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The legal framework

The UK has created one of the most advanced and successful child protection systems in the world, developed from many decades of reforms. One of the ways in which this success is measured is that, since the 1980s, the UK has seen the lowest rate of child abuse-related deaths compared to other major developed countries (Pritchard and Williams, 2009). This is combined with a child protection system that incorporates a host of well-established legislation and guidance protecting children's rights and welfare.

The safeguarding of children is now considered to be everyone's responsibility, meaning that all organisations have a duty to safeguard and promote the welfare of children. The legislative framework sets out the steps to be undertaken by children's services departments for the protection of children. Safeguarding is defined by the statutory guidance *Working Together to Safeguard Children* (Department for Education (DfE), 2018, p 102) as:

1. Protecting children from maltreatment
2. Preventing impairment of children's health or development
3. Ensuring that children are growing up in circumstances consistent with the provision of safe and effective care
4. Taking action to enable all children to have the best outcomes

Child protection is part of safeguarding and the promotion of the child's welfare. These powers are granted by Parliament to local authorities by statute. Local authorities are considered to be "creatures of statute", meaning that they themselves were created by statute. For that reason, local authorities are unable to act beyond the powers granted to them by Parliament.

The Local Authority Social Services Act 1970 created a framework that required every local authority to establish a social services department to carry out social service functions, including the provision of support for families. This Act was seen as a significant shift towards creating a co-ordinated and comprehensive approach to not only support families but also encourage people to seek assistance from the local authority. This is true even today, local authority social services departments can and do provide support to families, within their statutory powers, should this be considered necessary. This can be in the form of signposting, giving advice or providing direct assistance.

Since the passing of the 1970 Act, there have been many reforms, all intended to improve child protection processes, many of which will be explored in this guide.

Legislation and regulations are important as they support the creation of a single and unified code of practice; however, they alone cannot provide for a complete child protection system. As noted by Professor Eileen Munro, 'A good child protection system should be concerned with the child's journey through the system from needing to receiving help, keeping a clear focus on children's best interests throughout' (2011).

It also requires the ability for flexible professional judgement. Professor Eileen Munro identified in her reports (2010 and 2011) how over-regulation of processes can get in the way of social workers using their discretion and judgement to enable them to build meaningful relationships with children, prioritise children's needs, and take action without delay. Therefore, for the operation of a successful child protection system, there needs to be a fine balance between regulating children's services and having a system that permits professionals and, in particular, social workers to take action in accordance with the child's needs and, if possible, to act on their wishes. It is therefore essential that processes are continuously evaluated and fine-tuned, resulting in the development of a child welfare system that is dynamic and capable of adapting in accordance with the needs of society. This, combined with a continuum of improving practices and processes, helps to create an environment that has the function and ability to facilitate the best outcomes for children.

One of the ways in which the child protection system can be improved and refined is to consider its practical functioning. This is unfortunately at times undertaken when there is a child death as a result of abuse. One significant positive outcome from these tragic cases is the professional learning from Inquiries and serious case reviews (SCR)¹ that has helped to identify failings in the system. This learning then leads to active steps being undertaken to improve practice, with the hope that a potentially harmful situation will be identified prior to another child being at risk of significant harm.

The learning can even have national implications. For example, the death of Victoria Climbié in 2000 led to the introduction of major changes, including implementation of the Children Act 2004. Victoria, an eight-year-old child from the Ivory Coast who was brought to the UK by her relative, died after being subjected to torture and inhumane treatment by her carers. Victoria's tragic death resulted in a Public Inquiry, chaired by Lord Laming, which on its conclusion resulted in significant changes to the law and practice. The Inquiry (Laming, 2003) made a staggering 108 recommendations to improve the child protection system. It also contributed to the then Government's introduction of the Every Child Matters reforms (HM Government, 2003), designed to improve early intervention by expanding the contribution of all services involved with children and their families. Parliament also passed the Children Act 2004 to improve children's services and promote early intervention. This Act supplemented the Children Act 1989, taking a child-centred approach and reinforcing the message that safeguarding and promoting children's welfare are the responsibility of all organisations and agencies working with children.

The 2004 Act also required local authorities to replace Area Child Protection Committees (ACPC) with the establishment of Local Safeguarding Children's Boards (LSCB). Both ACPCs and LSCBs had representatives from multiple agencies and professionals responsible for safeguarding children in their local area. The main difference between the two was that LSCBs had a statutory footing and wider focus, introducing the key principle that safeguarding children

1 From June 2018, serious case reviews have been replaced by child safeguarding practice reviews introduced by the Children and Social Work Act 2017. This new panel's role is to identify improvements to be made in order to promote children's welfare.

in the local authority's area is the responsibility of any professional, that is, anyone who comes into contact with a child (Working Together, 2018, p 10, para 16) and not just that of statutory agencies. The local authority continues to have lead responsibility.

As a result of the continual evolving process, the Children and Social Work Act 2017 replaced LSCBs,² as they were not considered to be sufficiently effective, with new local arrangements working with Safeguarding Partners, that is, the local authority, police and health. The partners are required to work together to identify and respond to children's needs in their area.

As can be seen, the tragic death of Victoria Climbié triggered a chain of changes resulting in reforms designed to strengthen child protection processes and improve the effective safeguarding and welfare of children.

The continual improvement of matters relating to children and young people is also demonstrated by the flow of Acts of Parliament. The key legislation relating to the welfare of children is the Children Act 1989, which is supported by a number of later statutes that impact on the welfare of children and young people.

These are as follows:

- Children (Leaving Care) Act 2000
- Adoption and Children Act 2002
- Children Act 2004
- Children and Adoption Act 2006
- Children and Young Persons Act 2008
- Children and Families Act 2014
- Children and Social Work Act 2017

Other legislation that also impacts on children and young people includes:

- Mental Health Act 1983

2 S.30 Children and Social Work Act 2017 amends ss.13–16 Children Act 2004.

- Human Rights Act 1998
- Mental Capacity Act 2005
- Equality Act 2010
- Care Act 2014
- Data Protection Act 2018

This guide explores the major aspects of the significant legislation, statutory guidance and case law when following the child's legal journey.

We have already discussed that the law cannot undertake the vast task of safeguarding and promoting children's welfare alone, it also requires sound professional judgement and the ability of professionals to work in a collaborative multi-agency forum within a framework of effective systems and processes, thereby enabling sustainable and positive outcomes for children and ensuring that safeguarding children remains a shared responsibility. This process is supported by s.27 of the Children Act 1989, which requires co-operation between authorities, together with s.10 and s.11 of the Children Act 2004, which require each local authority to make arrangements to promote co-operation between the authority's relevant partners, persons or bodies to improve the well-being of children in the authority's area, including protection from harm and neglect.

1 Childhood

A child is defined in the Children Act 1989 as any young person under the age of 18³ (the age of majority) and childhood begins from the moment the child is born. A child will gain certain rights as they grow older and before they are 18; however, in law, irrespective of how mature the child is, they will remain a child until they reach 18, when in law they are then recognised as an adult.

In English law, the unborn child – that is, the foetus – is not recognised as a person and the law is unable to override the mother's rights whilst the child is in

3 S.105(1) Children Act 1989

utero. This was highlighted in *Re F (In Utero)*,⁴ where the local authority applied to protect the safety of an unborn child due to concerns about the mother, who suffered from mental health problems and had abused drugs. The Court of Appeal ruled that the court did not have any jurisdiction over the unborn child and that the child could only be protected once born, as to do so beforehand would give the court inappropriate control over the mother's life and, effectively, her body. Therefore, all the legislation relating to children is only applicable once the child is born, and no legal proceedings can be commenced until that day.

A child who is looked after is one who is provided with accommodation for a continuous period of more than 24 hours, and is:

- accommodated under s.20 of the Children Act 1989;
- subject to a voluntary arrangement between the local authority and parents with parental responsibility (a concept that is discussed later);
- subject to a care order (s.31 Children Act 1989) or interim care order (s.38 Children Act 1989);
- subject to a placement order with a care plan of being placed for adoption (s.21 Adoption and Children Act 2002).

Children who have been looked after by the local authority, subject to meeting the criteria (explained later in this guide), may be entitled to services from the local authority, post their 18th birthday, under leaving care services. These services are provided to eligible care leavers to give them the same level of care and support that children who are not in care would reasonably expect to receive from their parents or carers to enable them to transition smoothly into adulthood. If the child who was looked after is eligible for leaving care services, at 18 their status will change to that of a young adult, receiving advice and assistance under the Children (Leaving Care) Act 2000. Also at 18, now as young adults, their social worker and care plan are replaced with the allocation of a personal adviser from the leaving care team, and a pathway plan. This pathway plan will detail the services and support that the young person will require from the age of 18.

4 *Re F (In Utero)* [1998] Fam 122

The assessment of the pathway plan is undertaken by the social worker and the personal adviser prior to the child's 18th birthday.

The planning for adulthood for a child who is in care should start as early as possible, and for some local authorities this could be as early as when the child reaches the age of 14, with advice and support from the social worker and/or the child's foster carer in learning tasks such as cooking, cleaning and budgeting. This early process helps the social worker to start supporting the child in their transition to adulthood, and to consider how best to support the child's aspirations and goals in relation to all aspects of their life, including education, training or employment that the child wishes to pursue.

Good practice requires that local authorities should introduce the child, no later than their 16th birthday, to their allocated personal adviser, who will then work closely with the child's social worker until they take over when the child is 18. This ensures that the child begins to develop a relationship with the personal adviser, whilst still receiving support from their social worker, making the transfer of support easier for the young person to manage.

2 International conventions

2.1 Human rights

Human rights are the basic rights that safeguard the fundamental freedoms of everyone in the UK. The European Convention on Human Rights and Fundamental Freedoms, often referred to in short as the European Convention on Human Rights (ECHR), came into force in September 1953. The Convention is a series of Articles that set out the civil rights that all citizens of signatory states are entitled to. The UK Government ratified the ECHR, which means that UK citizens have its protection and can bring an action for breach of their human rights. Although the ECHR is written post-World War II, it stays relevant and alive for today's society as it is treated as a living instrument that will be interpreted in light of present-day changes in society and family life (*Tyrer v United Kingdom*).⁵ This process was

⁵ *Tyrer v United Kingdom* [1978] 2 EHRR 1, [1978] ECHR 20

simplified with the passing of the Human Rights Act 1998,⁶ which incorporated the EHCR rights and freedoms into domestic British law and permitted complainants to now bring an action against public bodies to the UK courts. If the case cannot be resolved in the UK courts, it can still proceed on appeal to the European Court of Human Rights, based in Strasbourg, France.

Protection of human rights is available to both adults and children, on the basis that children are humans entitled to protection (Fortin, 2009, p 33). The ECHR is now nearly 70 years old, and the language can appear quite outdated.

Prior to the UK leaving the European Union (EU) on 31 January 2020, famously known as Brexit, the Government gave a commitment to its continued ECHR membership (HM Government, July 2018), *The Future Relationship between the United Kingdom and the European Union*. This was confirmed again on 5 March 2020 when, in response to media enquiries, Downing Street announced that ‘the UK is committed to the European Convention on Human Rights and to protecting human rights and championing them at home and abroad’ (*The Independent*).

The actions and decisions of local authorities, as public bodies with responsibilities for children’s social care, must be compatible with human rights requirements. Children’s services, whether provided by the local authority or on its behalf, have a statutory obligation to treat children and families in accordance with their human rights. Local authorities must ensure that everyone is treated with dignity, respect, fairness, and that the child or their family members are able to exercise their rights and for their views to be considered in any decision-making process. When considering any policies, actions or decisions, there may be interference with a child’s or family’s human rights, and in such cases, the local authority must be satisfied that the interference is necessary and proportionate, for example, to safeguard a child.

There are 16 basic human rights. The Articles in the ECHR are categorised in three different types; that is, absolute, qualified and limited rights. Absolute rights are those that the local authority must adhere to and cannot depart from or restrict its obligations. Article 3 falls under this category. Qualified rights can be restricted in certain circumstances where a local authority is entitled to interfere in these

6 The Human Rights Act 1998 came into force in the UK in October 2000.

rights. Article 8 is a qualified right; that is, the local authority can legitimately interfere in family life if it is proportionate and necessary to safeguard a child's welfare. Limited rights have a limited scope; Article 6 is an example of a limited right. These articles are discussed in further detail below.

For the purposes of this guide, the key articles that regularly impact on social care cases are as follows:

- **Article 3: Freedom from torture and inhuman or degrading treatment**

No one has the right to inflict torture, inhuman or degrading treatment on anyone and any attempt to do so is incompatible with this right.

Inhuman treatment can include serious physical assault, serious physical or psychological abuse, and/or threatening to torture someone. This right is an "absolute right", meaning it cannot be restricted or limited in any way.

*A v United Kingdom*⁷ is an illustration of the impact of the application of Article 3 in child protection matters. An eight-year-old boy, A, admittedly very badly behaved, was caned by his stepfather, F, on numerous occasions. F was charged under s.47 of the Offences Against the Person Act 1861 for assault causing actual bodily harm. During the trial, F successfully claimed the English law defence that A's beating was reasonable chastisement, and he was acquitted.

The case went before the European Court of Human Rights, brought on behalf of the child against the State (UK Government), that the English law relating to lawful chastisement failed to protect A and violated A's Article 3 rights.

The European Court held that the caning did reach a level of severity prohibited by Article 3 rights; that is, A should not have been subjected to inhuman or degrading treatment. Allowing F to rely on the defence meant that it was the UK Government that had violated A's Article 3 rights by failing to provide A with adequate protection under the English law relating to chastisement. The court took the view that there was a positive responsibility on the UK Government to take effective measures to prevent conduct that would come within this Article.

7 *A v United Kingdom* [1998] 2 FLR 959, Times 1/10/98, ECHR

● **Article 5: Right to liberty and security**

Everyone has the right not to be deprived of their liberty except in limited cases specified in the Article (for example, when suspected or convicted of committing a crime, and provided there is proper basis in UK law for their arrest or detention). This Article will be particularly relevant in cases where the local authority is considering deprivation of a child's liberty. This is a limited right and can be lawfully restricted, which means that a young person's liberty can be lawfully deprived if authorised by statute or common law.

A child's liberty can be deprived in a number of ways:

- With the granting of a secure accommodation order under s.25 of the Children Act 1989. This order authorises the child to be placed in secure accommodation and thereby restricts their liberty. The criteria for the application of this order are where the child is likely to injure themselves or others, or abscond and therefore place themselves at risk of significant harm.
- Under the Mental Health Act 1983, for the purposes of admission and treatment of a child's mental disorder in a hospital.
- The Mental Capacity Act 2005 makes it lawful to deprive a child of 16 and over of their liberty when they lack capacity to consent to the care that they are receiving, including where they live and how they are cared for on a day-to-day basis. This can include foster care or a residential placement, and where it is necessary so as to sustain their life or prevent serious deterioration.
- Youth remand, youth detention accommodation or local authority accommodation under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- Criminal sentencing provisions of the Power of Criminal Courts (Sentencing) Act 2000.
- Deprivation of liberty for children under 16 can be authorised in the exercise of the inherent jurisdiction of the High Court.

- **Article 6: Right to a fair trial**

Everyone, including children, has the right to a fair and public hearing within a reasonable period of time. When care proceedings have commenced, all parties will be entitled to legal representation. This includes children who, in public law proceedings, are not only the subject of the proceedings but are also parties. Therefore, a children's solicitor is appointed to represent the child in public law proceedings. However, as children lack capacity to conduct proceedings due to their age, a Children's Guardian is appointed to give instructions to the children's solicitor on behalf of the child. The Children's Guardian is appointed by the court, is independent, and comes from the Children and Family Court Advisory and Support Service (CAFCASS). Their role is to seek the child's views and represent them in the care proceedings, and ensure that the child's welfare is promoted.

It should be noted that for social care professionals, Article 6 rights are not just restricted to legal proceedings or where legal proceedings are being considered. This right is also applicable when working with families prior to the commencement of any legal proceedings. This requires the social workers to work in a way that is both fair and transparent in the decision-making, ensuring that the child and family members are provided with a reasoned decision within a reasonable timescale. The issue of delay can become relevant under this Article as delay can be prejudicial and considered unfair. Having a reasoned decision within a reasonable timeframe enables the child and family members to understand the basis for the decision and thereafter to consider whether they wish to challenge it. During this process, the local authority must take into account any imbalance of power and, if this is present, ensure that steps are taken to address the imbalance by providing sufficient support necessary to the child and family. In the case of *Re G*,⁸ the local authority was criticised for failing to involve the parents properly in the decision-making process relating to changes to the children's care plans. The Judge elaborated that the local authority had a duty to provide full and frank disclosure of documents, including notes and minutes of conversations and meetings, and listed the following as important:

8 *Re G (Care: Challenge to Local Authority's Decision)* [2003] 2 FLR 42

- informing the parents promptly of its plans;
- giving factual reasons;
- providing an opportunity for parents to answer allegations;
- providing an opportunity to make representations; and
- parents should have the chance to attend and address any crucial meetings.

● **Article 8: Respect for family life**

Everyone has the right for their private and family life to be respected, and this includes their home and correspondence. This right is often incorrectly referred to as the right to family life, but it is in fact a right to respect for family life. This is not an absolute right and can be restricted in specified circumstances.

A local authority can interfere in a child or family's Article 8 rights, provided that this is permitted by the law, is necessary, and is a proportionate action to the risk posed to the child's welfare. Hence, any involvement by children's services in a child's life will engage Article 8 rights, and the involvement will be an interference in the parent's and child's private and family life. Therefore, any action undertaken by the authority must be considered in light of the Article 8 rights of everyone who will be affected by this intervention, and it must be a proportionate response to the level of risk posed to the child. In *Re O*, a Court of Appeal case,⁹ the appeal concerned whether the court was correct in granting a supervision order and not a care order. The Judge stated that 'the proportionality is key...as a response to the risk presented'.¹⁰

Social care professionals must always give due consideration to these key human rights, principles and duties. Failure to do so can place the local authority at risk of human rights challenges in court. A case that highlighted this was *Re (G) v Nottingham City Council*.¹¹ This case was of particular interest

9 *Re O (A Child) (Supervision Order: Future Harm)* [2001] EWCA Civ 16

10 *Re O (A Child) (Supervision Order: Future Harm)* [2001] EWCA Civ 16, para 28

11 *Re (G) v Nottingham City Council* [2008] EWHC 152 (Admin)

due to the publicity it received from the media. The mother, a young care leaver, gave birth to her child. The pre-birth plan was to remove the child at birth from the mother's care. When the baby was born, the baby was removed from the mother's care without an order or the mother's valid consent. The mother challenged the unlawful separation. The court found in her favour and that there had been a breach of the mother's Article 8 rights.

The appointment of a CAFCASS officer in Children Act public and sometimes private law proceedings (discussed in greater detail later in the guide) is another way in which the child's Article 8 rights are promoted.

In practice, when considering human rights issues, professionals need to be aware of the power imbalance that exists between the local authority and the parents or carers and the child. The local authority is more powerful as it has statutory powers, and when working with parents or carers, professionals should always consider ways in which to redress the power imbalance.

Social care professionals do not generally have a very good public relations image, mainly as their work is not fully understood by the public, or the profession is linked with failures in high profile child protection cases, such as the death of Baby P (Peter Connelly). In the majority of cases, instead of being welcomed into a family's life, a social worker may in fact be feared in the mistaken belief that they have the power to take a child into care, who ultimately could be adopted. Such fear and mistrust undermine public confidence in the profession and can have the impact of placing the child at greater risk. This is because instead of requesting support, the parent may be fearful of doing so due to the incorrectly held belief that, once a social worker becomes involved in the family's life, their child could be removed. Although social workers do have extensive statutory powers, what is often forgotten is that these powers can and will only be exercised if fully supported by evidence. The removal of a child from their parents' care can only be justified if the child has suffered significant harm or if their welfare is at risk of significant harm, and a decision on this is made by the courts. If there is supporting evidence, this clearly puts the social worker in a powerful position. If action is required, then the social worker must ensure that any action is necessary and proportionate to the concerns.

This imbalance of power must be addressed immediately. For example, if there are issues in relation to language or disability, sufficient support should be identified and provided from the outset by the local authority, for example, the provision of an advocate or interpreter, or the parents should be advised to seek independent legal advice or representation. The social worker must ensure that any communication with the parents or carers is fully understood so that the parent or carer can then consider what action is being proposed, the reasons for this and what steps could be taken if they do not co-operate.

Case study 2: The impact of social work intervention

A referral from a neighbour was received by children's services. The concerns were about the care of two children by their parents, who lived at 15 Summer Avenue, and the referral detailed that the children were being abused by their parents. The referral was allocated to the duty social worker. The children's names were not provided by the person making the referral. All that was known was that there were two children aged around nine and ten years old. The duty social worker planned to visit the address and ascertain more information from the parents. The social worker mistakenly noted the address and incorrectly visited 15 Summer Street, instead of 15 Summer Avenue.

When the social worker visited, she found a family with two children (of similar ages to those stated in the referral) living there. The parents were informed that concerns had been raised in relation to their care of the children. The parents did not question the social worker's visit, which they could have done in the exercise of their Article 6 rights. They fully co-operated with the social worker in her enquiries, listened attentively and agreed to do whatever she asked of them.

Following the second visit, the social worker realised that she had been visiting the wrong address and should have been visiting 15 Summer Avenue. On realising the error, she attended a third time at 15 Summer Street, this time with her team manager, and they informed the parents of the mistake. They advised the parents of their right to make a formal complaint. The involvement by children's services had interfered with this family's Article 8 rights and the parents would have been entitled to raise a valid complaint for this breach. The parents were asked why

they had not questioned the social worker at the initial and subsequent visits. The parents responded that from the time the social worker first arrived at their house, they were fearful that their children could be taken into care. For that reason, they felt that they had no choice but to fully co-operate. The parents were relieved that children's services would be ending its involvement with their family. They further stated that they would not be making any complaint as this would prolong involvement with children's services.

The parents' reaction is not surprising; they felt powerless when the social worker's investigation commenced. Understandably, they were extremely grateful when the social worker and team manager were ready to leave, after receiving confirmation that the case file would be closed with no further action.

Before closing such a case, it is good practice that the local authority should inform and agree with the parents what, if any, records will be retained by children's services, and provide written details of the parents' right to make a complaint.

2.2 Conflict of rights: children v parents

As detailed above, both children and adults have the right to the protection of their human rights. What if there is a conflict between the child's rights and the parents' rights? Whose rights take precedence? The ECHR has clearly established that where there is conflict, the child's best interests will prevail. The ECHR in *Johansen v Norway*¹² held that, in carrying out this balancing exercise:¹³

*The court will attach particular importance to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular the parent cannot be entitled under Article 8 of the ECHR to have such measures taken as would harm the child's health and development.*¹⁴

12 *Johansen v Norway* [1997] 23 EHRR 3

13 *Johansen v Norway* [1997] 23 EHRR 33, para 78

14 *Johansen v Norway* [1996] 23 EHRR 33, para 78

In a subsequent decision in *Yousef v Netherlands*,¹⁵ the ECHR reiterated:

*...that in judicial decisions where the rights under Article 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail.*¹⁶

The *Yousef* case followed the approach taken in the earlier ECHR case of *Johansen v Norway*.¹⁷

A similar approach was taken in a later ECHR case of *Gurgulu v Germany*.¹⁸ In this case, a father discovered the existence of his child three months after the child's birth; at four days old, the child had been placed with prospective adopters. The father sought for the child to be placed in his care but was unsuccessful, on the basis of the child having established a relationship with the prospective adopters, which it would not be in the child's best interests to sever. The father did, however, establish a violation of his Article 8 rights before the ECHR which applied the *Johansen* test, on the basis that the domestic courts had not sufficiently explored all possible solutions to the problem:

*Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents.*¹⁹

2.3 United Nations Convention on the Rights of the Child

An important international human rights treaty in relation to children's rights is the United Nations Convention on the Rights of the Child (UNCRC). Adopted by the United Nations on 20 November 1989 and ratified by the UK Government in

15 *Yousef v Netherlands* (Application no. 33711/96) 2002

16 *Yousef v Netherlands* (Application no. 33711/96) 2002, para 73

17 *Johansen v Norway* [1996] 23 EHRR 33

18 *Gurgulu v Germany* [2004] 1 FLR 894

19 *Gurgulu v Germany* [2004] 1 FLR 894, para 43

December 1991, it requires the UK Government to make laws, policies and practice fully compatible with this Convention.

The Convention has 54 articles, covering all aspects of a child's life, including their civil, political, economic, social and cultural rights. The Convention is to be considered as a whole, with no individual right more important or influential than another, and all being interrelated. All the rights in the Convention apply equally to all children (Article 2), and the best interests of the child shall be a primary consideration in all actions concerning children (Article 3).

3 Domestic law

3.1 Children Act 1989

The Children Act 1989 was drafted to be consistent with the UNCRC. It created a single coherent legal framework encompassing all previously existing welfare legislation pertaining to children (with the exception of criminal legislation) into one piece of legislation dealing with both private and public law proceedings. At the time of its passing, it was considered progressive and radical, as not only did it produce an umbrella enactment providing a comprehensive and consistent legal framework in child law, but it also introduced a fundamental change of approach by the courts and professionals involved in children's cases.

When the Bill was introduced to Parliament, Lord Mackay described it as:

...the most comprehensive and far reaching reform of child law which has come before Parliament in living memory.²⁰

The legislation's main aims were the subject of parliamentary discussions before its enactment, and clarified as such:

The Children Bill has two main aims. The first is to gather together in one place...one coherent whole, all the law relating to care and upbringing of children and the provision of social services for them. The second is to provide a consistent set of legal remedies which will be available

20 HL Deb 06 December 1988 vol 502 cc487-540

*in all courts and in all proceedings. Such simple aims should not be as revolutionary as, in fact, they are.*²¹

Even today, the Children Act 1989 remains the most important piece of legislation concerning children's welfare. Any relevant changes introduced in subsequent legislation are incorporated into this Act, thereby making it relevant and current to today's children and families.

The Children Act celebrated 30 years of its existence on 12 April 2019. Sir Andrew McFarlane, President of the Family Division, in his speech at the Nicolas Wall Memorial Lecture, stated:

*The Children Act was groundbreaking to a very high level...it changed the work of children law and it has...stood the test of time...The architects of the legislation, and its draftsman, simply got it right...and [it] continues to be to the great benefit of the children and young people whose needs it was aimed to meet.*²²

The Act aims to promote and safeguard the welfare of children, enabling them to be brought up within their family wherever possible. It starts from the premise that the best place for a child is with their family:

The 1989 Act rests on the belief that children are generally best looked after within the family with both parents playing a full part and without resort to legal proceedings. That belief is reflected in the new concept of parental responsibility...the local authority's duty to give support for children and their families...the local authority's duty to return a child looked after by them to his family unless this is against his interests.

(Department of Health, 1989, p 1, para 1.4)

This principle of maintaining the child within the family is also enshrined in Article 7 of the UNCRC, and the local authority's duty to safeguard and promote children's welfare set out in s.17 of the Children Act 1989. However, this principle needs to be balanced with the child's right for protection from abuse and neglect.

21 HC Deb 26 October 1989 vol 158 cc1074-118

22 The lecture was presented on 9 May 2019.

Therefore, the success of any child protection system requires it to be child-centred, recognising parents' rights and acknowledging that children also have rights.

3.2 Recognition of children's rights

Children's rights is not a new concept, and in fact can be traced from the late 1700s and has been developing since the 1800s. The Victorians passed a number of laws protecting children's well-being at work, school and in the home. However, these reforms must be understood alongside the Victorian view of children's rights, which was defined in relation to their future role as citizens. This period adopted a paternalistic approach, seeing the child as the property of the father, with the father taking the responsibility of making all decisions for his child. Prince Albert (Queen Victoria's husband) reflected this view when he argued that the working man's children were 'part of his productive power', an indispensable source of family income (Horn, 1997a, 1997b).

Moving on from the Victorian era, there began an encouraging progression and gradual shift from parental rights to acknowledging the need to safeguard children's welfare. This then progressed to recognising that children's legal rights are separate to those of their parents, with a need to treat children as individuals rather than to categorise them as a collective and undifferentiated class (Freeman, 2007). This progression led to an advancement of the protection of children, resulting in the introduction of legislation relating to children's education and welfare. This was further supported with the creation of national children's charities such as Barnardo's in 1867 and the NSPCC in 1884, whose aim was to protect children. Implementation of legislation also assisted to further this transformation, such as the enactment of the Prevention of Cruelty to, and Protection of, Children Act 1889, which for the first time enabled the State to intervene in the prevention of cruelty to children.

Fast forwarding to the implementation of the Children Act 1989, this further enhanced the concept of children's rights by shifting the focus away from parental rights to the recognition of parental responsibility, acknowledging that children are not their parents' property or to be protected only by charities. The

Children Act 1989 supported children's rights by introducing key principles, the first recognises that the child's welfare is of paramount importance in all decisions and introduces the "welfare checklist",²³ a list of factors to be considered in determining the child's best interests. Whenever the court has to consider any question in relation to the upbringing of a child, the court will apply the welfare checklist as set out in s.1(3) of the Children Act 1989:

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.*

The checklist does not detail race, religion, language or culture, and if these factors relating to the child need to be highlighted, then they can be referred to in the welfare checklist under paragraph (d).

To assist the court in considering what is in the child's best interests, statements or reports provided to the court by social workers or children's guardians when dealing with matters concerning the child's welfare must include the welfare checklist in relation to each child.

23 S.1(3) Children Act 1989

The Children Act 1989 also introduced the concept of parental responsibility,²⁴ reflecting the then Parliament's view that parenthood was a matter of responsibility and not just rights. Lord Laming recognised that parenthood is a lifetime commitment (2010, p 7); however, legal rights over one's child are not.

At the same time as the Children Act 1989 was being shaped in the late 1980s, there were developments in the recognition of the rights-based approach to children, which influenced the drafting of the Act. The key areas were:

- the development of human rights issues;
- the Cleveland Report (Butler-Sloss, 1988), which examined the inappropriate handling by professionals of the removal of a large number of children from their homes in Cleveland in 1987, without sufficient evidence to support that they were at risk of or had suffered sexual abuse; and
- the Gillick Case,²⁵ which established that a child who has capacity and maturity can consent to medical decisions without parental permission or even knowledge. It also firmly recognised the child or young person's right to make decisions about themselves, in accordance with their evolving capacity of understanding.

Each of these points, in their own way, created a wave of change leading to a marked transition from a paternalistic approach to recognising the child as a separate legal entity with rights similar to adult rights, and children not simply being regarded as "objects of concern" (Butler-Sloss, 1988). The Children Act 1989 did not eradicate the concept of parental rights but achieved a fine balance with recognition of the evolving rights of children. This was an important shift as it resulted in improvement of the treatment of children (Ferguson, 2013, p 188) and signalled that children deserve equal respect (p 184). The Children Act 1989 achieved this by being child-centred and focusing on children's needs. It recognised that children, like adults, should also have a voice with a right to express themselves and if unable or too young to do so directly, that their best interests need to be represented.

24 S.2 Children Act 1989

25 *Gillick v West Norfolk & Wisbeck Area Health Authority* [1986] AC 112 House of Lords

At the time of its implementation in October 1991, the Children Act 1989 introduced a number of other key fundamental principles that run like a golden thread through the whole of the Act and apply to both private and public law children proceedings, which are explored in the next section.

3.3 Key principles of the Children Act 1989

Paramountcy principle

As discussed, the Act introduced a balance between the parents' rights to exercise their legal responsibilities (known as parental responsibility) towards their children, alongside the State's (that is, the local authority's) duty to intervene where the child's welfare requires protection. Section 1(1) of the Act states that the child's welfare must take precedence, and in any proceedings it is the court's paramount consideration when making any decision in relation to the child's care and upbringing.²⁶ This welfare test was not new to the Children Act and first appeared in s.1 of the Guardianship of Infants Act 1925, which stated that:

Where any proceedings before any court...the custody or upbringing of an infant...[is] in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration.

Despite the passage of years, it is good to note that the thinking and language remain the same.

Therefore, before making its final decision, the court will also take into account other factors as set out in the Welfare Checklist,²⁷ and if there is a conflict between these considerations, then the child's welfare will overrule any other principle.²⁸

If there are adoption proceedings, then this principle is extended under s.1(2) of the Adoption and Children Act 2002, which requires the court and adoption agencies to consider the child's welfare throughout their life.

26 S.1(1) Children Act 1989

27 S.1(3) Children Act 1989

28 S.1(1) Children Act 1989

The least interventionist approach

The local authority and the courts should operate on the least interventionist approach. This principle is based on the belief that children are generally best looked after within their own home and by their family, with least recourse to legal proceedings. For this reason, as highlighted earlier, the local authority's first duty is to provide support and services to maintain the child within the family or the wider family network, whilst at the same time ensuring that the child's welfare is protected.

This principle was firmly established in the Children Act 1989 with the No Order Principle, and further developed in the Children Act 2004 and the then Government's Every Child Matters agenda, which emphasised the need for early intervention in the lives of vulnerable children. This was to be achieved by identifying and providing effective support to parents to prevent the child's needs from escalating and thereby the child being at risk of poor outcomes.

If intervention is required that results in the removal of a child from their family, the local authority must firstly attempt all steps to return the child to their family as early as possible unless it is not reasonable to do so and is against the child's interests (HM Government, 2015, p 13 para 1.5). If it is not possible to return the child to their birth parents, the local authority must make every effort to consider placement within the extended family or persons connected to the family.

The No Order Principle

In court, the principle of the least interventionist approach is applied by having regard to the "No Order Principle", as set out in s.1(5) of the Children Act:

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.

This means that the court will only make an order if it is satisfied that doing so is better for the child than making no order. If an order is necessary, the court will

make the least interventionist or lesser order that meets the child's welfare, with the court having available to it the full range of orders within the Children Act.

The No Order Principle applies in both private and public law proceedings; for example, if the parents on their separation have made their own arrangements in relation to where the children are to live and when the children are to have contact with the non-resident parent. There will then be no need to make a child arrangements order, unless deemed necessary to give security to the arrangements.

The No Delay Principle

The court, when dealing with children's proceedings, will have regard to the "No Delay Principle". This means that delay in determining a question with respect to the upbringing of a child is considered likely to prejudice their welfare. Therefore, delay will not be acceptable to the court unless it is justifiable. This is strictly applied by the courts in care proceedings where a statutory time limit of 26 weeks was introduced by the Children and Families Act 2014.

Delay and drift in planning for a child, without justification, should always be avoided, even if there are no court proceedings. Delayed decisions in respect of intervention can result in children experiencing the cumulative jeopardy of lengthy exposure to abuse and neglect; disruption of attachments with temporary carers; unstable placements at home or in care; and children experiencing prolonged uncertainty about their future (Brown and Ward, 2012, p 72). Professor Eileen Munro recognised that drift and delay in making forthcoming plans for children have serious adverse effects on their development (2010, p 18, para 1.31). Even what may be considered as a short period of delay by adults can be perceived as an enormous period of time in a child's life. This was recognised by District Judge Crichton, who stated that: 'Two months of delay in making decisions in the best interest of a child or young person equates to one per cent of childhood that cannot be restored'.²⁹

29 Judge Crichton (1 July 2010), Family Drug and Alcohol Court, London, *Munro Review of Child Protection Final Report*, May 2011

Principle of partnership

Although not explicitly referenced in the Children Act 1989, there is an expectation for children's services professionals to work in partnership with parents and carers in order to develop positive and open relationships.

What this means in practice is that, if the child is subject to an interim care order or a care order, the local authority shares parental responsibility with the parent/s who have parental responsibility. As they share this, the local authority must consult with those parents to seek their representations before making a decision in respect of the child. If there is conflict and the local authority is not in agreement with those who have parental responsibility, then the local authority should clearly communicate the reasons for its decision and why it is considered to be in the child's best interests.

When a child is subject to a care order, the local authority has the power to determine the extent to which a person with parental responsibility can exercise it (s.33(3)(b) Children Act 1989).

It is important to note that partnership with parents does not remove the local authority's overriding duty to safeguard and promote the child's welfare.

3.4 Interplay between the Children Act 1989 and human rights obligations

There is a great interplay between the Children Act 1989 and the International Conventions. The Human Rights Act 1998 protects individual rights as set out in the ECHR, and the UNCRC sets out the minimum standards of treatment towards children.

The interconnection between the Children Act 1989 and human rights issues is often raised in court proceedings. It was demonstrated in the leading Supreme Court case of *Re B (A Child)*,³⁰ which highlighted the relationship between the need to consider the child's welfare in accordance with the Children Act 1989 and the parties' Article 8 rights. This case concerned a child, A, aged three. In the care

³⁰ *Re B (A Child) (Care Order)* [2013] UKSC 33

proceedings, the care plan for A presented to the court was adoption. The Judge clarified that a care plan for adoption should only be considered if there were no other realistic options.

The local authority must fully explore all available options for the child to remain in the family or friends network, even with support. This would enable the child to be raised within the family or wider family whilst protecting the child's Article 8 rights and equally ensuring that their welfare was protected. By granting the care order in respect of A, the Judge was interfering with the child's and parents' family life. Therefore, it is important that all realistic options have been fully explored and ruled out, and the adoption plan must be of "last resort".³¹

3.5 The Equality Act 2010

The Equality Act 2010 replaced previous anti-discrimination legislation, recognising the nine categories of protected characteristics: age, disability, gender assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. It places a statutory responsibility on local authorities to not only eliminate discrimination but also to promote equality and foster good relations. Social workers will already be familiar with anti-discriminatory practice from their academic studies. Social care professionals must have due regard to their statutory duty when working with children and families. They must ensure that no child or family is treated less favourably than others and that the child and the family are supported to fairly access available services and support, if a need is identified.

3.6 Statutory guidance

In addition to legislation, local authorities must also adhere to statutory guidance; a good example is *Working Together to Safeguard Children* (HM Government, 2018) (see below). Professionals must follow this unless there are sound local reasons to depart from it. Statutory guidance is often issued to support the understanding of new legislation.

³¹ *Re B (A Child) (Care Order)* [2013] UKSC 33, para 77

The legal status of statutory guidance is unusual, in that it is produced by the executive and not the legislator. If it is issued under s.7 of the Local Authority Social Services Act 1970, the guidance has the equivalent status as if it had been passed by Parliament:

Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.

One of the core documents for multi-agency professionals is *Working Together to Safeguard Children* (HM Government, 2018). This is statutory guidance issued by the Government to support inter-agency working. It sets out a single set of rules and a clear national framework of guidance, placing a shared responsibility, and the need for effective joint working between agencies and professionals, in order to safeguard and promote children's welfare in accordance with primary legislation, in particular the Children Acts of 1989 and 2004. It is an extremely useful document and often an important starting point to understand how agencies such as police, local authorities, education and health services should work together for the protection of children. When there are substantial changes in the law, the guidance will be revised to reflect this. The latest edition of *Working Together* was issued in July 2018, replacing the 2015 edition, reflecting changes brought about by the Children and Social Work Act 2017.

Therefore, any guidance issued under s.7 of the Local Authority Social Services Act 1970 has the force of law as if it has been passed by Parliament, requiring local authorities to comply with the guidance unless there are justifiable reasons to depart from it. If the statutory guidance is not followed without sound justification, then children's services may be open to challenge by way of complaint or even possibly legal action by way of Judicial Review proceedings.

Equally, if a local authority acts outside of its statutory powers, such action can also be challenged through the complaints process or with the commencement of Judicial Review proceedings. These are legal proceedings requiring a High Court Judge to examine whether the local authority's actions are "*ultra vires*", that is, whether the local authority has acted beyond its powers, unlawfully, or whether it has exercised its powers unreasonably. If such action is found, then the

local authority will be directed by the court to review or rectify the process, for instance, by undertaking a fresh assessment.

3.7 Case law

Implementation of the Children Act 1989 came into force on 1 October 1991. How does this piece of legislation stay relevant in today's society? There are two ways in which this is achieved: firstly, from amendments being incorporated into the Children Act by later legislation such as the Adoption and Children Act 2002, the Children and Families Act 2014, and, more recently, the Children and Social Work Act 2017; and secondly, through case law, with the interpretation of the law by senior Judges when cases are before them.

Statutes passed by Parliament need to be drafted in broad language to cover a wide range of circumstances. When a case comes before a Judge, reliance on a particular section due to the way it has been drafted may appear vague or not applicable. The Judge's role is not to change the law laid down by Parliament; rather, through the judicial process, they assist with the interpretation of the law. If this judgement is made by a higher court, the judgement in the case is referred to as case law, which will then be influential on the lower courts. So case law issued from the Court of Appeal or the Supreme Court will create a binding precedent and influential guidance for the lower courts to follow. This process assists with developing consistency in the law's meaning and its application across all the courts. It also assists with the law's application to today's society and families. For the legislation to be relevant, it cannot remain static and has to be dynamic, adapting to society's changing needs. An illustration of this point can be highlighted in the interpretation of s.8 of the Children Act 1989, which details the provisions of child arrangements orders and other orders with respect to children in private law proceedings. (Child arrangements orders were introduced by the Children and Families Act 2014 and replaced the previous residence and contact orders.)

Child arrangements order means an order regulating arrangements relating to any of the following—

(a) with whom a child is to live, spend time or otherwise have contact, and

(b) when a child is to live, spend time or otherwise have contact with any person

(s.8(1) Children Act 1989)

When the Children Act 1989 was being drafted, it was based on the general understanding that, on the separation of a couple, the child or children would be in the care of one parent, with contact arrangements made for the other non-resident parent. If this could not be agreed, the court could grant a residence order to the resident parent/carer with whom the child/children were to reside and a contact order to the non-resident parent/carer.

In today's society, families are very different from how they were presented in the late 1980s. Today, it can be regarded as perfectly acceptable for parents to have children and choose not to live together, but want to undertake the long-term care of the children on a shared or joint basis. Case law has enabled recognition of these new forms of family arrangements and has now firmly established that joint and/or shared child arrangements orders can be made where they are manageable and suitable to meet the child's needs.

Case study 3: The family shares the responsibility

I qualified as a solicitor in 1995 and commenced my career as a local authority solicitor in 1997, as what were then known as local authority social services solicitors. One of the first care proceedings I undertook was a case my manager described as straightforward, based on the case facts. However, in my experience I have come to accept that there is no such concept as an "easy" or "straightforward" case, as was clearly demonstrated in the following case.

The so-called straightforward facts of the case were that a mother had given birth to a baby, who was suffering from drug withdrawal symptoms. Once the baby was ready for discharge, the baby was taken into voluntary care with the mother's consent, she being the only person with parental responsibility.³² Both parents were long-term drug users; their addiction was funded by the mother

³² Under S.20 Children Act 1989.

who was described as working as an “active prostitute”. (To this day, I do not know what a “inactive prostitute” means, but in any event I understood the nature of the concerns.) Upon the baby’s birth, the local authority commenced care proceedings immediately thereafter. I came to know that this baby was in fact the mother’s sixth child. What I found interesting was that none of her previous five children had been taken into care by any other local authority where the parents had previously lived.

On further investigation by the local authority, it was discovered that the older five children were being cared for by extended family members as part of a private family arrangement that had not required any input from children’s services or legal orders. The family had formulated their unique long-term care plan for each of these five children. With each birth, the parents had handed the child over to the maternal grandmother who took care of the baby at her home until the child was ready to commence pre-school education. Thereafter, the child’s care and residence transferred to the maternal aunt’s care, where the child would remain until they were ready to transfer to secondary school. From then on, the child’s care and residence transferred back to the maternal grandmother’s care. This enabled the older children to assist the grandmother in caring for the younger pre-school children in the maternal grandmother’s home.

Every Sunday, all the children, including the maternal aunt’s own birth children, would get together for a family Sunday lunch at the maternal grandmother’s home. The parents were also invited but knew that they could only attend if they were not under the influence of drugs or alcohol. All the children understood their position in the family, were aware of their situation, and welcomed the contact that they had with their parents as and when this happened. The children were thriving, meeting their developmental milestones in the maternal grandmother’s and maternal aunt’s joint care.

So, when considering a care plan for this new baby, it was clear that this family had a working care plan; it was tried and tested, and it would be equally suitable for this baby. The family members and the parents fully supported the baby being placed with the siblings in the same way. Also, placing the child within the wider family would mean that both the family’s and the child’s Article 8 rights were being respected.

Special guardianship orders had not yet been legally introduced at this time and so, at the final hearing, the local authority recommended a joint residence order (which would now be deemed to be a child arrangements order) so that both the maternal grandmother and aunt could share parental responsibility with the parents. A joint order was the preferred option as it enabled the maternal grandmother and aunt to share joint care of the child at different stages of the child's development.

If the same case facts were presented today, a special guardianship order to both the maternal grandmother and aunt could also have been an option. The special guardianship order does not specify where the child is to live and so the child could change residence as and when the carers deemed this necessary. The special guardianship order would only have been a preferred option if the maternal grandmother and aunt required the need to exercise parental responsibility to the exclusion of the parents. This was not required in this case as the parents were in complete agreement and were not attempting to exercise their parental responsibility over and above the maternal aunt or grandmother. Therefore, in accordance with the least interventionist approach, a child arrangements order could still be considered a suitable order.
