Law Commission
13th Programme of Law Reform

"Reviewing Children's Social Care"

Response of the
Association of Lawyers for Children

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Details: The Association of Lawyers for Children (hereafter 'ALC") is a national association of lawyers working in the field of children law. It has over 1200 members, mainly solicitors and family law barristers who represent children, parents and other adult parties, or local authorities. Other legal practitioners and academics are also members. Its Executive Committee members are drawn from a wide range of experienced practitioners practising in different areas of the country. Several leading members are specialists with over 20 years experience in children law, including local government legal services. Many have written books and articles and lectured about aspects of children's law, and several hold judicial office. The ALC exists to promote access to justice for children and young people within the legal system in England and Wales in the following ways:

(i) lobbying in favour of establishing properly funded legal mechanisms to enable all children and young people to have access to justice;

(ii) lobbying against the diminution of such mechanisms;

(iii) providing high quality legal training, focusing on the needs of lawyers and non-lawyers concerned with cases relating to the rights, welfare, health and development of children;

(iv) providing a forum for the exchange of information and views involving the development of the law in relation to children and young people;

(v) being a reference point for members of the profession, Governmental organisations and pressure groups interested in children law and practice.

(vi) from time to time to fund or co-fund research where we perceive gaps in knowledge or evidence-base relating to changes or proposed changes in policy/practices in children proceedings.

The ALC is automatically a stakeholder in respect of all government consultations pertaining to law and practice in the field of children law.

This response is directed solely to the "Reviewing Children's Social Care" proposal, as this reflects our members' area of expertise.

We welcome the suggestion by the Commission that, 25 years almost to the day since the Children Act 1989 was implemented, it is ripe for review. We agree that the provisions of Part III of the Act are very different from those of the Care Act 2014 and the work done by the Commission may well be transferable to the provision of support for children. We are, however, concerned about the underlying assumption that services for children are invariably provided in the same context as services for adults.

There are a number of disabled children who require long-term services under Part III (and possibly also under s2 CSDPA), whose needs are comparable to those presented by adults who receive services under the Care Act. This may include the provision of domiciliary care, short breaks/respite or full-time residential care. For children in that situation, there may be merit in adopting a similar approach to the Care Act, with the caveat that, as numbers are smaller than for adults and children's needs tend to evolve more quickly, the frequency and intensity of the review of provision may need to be greater.

Our concern is that children in that category form a relatively small proportion of the almost 400,000 children who meet the s17 definition of child in need. In 2014/15, only 13% of children in need had a disability[1] The proportion of children in need who have a disability has been trending downwards – in 2010 it was 14.2%. The child's disability was identified as the primary need in only 10.2% of assessments of children in need – Abuse or Neglect is the most common at 49% and family dysfunction coming second at 17.9.[2] The same pattern is seen in the outcomes of assessments, with domestic violence being a factor identified in 48.2% of cases and mental health in 32.5% - physical disability or illness is a feature of only 9.9% of assessment outcomes.[3]

It is clear from these figures produced by the Department for Education that children in need form a far more diverse group than adult recipients of social care services/support. Only a small proportion of such children are comparable to adult recipients. The majority of children in need have a wide range of needs and require a more flexible approach to assessment of need and provision of services. The Care Act approach would therefore be of limited value for most children. Further, we are concerned that the assessment and decision-making processes used under the Care Act are unlikely to be sufficiently flexible to meet the needs of most children in need. An exception to this is section 10 of the Care Act, which creates a right to a carer's assessment, but presently applies only to those who are caring for adults.

In reality, the supportive provisions of Part III of the Children Act cannot be considered in isolation from the coercive provisions contained in Parts IV and V. Part of the purpose that the framers of the Act had in mind was to create a coherent statutory framework that emphasised the important role of family support. Twenty-five years on, Parts III, IV and V, together with the child protection system provided for in the *Working Together* guidance, are used by local authorities as a single toolbox when dealing with families in distress. For example, *Working Together* requires the local authority to undertake an assessment and it says (at para 29) that the purpose of this is:

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[1] SFR 41/2015: Characteristics of children in need: 2014 to 2015, DfE 22 October 2015, page 4 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469737/SFR41-2015_Text.pdf

[2] *Ibid* Figure G on page 7.

[3] *Ibid* Figure H on page 8.

• to gather important information about a child and family;

• to analyse their needs and/or the nature and level of any risk and harm being suffered by the child;

• to decide whether the child is a child in need (section 17) and/or is suffering, or likely to suffer, significant harm (section 47); and

• to provide support to address those needs to improve the child's outcomes to make them safe.

Assessment for services and assessment for safeguarding are clearly parts of a single process in this context. This is reinforced at page 28-29, where the Guidance sets out a range of possible responses to a referral:

> *Within one working day of a referral being received a local authority social worker should make a decision about the type of response that is required. This will include determining whether:*
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> *• the child requires immediate protection and urgent action is required;*
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> *• the child is in need, and should be assessed under section 17 of the Children Act 1989;*
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> *• there is reasonable cause to suspect that the child is suffering, or likely to suffer, significant harm, and whether enquires must be made and the child assessed under section 47 of the Children Act 1989;*
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> *• any services are required by the child and family and what type of services; and*
>
> *• further specialist assessments are required in order to help the local authority to decide what further action to take.*

In practice, in most cases local authorities treat s17 child in need assessment and provision on the one hand, and s47 safeguarding and intervention on the other hand, as a continuum. Typically, a case involving domestic violence or neglect will be referred in and assessed. In the first instance, a very common outcome is a decision to provide 17 support[4] rather than to initiate s47 safeguarding enquiries. If this proves insufficient to ensure that the child's needs are met, then the case may be escalated into the child protection arena, with inquiries being made under s47 (Part V of the Act) and the child possibly being made the subject of a child protection plan. If further escalation is then needed, the local authority may issue a Letter before Proceedings under the *Statutory Guidance on Court Orders and Pre-proceedings* (DfE 2014). Again, this is seen as being part of an escalating response:

[4] Many cases will already have been the subject of early intervention before being opened as Child in Need cases, but we are focussing here on those cases that have met the s17 threshold and

> *"Where a decision is taken by the local authority that parenting cannot be improved within the child's timescale and that the 'threshold'[16] for care proceedings has been met in principle, it should determine whether to bring proceedings as quickly as possible."* (page 11)

The following section of the Guidance makes it clear that this continuum stretches back to include early help involving all of the professionals working with the child.

The top end of the continuum is, of course, the commencement by the local authority of care proceedings brought under Part IV of the Children Act.

Just as cases can be escalated through the various levels of intervention, so equally can they be downgraded. For example, where a mother finally terminates her relationship with a violent partner, but still needs support, the child protection plan may be discontinued but s17 support may remain in place for a time. This process of escalation and de-escalation may happen more than once in the same case.

In adult social care, while local authorities now have statutory safeguarding functions, service provision and safeguarding are not closely integrated in the way that occurs in children's services. Children's social workers use the provision of section 17 support as a key part of safeguarding work – the two processes simply cannot be separated out for the purposes of law reform. This is not to say that aspects of Part III cannot in principle be amended without also amending Parts IV and V[5], but there is a danger that any significant changes to the former will create unforeseen consequences for the latter.

As lawyers representing children in care proceedings, we are especially concerned about one particular aspect of the current legislation, where the interface between Part III and Parts IV/V is particularly inimical to children's welfare. This relates to the accommodation of children by local authorities under s20 Children Act 1989. The Commission has raised the issue of the relationship between the provision of accommodation under s17 and s20. We agree that the law in this area needs to be clarified, but we think that the Commission needs to go further and to consider the relationship between s20 and court proceedings.

The aspects of local authority accommodation where we think that review is needed are:

- Our primary concern, which is shared by many of the senior judiciary and has been the subject of a number of high-profile judgments, is the use by local authorities of 'voluntary' accommodation as an alternative to starting public

[5] There may be a need to consider other Parts of the Act, eg Part VI (Community Homes) and Part IX (Private fostering), but the main tensions are between Parts III, IV and V.

law proceedings under Parts IV or V. The 1985 Interdepartmental Report proposed an arrangement to be called "Shared Care"[6], which was to be "*a genuine and voluntary partnership for the care of children in need".* The report says at para 7.11:

> *"It is important that shared care should be voluntary in terms of the parents' agreement to the provision of care, and to be seen to be so…Admission to care or retention in care should not take place against a parent's objection."*

These recommendations led to the enactment of section 20 and its supporting sections.

The concern is that, while some children are looked after by local authorities in a genuine and voluntary partnership with parents[7], in many cases s20 accommodation is used by local authorities as an alternative to court proceedings, frequently with parents being placed under pressure to agree to 'voluntary' accommodation of their children in foster care. This arrangement may then go on for months or even years without the parents[8] or the child having the benefit of court scrutiny of the local authority's actions. In the most recent edition of the *Court orders and pre-proceedings for local authorities* statutory guidance, local authorities are encouraged to use s20 in this way, eg p16, para 28:

> *"Proceedings can be avoided if parents are able to demonstrate their capability to safeguard the child by working with relevant services to improve their parenting capability and/or agreeing to a protective placement for the child, with relatives or under section 20."*

There is also a requirement, contained in paragraph 7 of Schedule 2 to the Act, for local authorities to reduce the need to bring care proceedings.

There have now been a number of cases where the courts have criticised the use of s20 in this way. The judges have identified the following areas of concern among others[9]:

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[6] *Review of Child Care Law: Report to ministers of an interdepartmental working party* DHSS 1985, pp53-54

[7] This is more likely to be the case for disabled children, where s20 accommodation frequently consists of recurring short breaks.

[8] In principle, the parents can withdraw the child from accommodation, which will force the local authority's hand, but this right is often rendered meaningless by issues of capacity, vulnerability and/or lack of information. The child does not even have this right.

[9] This list is adapted from the judgment of Sir James Munby P in *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 at para 162 *et seq*

1. Failure to obtain informed consent. This may reflect failure to consider issues of capacity, failure to provide full information about the consequences of a decision to give or withhold consent;
2. 'Consent' that amounts to compulsion in disguise. Typically, this will be where a social worker tells a parent that, if they do not give consent, the local authority will seek an order to remove the child. A variation on this is where they are told that the child will be taken into police protection;
3. S20 accommodation often goes on too long, sometimes for several years;
4. Reluctance to return child if consent is withdrawn.

As a result of these concerns, local authorities are increasingly nervous about using section 20 and now tend to feel obliged to issue care proceedings in situations where previously they would not. This is one of the causes of the national increase in the number of care proceedings to levels that are becoming unsustainable.[10]

Some of the concerns expressed above relate to ways that social workers and their managers apply the existing law – for example, the duty of a local authority to return a child when consent is withdrawn could not be more clear. However, local authorities are acting defensively and issuing more proceedings in part because of a lack of clarity about the proper scope of s20 and its relationship with the coercive provisions of Parts IV and V. One example of this arises from changes in police practice. It is now all too common for parents, who have been arrested for alleged offences against their child, to be bailed on condition that they have no unsupervised contact with their children, and to remain on bail for many months, sometimes for over a year. In many cases, the parent then has no alternative but to agree to the child being accommodated by the local authority. The local authority will consider that the parent has given informed consent, but in reality the parent is acting under duress. The child may then remain in foster care for an extended period, in danger of drift caused by the local authority awaiting the outcome of the criminal process before deciding what to do. The parent will be liable to arrest if they try to force the issue by demanding return of the child. The child has no means to bring the situation to an end. Apart from the Independent Reviewing Officer employed by the local authority to review the child's case, there is no independent, still less judicial, oversight of the child's

[10] The statistics, which recently showed a 23% increase year-on-year, can be found at https://www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/care-demand-statistics.aspx
The President has expressed concern about the sustainability of this at http://www.familylaw.co.uk/news_and_comment/15th-view-from-the-president-s-chambers-care-cases-the-looming-crisis#.WBNADZozXMw

situation. The use of s20/"Shared Care" in this way cannot have been contemplated when the Act was drafted.

We urge the Commission to consider the terms of section 20, but to do so within the wider context of its use in child protection cases and its relationship with Parts IV and V and how the rights of parents and children can effectively be safeguarded.

- One of the significant changes in social work in the last 25 years has been a great increase in the use of kinship care for children who cannot remain with their parents. Previously, placement in local authority foster care would be the norm, at least in the early stages of local authority intervention. There has been a great deal of litigation about the situation that commonly arises where, as part of its safeguarding work, a local authority arranges for a child to live with family members or friends as an alternative to being placed with local authority foster carers under section 20. Such kinship placements can be treated either as informal family arrangements[11] or as s20 placements, with the carers in the latter case being approved as Connected Person Foster Carers. There have been many cases where local authorities have brokered what they consider to be private arrangements, but family members have believed that they were acting on behalf of the local authority and that the child was s.20 accommodated by the authority and placed by the LA with the family member as a connected person foster carer. These situations can continue for years before they are recognised. In many such cases, the local authority will have been acting unlawfully in treating the arrangement as informal. This can produce substantial financial claims for arrears of fostering allowance, but more importantly it means that the carer and the child have been deprived of the benefit of the safeguards and support that come with looked-after status.

  There is now a substantial body of case-law around the question of what constitutes an informal family arrangement on the one hand, and a looked-after arrangement on the other hand. This is still however an area that local authorities find difficult and it continues to produce litigation, It is not an area that is addressed in Part III, which is essentially silent as to the status of kinship carers. It would be helpful if the legislation in this regard was clearer.
- The provisions for support for young people who leave care have largely been added to the Act piecemeal. The provisions are now complex and difficult for many professionals to follow. In particular, the specific provisions are absent from the Act and need to be found in Regulations and several different sets of

[11] Such arrangements may or may not, also have the legal status of private fostering, depending on the nature of the relationship between the child and the carer. The term 'informal family arrangements is used here to distinguish them from s20 accommodation.

guidance. The provisions whereby certain children who are the subject of special guardianship orders qualify for certain Leaving Care services are particularly opaque and need to be simplified.

- Much of the 'meat' of Part III is contained in Schedule 2 to the Act. Some of the provisions in there are highly important and merit greater prominence within Part III itself. Examples include:
    - para 3 (especially if the power to assess is elevated to a duty),
    - para 4 (prevention of abuse and neglect, which is the key role of local authorities),
    - para 6 (duties towards disabled children),
    - para 10 (in particular, the requirement to promote contact where a child in need is living away from home but is not looked after – this is often seen by local authorities as not being their responsibility),

  Other provisions are properly located in a schedule, but are ripe for review
    - The provisions allowing local authorities to recover contributions towards the upkeep of looked after children are now little-used and arguably are no longer appropriate in an age where the majority of children are looked after as a result of, or under the threat of, court proceedings;
    - The language of para 8 (provision for children living with their families) echoes that of the National Assistance 1948 and bears little relation to the range of flexible, child-centred services that local authorities are now expected to provide;
    - Para 18 (power to guarantee apprenticeship deeds) was obsolete long before the Act came into force and simply has no place in 21st century legislation.

To summarise our position, we think that there is scope for reviewing aspects of Part III, but that alignment with the Care Act will benefit only a small minority of Children in Need. Those aspects of Part III that need to be reviewed should be considered in the context of their relationship with the other parts of the Act.

The membership of our Executive Committee includes advocates who have appeared in leading s20 cases, policy/research specialists and lawyers who have devoted their careers to representing parents, children and local authorities in Children Act cases. If the Commission decides to review this, or any other, part of the Children Act, we stand ready to make our combined expertise available to assist in any way we can.

Association of Lawyers for Children
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