

## **Chapter one: The legal framework**

### **At a glance**

- **The statutory provisions in Children Act 1989**
- **The Children Act 1989 s.17 The Children Act 2004 provisions**
- **Local authority s.17 duties and powers Legal tensions**
- **The Framework for Assessment of Children in Need and their families**

## Introduction

The Children Act 1989 part 1 starts from the premise that the welfare of children is paramount and cases should only come to the court where no other alternative is available. Implicit within the act is the notion that early intervention can prevent longer term impact on children's development and reduce the likelihood of children being removed from the care of their parents. Part 111 of the Children Act 1989 instituted the concept of *children in need* and made provision for their support at local authority level. This chapter discusses the evolving nature of the concept of children in need, and also examines how local authorities might and do interpret their duties towards children in need in their area. The difficulties and challenges in assessing and providing support to children in need are discussed drawing on recent research, on case specific examination, and issues related to quality in assessment practice.

Hendrick (1994) examines the way in which child care social work came under significant public and political scrutiny during the 1980's following a series of very high profile child deaths – including Jasmine Beckford, Heidi Kosedra and Tyra Henry in 1984, Kimberley Carlisle in 1986, and Doreen Mason in 1987. In all of these cases the children were known to social workers. The inquiries following their deaths at the hands of their parents and step parents leveled harsh criticism at the local authorities and the NSPCC for failing to take sufficient action to protect the children. Conversely the public enquiry into the Cleveland affair in 1987 (Butler –Sloss 1988) criticised the intrusive activities of social workers who removed children from their parents. Dozens of children were subjected to questionable and controversial diagnosis of sexual abuse

by an hospital pediatrician. Not only had workers acted in haste, they had also excluded parents using “place of safety” orders to remove children in what was deemed to be a traumatic manner. The Children Act 1989 was thus designed to strike a better balance between parents and the state and introduced new concepts which emphasised partnership between parents and the state, parental responsibility and support for children and families. There was a shift away from the state (via the courts) being involved in family life and the introduction of local authority duties and powers to support children and families in Section 17.

### **Key principles of The Children Act 1989**

The key principles of the Children Act 1989 were designed to ensure that children and their best interests were prioritised in decision making about them. A balance was required to ensure that only those cases coming to court were the most complex and could not be dealt with by other formal community based mechanisms. These principles determine that the welfare of children is paramount in any proceedings about them. Section 1 states that

*(1) When a court determines any question with respect to:*

*(a) the upbringing of a child; or*

*(b) the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the court’s paramount consideration.*

*(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.*

(3) *In the circumstances mentioned in subsection (4), a court shall have regard in particular to—*

- (a) *the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*
- (b) *his physical, emotional and educational needs;*
- (c) *the likely effect on him of any change in his circumstances;*
- (d) *his age, sex, background and any characteristics of his which the court considers relevant;*
- (e) *any harm which he has suffered or is at risk of suffering;*
- (f) *how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
- (g) *the range of powers available to the court under this Act in the proceedings in question.*

(4) *The circumstances are that—*

- (a) *the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or*
- (b) *the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.*

Cases about children should only be brought before the courts when other options have been tried. In an important step forward the Children Act 1989 formalised the requirement for children's wishes and feelings to be heard and introduced the "no order" principle. This principle s.1.(5) was designed to prevent cases coming to the courts if it was better to not make an order:

*Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.*

In s.2 the concept of parental responsibility as a formal status is introduced and defined in s.3, whilst s.4 determines who can have parental responsibility and how it is acquired. Where parents are married they each have parental responsibility.

Unmarried fathers can acquire parental responsibility in a number of ways: S.4 of Children Act 1989 deals with the acquisition of parental responsibility by a child's father

*(1) Where a child's father and mother were not married to each other at the time of his birth the father shall acquire parental responsibility for the child if—*

- (a) he becomes registered as the child's father under any of the enactments specified in subsection*
- (b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or*
- (c) the court, on his application, orders that he shall have parental responsibility for the child.*

This was amended in Adoption and Children Act 2002, s 111(1), (3).

Step parents and others who might care for a child are also able to acquire parental responsibility. It was expected that the implementation of Children Act 1989 would divert cases away from the courts and it was recognised that alternative community based provisions would be required to provide support to families and children.

## **Statutory Provisions in Children Act 1989**

The Children Act 1989 Part III includes the statutory provisions for local authority support for children and families. S.17 (1) deals with the provision of services for children in need, their families and others:

*It shall be the general duty of every Local authority.*

*(a) to safeguard and promote the welfare of children within their area who are in need;*

*and*

*(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.*

The Children Act 1989 shifted the focus towards supporting families with children, and ensuring the safety and well-being of children. As well as emphasising that parents have primary responsibility for their children, local authorities are required to support parents and families and provide services to enable families to support the welfare of their children.

### **The definition of a child in need**

Children in need is defined broadly in Children Act 1989 S.17 (10):

*For the purposes of this Part a child shall be taken to be in need if*

*(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a Local authority under this Part; .*

*(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or .*

*(c) he is disabled, .*

*and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.*

The extension to every child who has disabilities was welcomed as a step in the right direction as it was designed to alter the way in which local authorities engaged with children and their families and was intended to ensure that standards of care, support, protection and review of needs were appropriate to the needs of children with disabilities and their families. However as the cases discussed in this book illustrate local authorities throughout the UK challenge their duties to provide support to children in need, and restrict though gatekeeping and assessment processes access to statutory services and support.

Jordan (2012) discusses the difference in definitions of children in need that families have and the legal definition and suggests that often families understand "in need" to mean that without extra support services, their child's health, development or well-being will be affected as they will be denied the advantages that additional local authority support could bring. However the local authority can make decisions about how to exercise its duties by the determination of what is meant by 'reasonable standard' (Children Act 1989 (s.17(10) a) and 'significantly' (s.17 (10) b). In effect professional judgments are made based on the interpretations of these two words by professionals and in accordance with these definitions.

The definition of health and development are the same definitions used in s.31 of the Children Act 1989 and the application of criteria to determine whether care proceedings are necessary. The relationship between a child requiring protection and a child being in need is based on a child in need - child protection continuum and the professional judgment by the social worker which informs the assessment of whether or not the needs can be met by the child parents/carers. A general principle is that children in need are those whose needs cannot be met through universal education and health services. Of course there are difficulties in ensuring that all parties agree on what services might be provided.

### **Identifying and supporting children in need**

As well as identifying children in need within their area and ensuring a range of services are available to meet these needs, local authorities are required to undertake assessments, provide family support services and resources and take steps to prevent the accommodation of children and care proceedings. This general duty does not however mean that individual children have universal rights to support. Instead the local authority has a duty to identify children in need and provide services to support them in their families. As the cases in the previous section illustrate the reality is that children in need services are targeted or rationed and this presents challenges for parents and professionals who must make the best use of the limited resources available and negotiate the tensions between agencies commissioned to provide services and allocate services to families.



Local authorities must also act lawfully in their decision making and rationing of resources for children in need. Schedule 2 of Children Act (1989) outlines the requirements for Local authority support to all children and families. This includes:

- Identification of children in need and provision of information
- Maintenance of a register of disabled children
- Assessment of children's needs
- Prevention of neglect and abuse
- Provision of accommodation in order to protect child
- Provision for disabled children (amended by Children and Young Persons Act 2008)
- Provision to reduce need for care proceedings etc.
- Provision for children living with their families
- Provision for accommodated children (amended by Children and Young Persons Act 2008)
- Maintenance of the family home
- Duty to consider racial groups to which children in need belong

The Children Act 1989 s.17 (10) laid out the expectation that local authorities would identify children in their locality whose health and development are being compromised by their individual or family circumstances. The local authority must determine what those needs are, and ensure that appropriate and relevant services were available either by directly providing them or commissioning them from voluntary or private sector organisations. The Children Act 2004 (s.10) made provision for the cooperation of relevant and specific agencies in local authorities to promote the well-

being of children and young people in their area. In doing so the legislation reaffirmed a commitment to working with parents (s.10.3), and ensuring the availability of adequate and appropriate resources and pooled funds (s.10.6).

### **Section 17 duties of the local authority**

Section 17 of the Children Act 1989 is a general duty conferred on local authorities who have a number of duties to provide services for the welfare of children with an emphasis on preventative support and services for families. In addition s.17 drew a distinction between all children in need and those defined as “in need”. However as discussed this also suggests that resource pressure may lead to only the neediest or those at risk being provided with services and this is a constant challenge with practitioners and managers find themselves dealing with.

Under part III of the Children Act local authorities have a duty to provide support for children in need and their families. Family is defined for this purpose as parents and children, as well as any person with parental responsibility or any other person with whom the child is living (s17(10)). Services are to be provided if they are going to safeguard or promote the welfare of a child in need (s17 (3)). Part III also includes duties related to the provision of services (ss17-19) and the provision of accommodation (ss 20 and 21) as well as duties towards children who are looked after.

These duties of local authorities are defined in section 17 (10) of the Children Act 1989:

*It shall be the general duty of every Local authority:*

*(a) to safeguard and promote the welfare of children within their area who are in need; and*

*(b) so far as is consistent with that duty, to promote the upbringing of such children by their families*

There are also now specific obligations to ensure a sufficient supply of certain services for disabled children, for instance childcare; under the Childcare Act 2006 s. 6(5),<sup>1</sup> the duty on local authorities to secure sufficient childcare for working parents applies in relation to disabled children up to the age of 18.

In section 17 (11) Children Act (1989) A child shall be taken to be in need if—

*(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a Local authority under this Part;*

*(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or*

*(c) he is disabled,*

*and “family”, in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living(S.17 (10)).*

In s.17 (11) a disabled child is defined as in the definition include in the National Assistance Act 1948 s.29 (1) "*persons who are blind, , deaf or dumb, and other persons who are substantially permanently handicapped by illness, injury, or congenital deformity or such other disabilities*".

## **Legal entitlements**

Wise et al (2011) offer a stark warning to local authorities who evade their duties which are "*...clear and enforceable and it is no exaggeration to suggest that downgrading these duties to mere discretionary powers undermines the rule of law...it does not matter how the child comes to be in need of support, what matters is that if a child is, for whatever reason, in need of support, such support as is needed should be provided*" (2011, p.6-7).

The entitlements of children in need are as follows:

### *Participation and best interests:*

They must be allowed where it is reasonably practicable to participate in any decisions taken about their lives S.17 4 A (b). Decisions must give their best interests primary consideration and respect their rights to family and private life.

### *Assessment:*

They are able to have an independent determination of age if this is disputed by the state. They are entitled to an Initial Assessment and if it is considered that support may be needed from several agencies then a Core Assessment must be offered

*Services and support:*

Services to meet their assessed needs where the conditions in one of the statutory duties are met or where intervention is required

A care plan which should be a realistic plan of action

Suitable accommodation where parents or carers are prevented from providing them with suitable care or accommodation

Support as a 'looked after' child if they are accommodated for more than 24 hours.

A personal adviser and a pathway plan after the age of 16 if they are a care leaver

Legal aid to challenge any failure to realise these entitlements

Even if a public body only has a power and not a duty, to confer a particular benefit on a child or their family so that no entitlement to the benefit arises, that power still has to be exercised rationally, reasonably and fairly. There has to be a transparent and equitable decision making process. This is important because in the current economic context of dwindling public resources and already over stretched local authorities the decision related to the local authority exercising powers may be seen as a reduction or withdrawal of services. There is also the potential or likelihood of cases coming to the appeal courts and judicial review if those decisions are found not to have been made fairly or rationally. In addition as was found in Laming (2003), the inquiry into the death of Victoria Climbié found that the London Boroughs of Ealing, Brent and

Haringey were: *“at the time of Victoria’s case, all spending significantly below their Standard Spending Assessment (SSA) on services for children. This was in sharp contrast with the national picture, where most local authorities were overspending their SSA on services for children and families”* (Laming 2003, p.14) It is thus crucial that social workers undertaking assessments, service managers, council official and elected members who allocate resources are fully informed as to the powers and duties of their authorities in respect of children in need.

On the spot question:

What non legal factors might influence your assessment of whether or not a child is in need?

Once a referral is made to children’s social care an initial assessment will determine whether or not a child is defined as “in need”. Several questions will assist in the decision making process here:

- How does the child meet the “child in need” criteria for an assessment?
- Is the child a child in need as per the Children Act 1989 s.17
- Is this authority the authority that has a duty to assess and provide services?
- If the child is “in need” will that child be eligible to other services as a result of being “in need”?
- Should a child “in need” be placed with its family?
- Does the child meet the threshold for an assessment as a child in need or are there concerns about significant harm which may warrant a child protection investigation (S.47)

## Key Case analyses

The question of whether a child in need is dependent upon the outcomes of an assessment. The quality of the assessment in this case was thought to be poor and although the judge agreed that the quality of the assessment was lacking the outcome of the assessment was accepted.

In *R (on the application of OO) v London Borough Of Hackney* [2013] EWHC 4089 (Admin). The mother of 3 children claimed that her children were “in need” and despite the solicitor for OO criticising the assessments which had been undertaken, the judge declined a judicial review on the grounds that the local authority had looked at the case fairly and come to the correct decision. The reports from the children’s school suggested that they were well cared for and enjoyed a close loving relationship with their mother OO. This was in sharp contrast to the claims made by OO that she was destitute and unable to provide for her children’s welfare. In this case the judgement decided that the children were not *in need* and that the assessments which had been undertaken were appropriate. Indeed OO had not always cooperated with social services and her case claiming that she was destitute and homeless was not accepted. The assessment information identified that OO had sufficient and extensive support networks. It is clear that it is not sufficient to simply criticise the assessment. In the case of OO the judge concluded that the assessment had been carried out fairly, the duty to assess had been met and the decision not to provide services was based on the assessment.

The children did meet the criteria for assessment but the assessment concluded that they were not *in need* as not only were there sufficient familial resources, there was also evidence contained in the assessment that the children were well cared for and not destitute. What this case also highlights is that entitlement to an assessment does not necessarily lead to the provision of services. The needs have to be sufficient to meet S. 17 (10 criteria).

#### Practice focus

If the assessment had identified that the children were in need what duties would apply to provide services?

The child was assessed as being in need in this next case, however the local authority declined to provide services on the grounds that the child was not ordinarily resident in the area for part of the year.

In *R (on the application of J) v Worcestershire County Council (2013)*, the issue of whether the local authority should provide services came before the courts. The claimant was a three-year-old boy who suffered Down's syndrome and other complex medical problems, with developmental delay. His parents were of Romany Gypsy ethnicity and were fairground travellers. The paternal grandfather was retired and lived in a dwelling at a fixed address in the defendant local authority's area. The claimant and his family normally resided there during the winter break, still living in their caravan, but parking it on the grandfather's land. The authority agreed that the claimant was a child in need for the purpose of s.17 of the Children Act 1989, but determined that it was not able or lacked power to provide any help or support



whenever the claimant was outside its area, however briefly. The claimant sought judicial review of the authority's decision. He contended that the authority had misdirected itself as to the geographical reach or extent of its powers under s 17 of the Act and sought a declaration that the authority's power to provide services under s 17 of the Act applied to services that might be provided to the claimant when he was outside its area. The application was allowed because the local authority had a duty to assess and provide services even when the child was out of their area. The law was intended to ensure that the power to provide services was extended to when the child was not in the area as long as he remained a child in need.

#### Practice Focus:

What measures might need to be considered to work with this family given that for part of the year the child may not reside in the local authority areas which has a duty to provide services?

Cases have also been brought before the courts and the courts have found that local authorities have met their duties to provide for the child but not the support which is requested by the parent as in the case *R (on the application of G) v London Borough of Barnet*. G a Dutch national of Somali origin was not eligible for housing assistance, has a son, born in May 1999. G claimed she left the Netherlands because of social ostracism encountered there in the Somali community on account of her child's illegitimacy, and that she came to the UK to look for the child's father. G did not satisfy the habitual residence test and so an application to the London Borough of Barnet for assistance with housing was refused. G then sought assistance from Barnet council

as the local social services authority who assessed that the child's needs would be best met by the return of child to Holland with G the mother as they would be immediately entitled to accommodation and other benefits. The council did not accept the mother's account of her reasons for coming to London. G applied for judicial review of this decision and argued that it was not in her child's best interests to be removed from her care which would happen unless she was housed and able to access benefits. If the mother refused to return to the Netherlands, the council intended to place the child with foster parents, and to provide no accommodation for the mother. Interim relief was granted in the judicial review proceedings. The decision was later quashed. The child was in need, and it was in the best interests of the child to live with his mother. Given the duties imposed on the local authority by section 17(1) of the Children Act 1989, and the powers granted to it by section 23, the local authority 'has no alternative' but to place the child with his mother assuming it is reasonably practicable to do so. This was so even though the mother was, in the view of the local authority, acting unreasonably. The council duly appealed and the judicial review application was dismissed. The judge said the duty imposed by section 17(1) was met by providing financial assistance for the return of the mother and child to Holland. The local authority did not act unlawfully in refusing to provide assistance in cash or in kind to assist in the provision of accommodation for the mother and her child. Section 17(3) and (6) imposed no such duty on the Local authority. Section 20 imposed a duty to provide accommodation for the child, not for the parent and the child.

This case illustrates that the assessment of the local authority and their decision to provide assistance for return and not accommodation was not unlawful was accepted by the court. In this case it was accepted that the child was in need but the local

authority made a different assessment of what was in the child best interests. They agreed to fund return journeys for the child and mother, but not to provide accommodation to meet the needs of the child

In another case *R (on the application of G) v Southwark London Borough Council* the court had to decide if the local authority had acted lawfully in assessing that the claimant was a child in need (s.17 ) and entitled to support when the claimant argues that he should be provided with accommodation under s.20 of The Children Act which cover the provision of accommodation for children:

*(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of .*

*(a) there being no person who has parental responsibility for him; .*

*(b) his being lost or having been abandoned; or .*

*(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.*

The claimant came to the United Kingdom with his mother and siblings in 1998. He was granted indefinite leave to remain in 2005. Relations with his mother deteriorated and he left his family home. He approached the local housing authority, who unsuccessfully attempted mediation. After staying with friends, the claimant aged 17 consulted solicitors who advised him to present himself to Social Services and request an assessment of his needs under s 17 of the Children Act 1989, and immediate accommodation under s 20(1) of that Act. The claimant was given temporary bed and

breakfast accommodation pending the authority's investigation. The initial assessment was completed and the report concluded that there were not additional needs or vulnerabilities that would suggest the need for longer-term accommodation being provided by Social Services. The was not in full-time education at this point in time, therefore the accommodation provided by [the authority's Homeless Persons Unit and referrals to other support agencies was deemed sufficient to work on addressing the social, emotional and practical issues identified in this assessment. The report also referred the claimant to the authority's own family resource team, which could provide:

- social work support
- help him in dealings with the Department for Work and Pensions in applying for benefits,
- explore holding a family group conference to work on reconciling him with his mother,
- link in with his prospective college and provide any support necessary for his enrolment,
- and to an agency giving housing and careers advice.

The authority maintained that s 20 of the 1989 Act was not the appropriate section in the instant case and that it had fulfilled its duty to the claimant who was not an unaccompanied minor. They had carried out an assessment and identified support for the claimant as above. The claimant unsuccessfully sought judicial review of that decision. The Court of Appeal dismissed the claimant's appeal, finding that the authority had been entitled to conclude that he had required only 'help with accommodation' under s 17 of the 1989 Act and not accommodation under s 20(1).

**In this case R (on the application of W) v London Borough of Lambeth (2003)** the issue was about housing and whether the local authority should provide accommodation to the family or simply to the children whilst the mother found alternative accommodation.

W who had two children aged 16 and 7 had become intentionally homeless within the meaning of that expression in the homelessness legislation and sought assistance for accommodation from the London Borough of Lambeth as local social services authority. This was refused. In a further assessment Lambeth council decided it should explore placing the children with extended family members in the short term whilst the mother sought alternative accommodation. This provision could be made for the children alone under s.20 of the Children Act 1989. The Court of Appeal dismissed an appeal in respect of the council's decision and considered there were not sufficient grounds for interfering with the council's decision. The court held that s.17 of Children Act 1989 imposes a duty on the council in respect of services to children in need, but not in relation to individual children - where the council only has a power. The council had provided clear reasons as to why it was not willing to exercise its power in this case, and balancing other pressures on its resources. As such where all else failed the local authority has power to help under section 17, but it can reserve this power for extreme cases which this case was not deemed to be.

In these appeal court cases the duty owed by the local authority to an individual child or family was limited and the child in need does not have a right to the services even when assessed. The second issue in these cases related to the view of the appeal court that the local authority had some degree of discretion and was able to make judgments in light of the availability of resources it could and was able to provide or commission for children in need.

This chapter has discussed the development of in need as a legal concept introduced in S.17 of the Children Act 1989. The tensions in what families define as “in need” in respect of their own children and what duties and powers local authorities have in regard to children in need and their families was explored. As discussed local authorities can exercise some discretion in terms of their powers but not in a way which undermines the rule of law.

### **Further reading**

*DoH(2000) Framework for the Assessment of Children in Need and their Families.* Although this has now been replaced with *Working Together* (DfE 2013) this document remains a rich source of information about the processes involved in the assessment as well as containing clear references to theories and approaches which underpin assessment work with children and their families.

*Hendrick , H., (1994) Child Welfare: England 1872-1989. Routledge.* Hendrick’s now classic work examines the history of legislation, ideology and theory related to child welfare policies and practice. Chapter 11 of this book discusses the development of the Children Act against a backdrop of the Public Inquiries in the 1970’s and 1980’s .

*Holland, S., (2011) Child and Family Assessment in Social Work Practice 2nd edition London, Sage Publications.* Holland usefully outlines the processes of assessment and discusses some of the fundamental issues related to undertaking an assessment as a legalistic task

Jordan. L., (2012) *The legal foundations of family support work in* (eds) Davies, M., (2012) *Social Work with Children and Families*. Palgrave MacMillan. This chapter examines the legal basis for how the range of family support for children in need is defined and lays out the key issues for social workers.

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