset recorded a form of short-notice hearing (according to the categories used by Cafcass). In 2019/20, 86.3% of cases in England (approximately 2,500), and 74.8% of cases in Wales (approximately 150), recorded a short-notice hearing (see Table 3). Thus it is currently the norm for local authorities to request (and the courts to schedule) urgent decision-making in newborn cases.

In England and Wales, parties typically have between one and two days' notice between the s.31 application and the first hearing. That is, most cases record an 'emergency' hearing according to the terminology used by Cafcass. In England, whereas 45.6% of all newborn cases were issued with between one and two days' notice in 2012/13, by 2019/20 the proportion had increased to 56%. In Wales, whereas 36.1% of all newborn cases were issued with between one and two days' notice, by 2019/21, the proportion had increased to 49.5%.

Table 3: Percentage of newborn babies subject to s.31 proceedings by days' notice between the issue of care proceedings and first hearing

Country	Fiscal year	0 days	1-2 days	3-6 days	7+ days	Missing
		%	%	%	%	N
England	2012/13	9.3	45.6	37.2	7.9	11
	2013/14	9.3	46.1	28.5	16.1	11
	2014/15	12.8	49.1	18.9	19.3	11
	2015/16	16.9	48.3	15.7	19.1	17
	2016/17	16.9	51.1	15.7	16.3	17
	2017/18	16.4	55.9	14.0	13.8	16
	2018/19	18.2	57.4	13.0	11.4	17
	2019/20	18.5	56.0	11.8	13.7	17
Wales	2012/13	6.2	36.1	41.0	16.7	<5
	2013/14	8.1	37.8	23.0	31.1	<5
	2014/15	12.8	50.0	15.5	21.6	5
	2015/16	15.4	51.9	14.7	17.9	<5
	2016/17	17.9	43.9	11.3	26.9	<5
	2017/18	22.0	49.1	6.9	22.0	<5
	2018/19	20.1	52.7	7.5	19.7	<5
	2019/20	16.8	49.5	8.4	25.2	<5

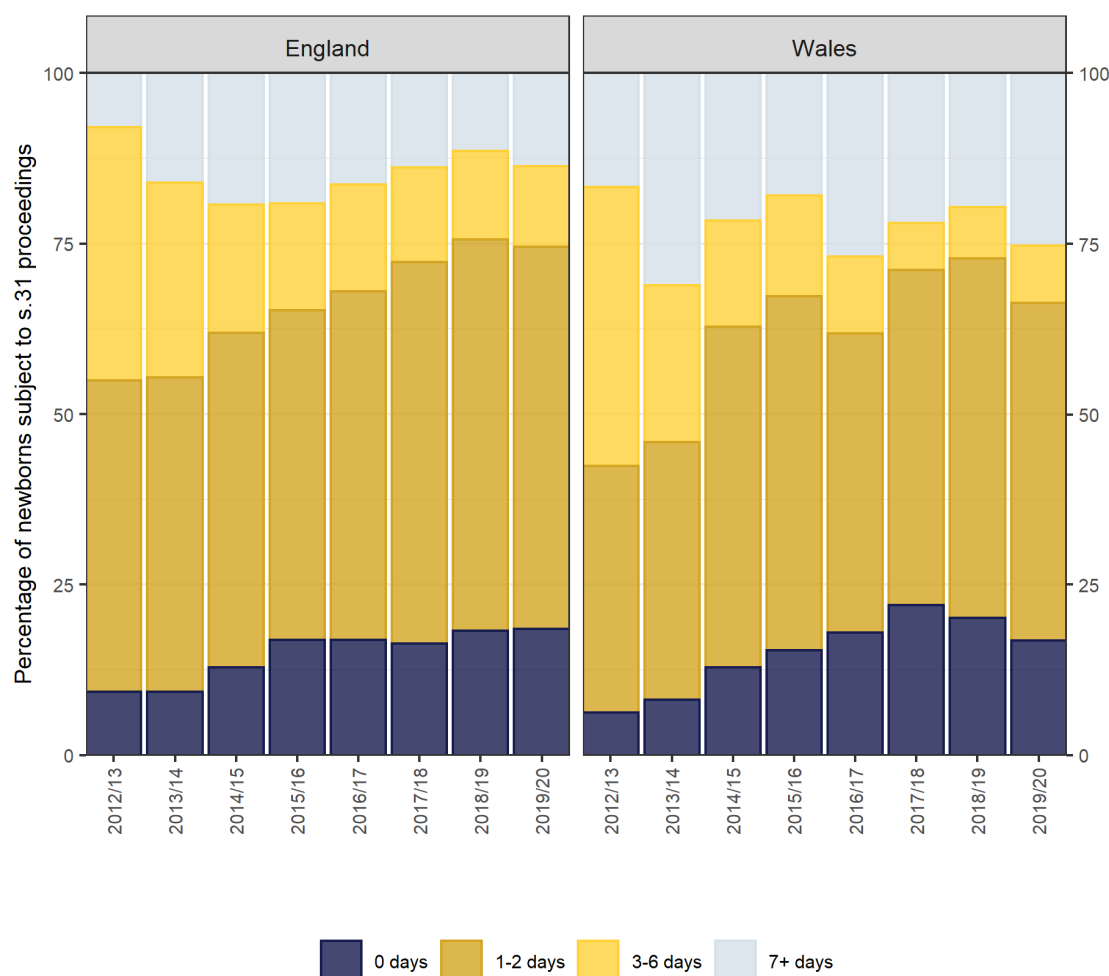
Regarding same-day hearings (zero days' notice), in both England and Wales, a sizeable proportion of newborn cases are issued and heard on the same day. From Table 3, the most recent year (2019/20) shows that in 18.5% in England and in 16.8% of cases in Wales, the first hearing is heard on a same-day basis. These percentages constitute a sizeable increase when compared to the percentages at the start of our observational window. In 2012/13, the percentages of same-day hearings were 9.3% for England and 6.2% for Wales.



England and Wales are similar in terms of the proportion of same-day and short-notice hearings, and both show a similar trend over time. Over time a greater proportion of newborn cases record same-day hearings in England and Wales.<sup>29</sup>

The percentage of cases that record a same-day hearing has risen by an additional 1.4 and 1.9 percentage points each year respectively. In 2019/2020, the data indicates that an application will be issued for care proceedings in one in every six cases, and the first hearing held the same day. Figure 3 below shows the changes in the proportions of short-notice, emergency and same-day hearings between 2012/13 and 2019/20.

Figure 3: The proportion of short-notice, emergency and same-day hearings for newborn babies in s.31 care proceedings



<sup>29</sup> Two simple linear regressions were conducted, regarding the share of newborn babies subject to s.31 proceedings at short notice or on the same day against country, time, and the interaction between country and time. Simple linear regression of short-notice cases: intercept 84.75, Wales -7.96, time 0.01 and Wales: time -0.11; standard errors 3.06, 4.33, 0.73 and 1.03; t-values 27.69, -1.84, 0.02 and -0.11; and p-values <0.005, 0.091, 0.985 and 0.915, respectively. Simple linear regression of same-day cases: intercept 9.76, Wales -1.80, time 1.41 and Wales: time 0.53; standard errors 1.54, 2.17, 0.37 and 0.52; t-values 6.35, -0.83, 3.84 and 1.02; and p-values <0.005, 0.422, 0.002 and 0.326, respectively.

## Regional variations

### Incidence rates

With the exception of London, the picture is of increasing incidence of newborn cases across England and in Wales over time (Table 4 and Figure 4). In London, the incidence rate is decreasing and is now markedly lower than all other regions. In London, 24.9 newborn babies per 10,000, were subject to care proceedings in 2019/20.

Incidence rates are rising faster in some regions of England than others. The North East is the region that has experienced the greatest increase in the rate of newborn babies appearing in care proceedings over time, when compared to Wales and all other regions of England. In the North East, the newborn incidence rate has increased from 34.0 to 83.1 per 10,000 live births across our eight-year observational window. This means that in the North East, the average relative increase is 16.6% on the previous year, and the incidence rate has more than doubled over time.

There are marked similarities in trends between Wales and the North West region of England.<sup>30</sup> Whether we examine incidence rates or trends over time, Wales and the North West are remarkably similar and record some of the highest newborn rates of all regions. When tested for significance, there was no difference in the rate of newborn babies subject to s.31 proceedings between Wales and the North West region of England. In 2019/20 they recorded a rate of 68.0 and 66.2 per 10,000 live births respectively.

It is interesting to note that in 2012/13, the newborn incidence rate was similar for Wales and West Midlands and Yorkshire and the Humber. Over time however, Wales and these regions have diverged—West Midlands and Yorkshire and the Humber have experienced a smaller increase in incidence rates.

Table 4: Incidence rates for newborn babies subject to s.31 care proceedings, by region (England) and Wales

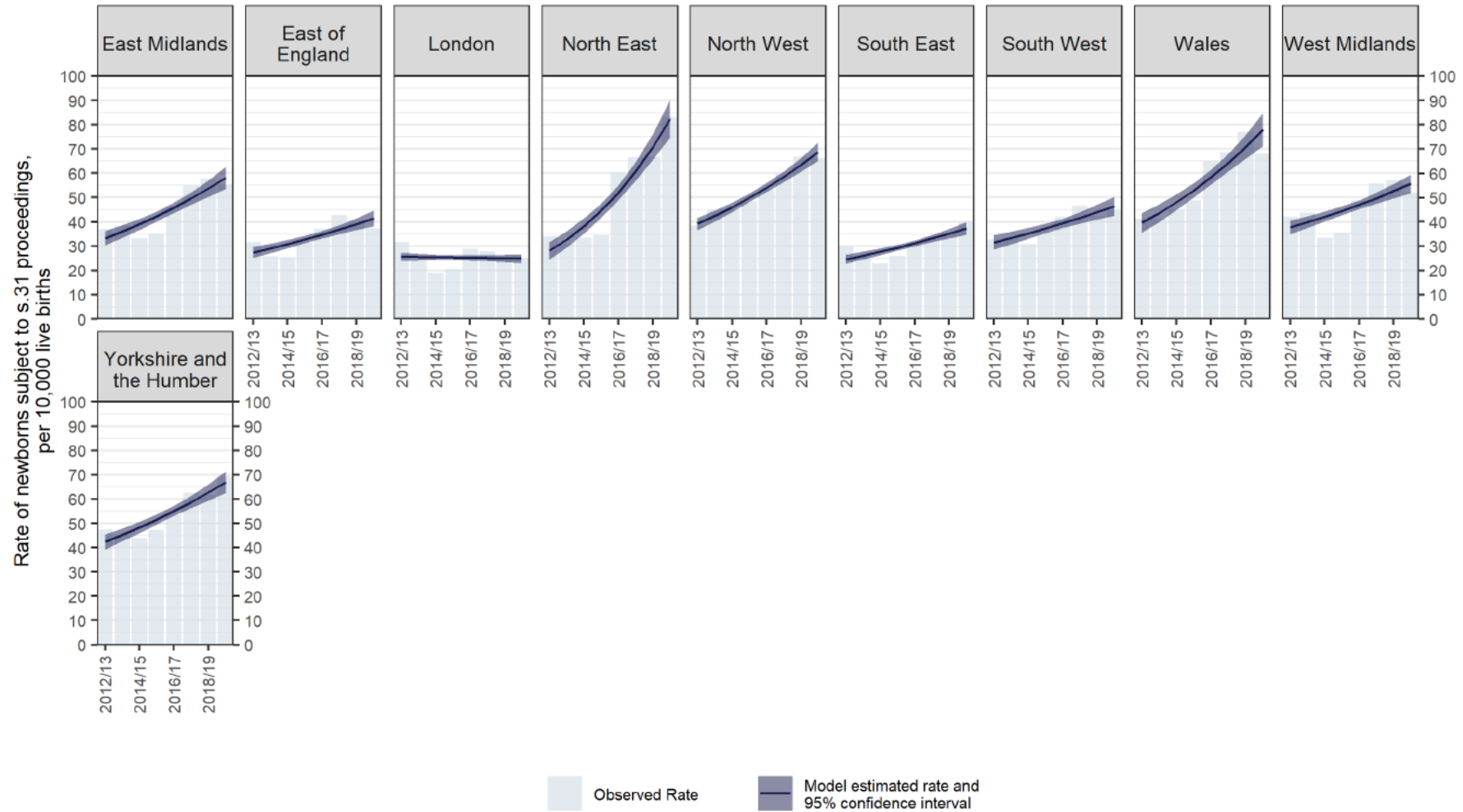
Region	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
East Midlands	37.2	38.4	33.3	34.9	46.2	54.9	57.8	55.3
East of England	31.6	25.8	25.5	31.7	37.1	42.7	39.8	37.4
London	31.6	24.1	18.9	20.5	28.9	27.8	24.9	24.9
North East	34.0	31.1	33.4	34.2	60.2	66.6	66.7	83.1
North West	38.3	44.7	45.1	48.5	53.3	59.7	66.9	66.2
South East	29.9	25.5	22.8	26.1	30.9	34.0	35.5	39.6
South West	32.7	33.6	30.8	36.3	42.1	46.5	42.4	44.7
West Midlands	42.1	43.8	33.5	35.7	48.8	55.8	57.1	52.1
Yorkshire and the Humber	47.5	45.1	43.9	47.1	53.7	62.7	61.7	69.3
Wales	41.1	41.3	45.0	48.9	65.0	68.7	77.1	68.0

<sup>30</sup> Poisson regression of the number of newborn babies subject to s.31 proceedings offset by the number of live births, against region, time in years since 2012/13, and the interaction between region and time. Wales was the reference region.

The two regions that are the most distinctive based on this analysis are the North East and London. As previously described, London is significantly different in terms of newborn babies in care proceedings and trends over time, demonstrating markedly lower incidence rates with minimal change over time. London records a rate of 24.9 per 10,000 newborn babies in 2019/20, which is a fraction of the rate of other regions.

However, the North East demonstrates the opposite picture. The North East is the region that has experienced the greatest increase in the rate of newborn babies appearing in care proceedings over time, when compared to Wales and all other regions of England. In the North East the newborn incidence rate has increased from 34.0 to 83.1 per 10,000 live births across our eight-year observational window. This means that, in the North East, the average relative increase is 16.6% on the previous year, based on the statistical model. In the North East, there is no indication of anything but escalating rates of newborn babies appearing in care proceedings.

Figure 4: Newborn babies subject to s.31 proceedings, per year, across the regions of England and Wales (model estimated rate, with 95% confidence interval)



Observed rates have been augmented to prevent disclosure of small numbers in subsequent analyses.

## Short-notice, emergency, and same-day hearings

There has been a significant growth in the proportion of newborn babies subject to short-notice hearing in all areas, except in the East Midlands, where the relative proportions of different types of short-notice hearing are largely stable (see Figure 5). Apart from the North East, the largest proportion of newborn cases recorded emergency hearings at between one and two days' notice across England and Wales.

Regarding the split between short-notice and same-day hearings, many of the regions of England and Wales demonstrate a similar picture. Relative to the proportion of short-notice cases among newborn babies in Wales, there were five regions of England that evidenced no significant difference in terms of magnitude or trend over time: London, the North West, South East, South West, and Yorkshire and the Humber.

Wales and two regions of England (the North East and Yorkshire and the Humber) evidence a statistically significant upward trend in the proportion of cases heard at zero days' notice. Other regions of England do not record a statistically significant trend over time.<sup>31</sup>

Over time, the proportion of same-day cases has doubled in the North East. In 2019/20, 41.3% of newborn babies in the region were subject to hearings with zero days' notice, which is by far the highest proportion across England and Wales.

While lower than in the North East, the same-day trend is also upwards in Yorkshire and the Humber. At 26.8% in 2019/20, the proportion is higher than the national average: in Yorkshire and the Humber, one in every four cases is issued on a same-day basis, compared to one in six nationally.

By way of contrast, in London and the South East, the proportion of same-day hearings is lower than other regions of England and Wales, and consistently lower over time. In London, in 2019/20, less than 10% of cases record a same-day hearing (9.3%), and in the South East, the figure is just about 10% (11.4%).

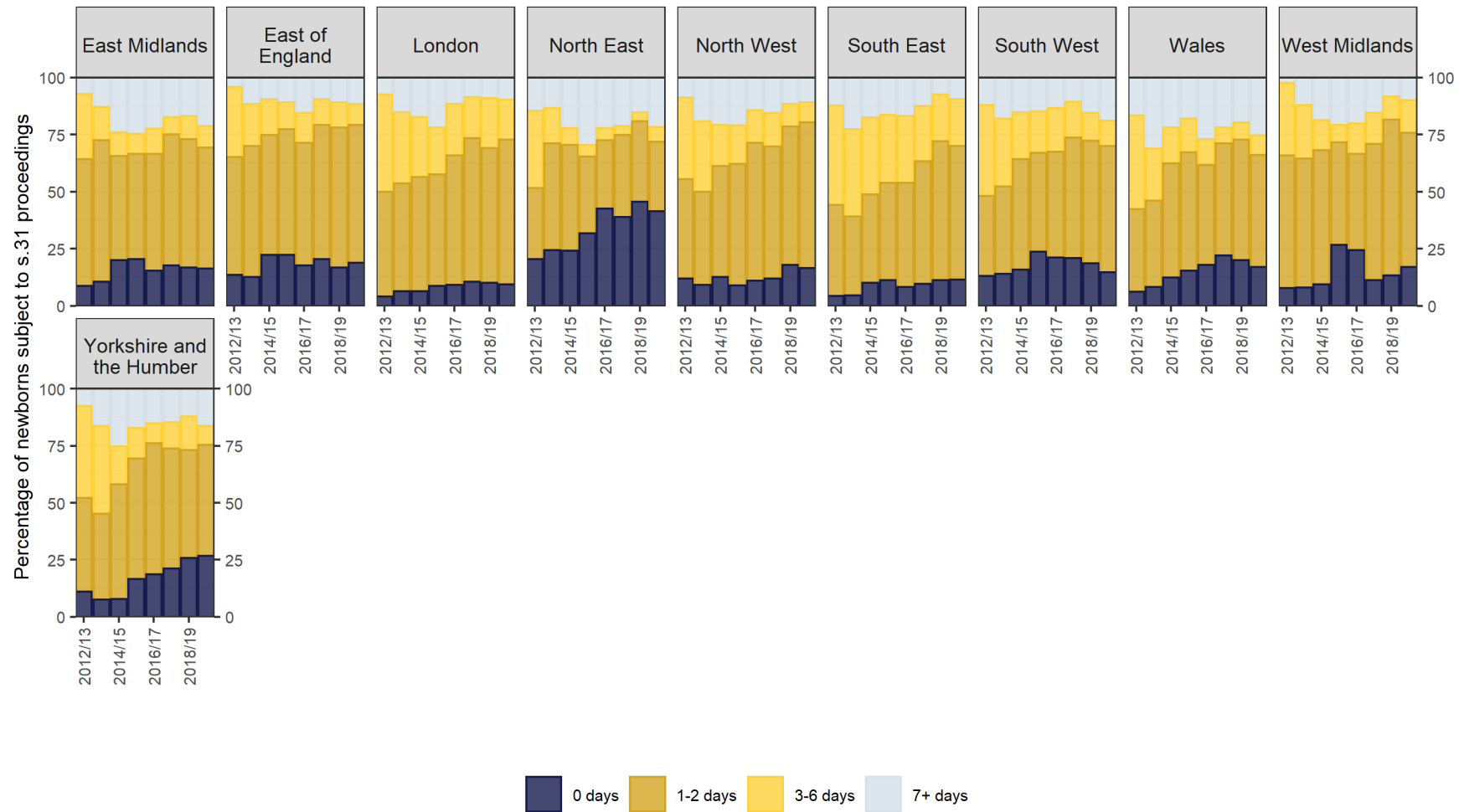
Across all regions, there does not appear to be any straightforward pattern between high rates of newborn cases and the proportion of cases that record a same-day hearing. For example, the North West has a high incidence rate—yet a much lower proportion of same-day hearings than the North East.

A full breakdown of the proportions of short-notice hearings by region, for the most recent year (2019/20) is available in the annex. Figure 5 below, visualises the same data.

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<sup>31</sup> Two simple linear regressions of the proportion of newborns subject to s.31 proceedings at short-notice (with less than seven days between the issue of the application and the first hearing) or the first hearing occurring on the same day that the application was issued. Each modelled against the region, time in the number of years since 2012/13, and the interaction between time and region.

Figure 5: Proportion of newborn babies subject to s.31 proceedings by number of days from the issue of care proceedings to first hearing, by year, and by region (England and Wales)



\*Non-zero counts less than 5 have been rounded up to 5.

## **Emergency protection orders in England and progression to s.31 proceedings**

We identified 13,119 children in England for whom an application for an EPO was made between 2012 and 2020, of which 3,652 applications were for infants. Of these, 1,731 concerned newborn babies.

Infants were more likely to be subject to applications for an EPO than older children. If they were subject to an application for an EPO, all children were highly likely to appear as subjects in care proceedings within a 28-day period (or within the same case). The number of all cases that subsequently recorded a s.31 application was 86.1% for all children (across years, 2012–2020). For infants, the percentage was slightly higher at 89.0%, and for newborns, higher still at 90.4%.

However, annually, there are far more applications for care proceedings than for EPOs. We found only 6.5% of care applications for all children were preceded with an EPO application. For infants and newborn babies, the picture was of a similarly very small percentage of care proceedings, which were preceded by an EPO (7.3% for infants, 7.7% for newborn babies). Therefore, taking the evidence presented in this report together, we can see that local authorities are demonstrating a strong preference for short-notice care proceedings rather than through an EPO.

## 5. Discussion

The interim and final reports of the PLWG devoted considerable attention to applications for the removal of newborn babies and infants, and short-notice hearings in care proceedings. With the publication of the final report in March this year (PLWG 2021), recommendations are now agreed that aim to improve practice. Both the interim and final reports called for further research and compilation of data on short-notice (urgent) applications and EPOs. Cafcass [England] provided a snapshot of data for 2018. In this report, we have responded to both these requests and provided further benchmarking data to allow the monitoring of progress against PLWG recommendations. In this final chapter, we summarise the main findings before considering the policy and practice implications.

### The number, proportion and incidence rates of newborn babies in care proceedings

Against our original benchmarks (Broadhurst et al. 2018; Alrouh et al. 2019), new empirical analysis finds, overall, a continued upward trend in the number of s.31 applications for newborn babies since 2012/13.

Regarding incidence rates, regional differences remain stark. As might be expected, London differs very significantly from both Wales and many regions of England, particularly, the North West, North East, and Yorkshire and the Humber. In an earlier report in the *Born into Care* series (Mason and Broadhurst 2020), practitioners shared their views on potential reasons for this. Practitioners suggested that the greater availability of preventative services, such as mother and baby placements and the quality of legal advocacy, resulted in few infant cases being issued at birth in London.

The North West, the North East, Yorkshire and the Humber, and Wales record the highest incidence rates, with an overall upward trend. The upward trend is the steepest in the North East, where rates had already been at the higher end of the scale in 2012/13. In 2019/20, the incidence rate for the North East is more than three times higher than in London. It is very important to note the particular pressures that the North East is facing. The North East circuit records the highest volume of public law receipts and applications than any other region nationally. Rising demand has not been matched by rising resources. This places extraordinary pressures on frontline staff. Poverty rates in the North East are second only to London. According to analysis conducted by Jonathan Bradshaw (2020), the North East is the region with the highest proportion of households in which families are unable to keep accommodation warm, or replace worn out household items. These are basic necessities vital for the care and upbringing of children. Although London also has a number of deprived boroughs, from our discussions with colleagues in response to an earlier report in the *Born into Care* series, we have heard that London is better served in terms of preventative resources. From our earlier workshop conversations with professionals, we have in contrast heard of hollowed out preventative services and rising need, leaving social workers in several of the 13 local authorities in the North East with limited resources to avert care proceedings (Mason and Broadhurst 2020). Pockets of innovative practice are emerging in the North East, and it may be that their effect is not yet being felt. For example, in Sunderland, a dedicated pre-birth social work service has been established. The challenge in the North East to 'level up' preventative options for both professionals and families alike is considerable, and hence, the findings we present regarding rising incidence rates of infants in care proceedings are not surprising.



Focusing on the most recent data included in this study, and based on our modelling of trends in newborn cases, growth in Wales has slowed in 2019/20. We know from our engagement with professionals that new and innovative preventative services have been established in some areas of highest need. A number of new initiatives are now providing intensive support in pregnancy and/or the first year of an infant's life. Examples include Jig-So (Swansea), Baby and Me (Newport), and Baby in Mind (Bridgend). In addition, the Reflect project continues to expand, and is helping parents to access rehabilitative services if a child has been removed from their care, as well as to be very clear about what needs to change if they are to care for future children. It is likely that these new, typically intensive, services are already delivering positive benefits by supporting parenting capacity. Certainly, early evaluative evidence shared with the team would suggest this is the case.<sup>32</sup> However, given the change in incidence rate for Wales is only evident in the last year, we should further monitor this deviation from the trend, rather than draw firm conclusions. It is also important to note that, as yet, intensive services in Wales in the pre-birth period are very different across regions, which means that parents have uneven access to the kind of intensive support needed to effect change.

## Short-notice hearings

The data analyses provided in this report finds that requests for swifter decision-making in care proceedings have increased over the last eight years and are now the norm; more than 86% of all newborn cases record short-notice hearings in England and more than 74% in Wales. The picture is very similar for England and Wales. In addition, we have been able to determine that the typical notice period is typically between one and two days in newborn cases (emergency hearings).

In Wales and several regions of England, the proportion of same day (zero days' notice) first hearings is also increasing. As stated above, local authorities need to seek permission from the court to abridge notice, but from this evidence we can see that same-day hearings are now sanctioned by the courts in approximately one in every six newborn cases in England and Wales. Thus, a sizeable proportion of cases are heard with zero days' notice.

The picture for the North East is again concerning. More than 40% of hearings relating to newborn babies are now being heard on a same-day basis. Of course, it is highly likely, that the escalating rate of newborn babies in care proceedings in the North East and the growth in same-day hearings are interlinked. However, it is important to note that although incidence rates in the North West remain high, we do not see a corresponding increase in same-day hearings. Of course, we should not jump to premature conclusions about the outcomes of same-day hearings, rather the statistics we present provide important foci, for local area analysis. The findings we have presented regarding the North East require in-depth local area analysis, to progress insights further and examine the practice behind these statistics. In addition, given knowledge of some new approaches to pre-birth practice in the North East, it is imperative that the impact of new approaches is evaluated.. Practices such as how the courts list urgent cases can, for example, influence the statistics, but without a more in-depth qualitative review of practice, such factors are difficult to discern.

At present, regional differences in the use of hearings, with zero days' notice for parents in England and Wales suggest considerable inequity regarding the time afforded parents to

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<sup>32</sup> Evaluative evidence is not yet published. However, practitioners will be invited to share early insights as part of the launch of this report.

instruct a solicitor and engage meaningfully in the court process. However, questions this report raises about short-notice hearings are more broadly relevant, given that between one and two days' notice is the most typical form of short-notice hearing in England and Wales.

## Emergency protection orders

The evidence presented in this report refutes concerns that children who appear in EPO applications do not subsequently appear in care proceedings. In England, for both infants and older children subject to a s.44 application, by far the majority will subsequently appear in s.31 care proceedings within 28 days (or within the same case). Regarding infants, in 89% of instances, a s.31 application follows a s.44 application. Regarding all children, the percentage is 86%. Thus, it does not appear that there are many instances of unwarranted EPO applications being made in England. The limited use of EPOs is not surprising, given strong judicial advice that their use should be restricted to circumstances where the child requires immediate protection (see Ryan and Cook 2020 for a fuller discussion).

However, in England, most s.31 applications are not preceded by a s.44 application. Putting our findings together, it is far more likely that local authorities in both England and Wales deal with urgent/emergency situations by requesting earlier decision-making in care proceedings, rather than making an EPO application. Based on the data presented in this report, we do not know the reasons behind this preference. However, para. 162 of the interim PLWG report (p.76, 2019) notes the continued different judicial and professional views as to which legal route is more appropriate (EPO or ICO) and the matter remains unresolved. Arguably, whichever route is chosen, the same concern applies: short notice provides parents with very limited opportunity to seek legal representation, which is critical to a fair trial.

From practitioners in Wales we have heard that EPOs are also likely to be followed by care proceedings. However, we have not been able to use Welsh data to test this assertion. Although EPO data is collected systematically, numbers are too small to enable meaningful statistical analysis and would be considered disclosive by the SAIL Databank.

## National policy and practice implications

If same-day or emergency hearings are now the norm in newborn care cases in England and Wales, then this suggests that wholesale review is needed of how care proceedings are conducted at birth. It is difficult to conclude anything other than significant compromise of parents' Article 6 rights given that all the hearings we have captured will have taken place exceedingly early in the postpartum period. Moreover, short-notice action is also not in the best interest of infants where there has been insufficient placement planning. The advice we have received from children's guardians is particularly concerning; they feel unable to challenge requests for interim removal at urgent ICO hearings, where there has been insufficient notice to enable parents to be seen and fuller review of the case. In some cases, this can result in infants being removed from parents' care to foster care, only later to be placed with family members. Cafcass colleagues have recommended further work on infant pathways, with a specific focus on placement moves, to systematically examine this concern.

Work is ongoing, led by Lancaster University with Oxford University, to improve the interface between children's services and health services when care proceedings are issued at birth in

England and Wales.<sup>33</sup> New inclusive guidelines (referred to in the PLWG final report as ‘protocol’) are being developed inclusively through detailed engagement with eight hospital trusts and local authorities in England and Wales. A first findings paper will be published in the summer and the draft guidelines published in August of this year. Regarding the legal process however, the findings we present suggest the legal process itself requires further and urgent consideration.

Many of the important recommendations set out in the final report of the PLWG may deliver improved practice, enabling more timely and inclusive decision-making for infants and parents, where they are sufficiently implemented. Recommendations include:

- better and more timely use of pre-proceedings/PLO
- a new information form which requires the grounds for an urgent ICO hearing to be made clear
- early notice to Cafcass and Cafcass Cymru pre-birth
- review of parents’ access to legal advice pre-proceedings.

Regarding parents however, do the recommendations go far enough? It is highly likely that a sizeable proportion of newborn cases will continue to include requests to the court for urgent hearings. In cases where infants under a year of age are to be accommodated as a family support service, it will be appropriate to reclaim use of s.20/s.76. However, as the PLWG makes clear, where the threshold is met for compulsory intervention on account of actual or likely significant harm, then the court must have oversight of the case. In the latter circumstances, we are still faced with the ethical issue that in the immediate postpartum period, we cannot reasonably expect birth mothers to meaningfully participate in care proceedings. In earlier reports in the *Born into Care* series, we provided new evidence concerning elevated mental health difficulties for mothers in care proceedings when compared with mothers in the general population (Griffiths et al. 2020b; 2021). The reports found that women in care proceedings had higher rates of mental health need prior to and during pregnancy when compared to matched comparison groups. Given this firm evidence of mental health need, questions about procedural fairness in these cases are ever more pressing. The same applies to parents who require the services of an interpreter, parents with a learning disability or indeed, very young parents.<sup>34</sup> Although guidance has been issued regarding parents with learning disabilities for example, it is not clear how such guidance is applied when cases are heard on an urgent basis.<sup>35,36</sup> Overall, there are long-standing concerns that parents find the process, language, and protocols of the family justice system very difficult to understand (Hunt 2010; Broadhurst et al. 2017). Although the use of EPOs and the question of notice to parents have been the subject of some considerable judicial scrutiny and comment (as above), the same cannot be said for urgent or same-day hearings, which arguably raise very similar concerns regarding the time afforded parents to instruct a solicitor and engage with court proceedings.

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<sup>33</sup> Project information is available at: <https://www.lancaster.ac.uk/sociology/news/born-into-care-towards-inclusive-guidelines-when-the-state-intervenes-at-birth>

<sup>34</sup> See Tarleton et al. 2006, The Baring Foundation: Finding the Rights Support (Chapter 8): <http://www.bristol.ac.uk/media-library/sites/sps/migrated/documents/rightsupport.pdf>

<sup>35</sup> See the Family Procedures Rules Part 3A & PD3AA – Vulnerable persons participation in proceedings and giving evidence. Examples of relevant case law include: *Re D (Non-Availability of Legal Aid) (No 2)* [2015] EWFC 2, [2015] 1 FLR 1247 and *Re D (Adoption) (No 3)* [2016] EWFC 1, [2017] 1 FLR 237

<sup>36</sup> This reflects a general trend in the family justice system, for excellent guidance to be issued, but not necessarily systematically evaluated for its impact on practice.

Since the implementation of the Children Act 1989 there has been no review of care proceedings at birth. At paragraph 120 of the final report from the PLWG, the following statement is made:

*The incidence and impact of applications seeking removal of newborns is such that this issue merits further discussion. It is recognised that these are fundamental, difficult and potentially contentious areas, but that should not prevent the debate (para.120, p. 51, 2021).*

When we combine evidence from the *Born into Care* series to date, which includes more and more babies being subject to proceedings at birth, we consider that the case is made for a more fundamental review of care proceedings at birth.

## Case list

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## Annex

Table A.1: Percentage of infants subject to s.31 care proceedings by age in 2019/20

Age	England	Wales
<2 weeks	50.9	50.8
2–3 weeks	7.5	9.2
4–12 weeks	12.5	13.5
13–25 weeks	12.5	11.2
26–38 weeks	8.6	7.2
39–52 weeks	8.0	8.0

Table A.2: Percentage of newborn babies subject to s.31 care proceedings by number of days' notice between the issue date of the application and the date of the first hearing in 2019/20

Days' notice	England	Wales
0 days	18.5	16.8
1–2 days	56.0	49.5
3–6 days	11.8	8.4
7+ days	13.7	25.2

Table A.3: Percentage of newborn babies subject to s.31 care proceedings by number of days' notice between the issue date of the application and the date of the first hearing in 2019/20, in Wales and by region (England)

Region	0 days	1–2 days	3–6 days	7+ days
East Midlands	16.3	53.0	9.6	21.1
East of England	18.8	60.4	9.2	11.6
London	9.3	63.6	17.5	9.6
North East	41.3	30.5	6.6	21.6
North West	16.5	63.9	8.7	10.8
South East	11.4	58.7	20.4	9.5
South West	14.6	55.4	11.2	18.9
Wales	16.9	49.3	8.5	25.4
West Midlands	16.9	58.9	14.3	9.9
Yorkshire and the Humber	26.8	48.6	8.2	16.4



# 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.

Nuffield FJO has funded this project, but the views expressed are those of the authors and not necessarily those of Nuffield FJO or the Foundation.

## 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] and Cafcass Cymru 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. All proposals to use this data are subject to review and approval by the SAIL Information Governance Review Panel (IGRP). 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](http://www.saildatabank.com/application-process)