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Making timely decisions for children: balancing differing needs in families

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Introduction

In Northern Ireland the number of children looked after by Health and Social Care (HSC) Trusts is currently at its highest since The Children (Northern Ireland) Order 1995 commenced on 1st October 1996. Between 1st April 2011 and 31st March 2014 the number of children looked after has increased sharply by 14% to 2,858. While the majority of looked after children in Northern Ireland have been looked after for less than three years, a tenth have been looked after for ten years or longer. While there was a 9% decrease in the numbers of children being admitted to care during 2013-14, the number of discharges from care (798) were still less than the number of admissions (910) (Department of Health, Social Services and Public Safety, 2014a).

The reasons for this significant increase in the numbers of children becoming looked after are not well understood. Based on the wider child welfare research literature, it is likely to be linked to:

- the current severe economic recession leading to greater poverty and financial strain on families;
- increasing numbers of applications for public law orders after a series of high profile child deaths from neglect and abuse across the UK; and,

- recent legal judgments clarifying the responsibilities of HSC Trusts for young people aged 16yrs and 17yrs who are homeless

The increasing numbers of children in public care has placed a significant strain on the various legal and care systems that have a role in determining whether children should be looked after by the State, and what happens to them when they do enter State care. Whilst children become looked after for a variety of reasons, the majority are admitted to care due to a complex interplay of vulnerabilities arising from their needs and their parents' ability to meet these needs (Coman and Devaney, 2011). The looked after system therefore must seek to promote children's sense of safety, stability and identity, and while these three needs are core, the system must try to find a balance that discharges agency responsibilities to the individual child whilst also meeting the needs of other children within finite resources. In spite of this significant increase of admissions to care it is estimated that between 2010-13 the level of expenditure on children's social care has decreased by 7% in Northern Ireland (Jütteet *al.*, 2014).

In both England and Northern Ireland there appears to be a policy consensus that early authoritative intervention is required with families in order to ensure vulnerable children do not remain too long in neglectful situations. Recent legislation in England such as the Children and Families Act, 2014 contains timescales for court proceedings alongside support for speeding up adoption processes. These developments are clearly aimed at ensuring the welfare of children is protected, but they do potentially contain implications for their parents and wider family networks, especially in a context of resource constraints. Drawing upon empirical and theoretical research this briefing paper will explore the balance to be sought in making timely decisions for children alongside providing the opportunities for parents and other family members to demonstrate how they can meet children's needs. In doing so, the authors will identify key considerations for policy makers in Northern Ireland in developing the forthcoming Adoption and Children Bill.

Strains on the Looked After System for Children in Care

Researchers in Northern Ireland have identified two parts of the looked after system that are not operating as intended. Firstly, there has been an increasing recognition that some children are entering the care system at an advanced age, often after many years of intervention aimed at maintaining them with their birth families whilst attempting to effect improvements in their family situation (Kilpatrick *et al.*, 2008; Sinclair and Geraghty, 2008). When this improvement has not happened the children have been received into care, often after having endured considerable adversity with both immediate and longer term consequences for many (Davidson, Devaney and Spratt, 2010). The reasons for these late admissions have been explored and there appears to be a desire on the part of child welfare professionals to give parents the opportunity to address the challenges

in their lives, balancing the child's need for safety and stability with their right to retain their identity with their birth family.

However, there is also evidence to highlight that social workers feel that the threshold of significant harm applied by the court for the granting of care orders is too high, especially for cases of chronic neglect, and that the legal process is too slow in reaching a decision about whether the State should assume parental responsibility for a child (McSherry, Iwaniec and Larkin, 2004). The case of R & T v Health and Social Care Trust (OHA9466) highlights the issues of a court system that is not working to meet the needs of children or the statutory duty imposed by The Children (Northern Ireland) Order 1995 to avoid delay. This case was originally brought before the Family Proceedings Court in late 2013, but was transferred to the Family Care Centre when it became evident that it would not be possible to find consecutive days to hear the evidence of the various witnesses. Unfortunately the pressure of work in the Family Care Centre, combined with other Crown Court and County Court hearings, meant that the hearing of this case was fragmented and protracted. The court made a determination on 4th August 2014, but the parents appealed this decision with the appeal being heard in November 2014. In addition the Appeal Judge, whilst acknowledging the work of the HSC Trust with the family, and the intransigence of the family in engaging with the support and assistance offered, criticised the Trust and the Guardian ad Litem:

“While the delay in court proceedings was not their fault, it is simply not good enough for statutory bodies to adopt a position and stick to it month after month, even after being encouraged by the trial judge to consider what more could or should be done. There are not many children's cases in which the point is reached at which a Trust can legitimately say that it is not going to make any further effort to keep the children, or at least some of the children, with the parents or at least one of the parents. And this was not such a case.”

The policy response has been to focus on whether earlier authoritative intervention might be better for some children through a greater focus on parent's *ability* to change, their *motivation* to make the necessary changes required for their children and the *durability* of any improvements (Forrester *et al.*, Early View; Department of Health, Social Services and Public Safety, 2014c). This approach though must be predicated on the availability of resources to support parents to make the required changes, and a commitment to longer term support for children and their families. This requires a fundamental reimagining of such long term support as an investment in children's futures, rather than the fostering of dependency by their parents (Davidson, Devaney and Spratt, 2010). The current economic climate makes this a challenge. There is also a belief that even in instances where there is little prospect of parents being able to achieve and sustain the required standard of care for their child, social workers feel that they must wait for a significant incident to occur before initiating legal proceedings due to the high thresholds it is believed that the courts apply.

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As noted in the aforementioned case example there have been concerns about the length of time it takes to conclude legal proceedings. The reasons for the delay in concluding proceedings have been rehearsed elsewhere (Department of Justice, 2011) but in summary focus on the workload of courts, the repeated use of interim orders, the number of parties and associated legal representation, the overuse of expert witnesses, and a perceived over involvement of judges and lawyers in the detail of care plans. The Department of Justice (2014) have recently proposed to pilot a model of the Tri-borough approach used in England in order to develop an evidence base on the causes of delay, foster good practice and determine how best to secure improvements in process as well as whether and where legislative reform may be needed. This is to be commended as the initial evaluation of the Tri-borough approach shows that more timely decisions for children were achieved in a greater number of cases than previously by a concerted effort from all the agencies involved (Beckett, Dickens and Bailey, 2014). However, they also note that the division of powers and responsibilities between professionals with distinct roles in the court process is a bedrock for protecting individual rights in liberal democratic societies (Dickens, Beckett and Bailey, 2014).

The second area that is ripe for reform is in the area of adoption. During the year ending 31st March 2014 eighty nine children were adopted from care in Northern Ireland, one more than in 2013. The average age of children at the time of adoption was 4 years 4 months, and from the last entry into care, the average length of time for a child to be adopted in 2013-14 was 2 years 11 months. This was 6 months shorter than in the previous year (Department of Health, Social Services and Public Safety, 2014b). Following a review of adoption services in 2002 (Social Services Inspectorate, 2002), aspects of The Adoption (Northern Ireland) Order 1987 were identified as being in need of amendment to fit with The Children (Northern Ireland) Order 1995 and various other pieces of legislation, alongside changes in societal attitudes and the needs of children and families involved in the adoptive process. In 2006 the Department of Health, Social Services and Public Safety published a draft strategy on adoption reform, with 21 recommendations, including that unmarried and same sex couples be allowed to adopt (Department of Health, Social Services and Public Safety, 2006). This single issue resulted in disquiet from some sections of the community, resulting in an impasse in adoption reform that has also seen the Minister for Health, Social Services and Public Safety being judicially reviewed and losing. The net result is that many developments in adoption and the wider child welfare system, such as Special Guardianship, are not available to children in Northern Ireland. As Wade and colleagues (2014) have highlighted, Special Guardianship has many benefits for children in State care, and offers an alternative and very appropriate alternative route to permanence for some children. They also note, however, the importance of it not being used to achieve permanence for children 'on the cheap'.

Some policy developments in England

Two linked policy developments in England concern:

- Reforming the family courts in England in order to speed up the court process;
- Increasing the numbers of children being adopted from care

Time limits

The length of time taken and the cost of care proceedings have been the subject of concern for some years. Under the Labour government the Public Law Outline (PLO) was introduced in April 2008 as a way forward in the management of care proceedings. This aimed to reduce the number of cases coming to court by the greater use of pre-proceedings assessments of parents and family members and, indeed, the number of care proceedings decreased dramatically in the immediate aftermath of the introduction of the PLO. However, following the death in 2008 of Peter Connolly, the numbers of care proceedings rose again and have continued to rise in the intervening period.

In 2010 a review of the family justice system was established and the recommendations became the basis of the Children and Families Act 2014. Some of the key changes brought in by this legislation included:

- Introducing a time limit of 26 weeks when courts are considering whether a child should be taken into care for all except 'exceptional cases'
- Promoting 'fostering for adoption' so that children are placed sooner with the families that are able to adopt them
- Limiting the use of expert evidence to that which is necessary to assist the court to resolve proceedings justly
- Restricting judicial oversight of the care plan for the child

This legislation was the subject to considerable debate throughout its passage through Parliament. The imposition of what appeared to be an arbitrary time limit of 26 weeks was contested in terms of whether it would promote better child outcomes especially in the context of financial austerity and cuts to a range of family support provision and the implications it might have for family members coming forward as carers. There were also concerns about the compatibility of 'fostering for adoption' with human rights legislation. Moreover, it was argued that the underlying causes of delay were due to court and local authority resources and these were not being addressed.

Adoption

Adoption has in the last decades been put forward as a solution to poor outcomes and abuse in care amid concerns that it was not being pursued because of 'politically correct' attitudes towards prospective adopters

based on age, obesity and ethnicity (Kirton, 2013). US reforms in the 1990s to radically increase adoption from care by setting strict time limits on reunification with birth families and proscribing any consideration of ethnicity were to prove very influential with the then Labour government in the UK. Prime Minister Blair signalled a clear desire to promote adoption and the Adoption and Children Act 2002 gave this aspiration legislative expression. There was a rise in the numbers initially with numbers peaking in 2005 at 3,800 (twice the number in the mid-1990s). But numbers then fell in 2011 and the Coalition government, by then in power, took a very determined and proactive stance to increase numbers again. The initiatives have included the establishment of an Adoption Leadership Board and ring fenced funding to support recruitment and post adoption placement support. The performance of local authorities has been monitored through the publication of score cards.

The current landscape: confusion and uncertainty

A number of key judicial judgments have opened up debate about what is happening particularly in relation to adoption. In *Re B (Care Proceedings: Appeal)* (2013) UKSC 33 2013 2FLR 1075 Lady Hale commented that adoption should be the solution only when 'nothing else will do' (para. 198). This was then picked up by Sir James Munby in the Court of Appeal in *Re B-S (Adoption: Application of s 47 (5))* 2013 EWCA Civ 1146 2014 1 FLR 1035). This judgment has had a significant impact and it is worth exploring its key themes (see also Gupta and Lloyd-Jones, 2014).

The case leading to the judgment was about a mother's application for leave to oppose the making of adoption orders in relation to her two children. While her application was refused, paragraphs 15-49 consider general issues about practice and decision making in care and adoption proceedings. It is restated that the aim of statutory intervention should be to reunite children with their families if possible and effort should be devoted to this end. Courts need to take the least interventionist approach and a judgment from the European Court of Human Rights (*YC v United Kingdom* (2012) 55 EHRR, 967) is quoted: ' family ties may only severed in very exceptional circumstances and...everything must be done to preserve personal relations and, where appropriate to "rebuild" the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing'(para. 134). Justice Munby also expressed concern about the analysis and reasoning provided in support of a plan for adoption in some of the cases coming before the courts. He called for global holistic evaluations that involve an evaluation of the positives and negatives of each option, and then a comparison with all competing options including an acknowledgment of the 'draconian nature' of the permanent separation of a child from her birth family. It is important to note that he supports the 26 weeks time limit so his call for better assessments should not be read as a critique of the impact of time limits on the

quality of assessments. He also argued that a stringent and demanding test be applied before parental consent is dispensed with in cases of adoption.

The concerns raised by Justice Munby chimed with those of others. Dale (2013) had, for some time, been raising concerns about the high numbers of non-consensual adoptions (adoption without the consent of birth parents, also known as 'forced adoptions') and, indeed, The Council of Europe has also recently reported its concerns about how out of line England (and indeed Wales) are with the rest of Europe in their use of non-consensual adoption (Committee of Social Affairs, Health and Sustainable Development, 2015). Featherstone, White and Morris (2014) expressed concerns about the high number of care proceedings and removals given the research evidence of a link between deprivation and the likelihood of being removed and the austerity measures which were impacting upon the formal and informal supports that act as buffers for families in adverse circumstances (see also Gupta and Lloyd-Jones, 2014).

The significant reduction in numbers of placement orders made and the number of decisions made by local authorities to pursue care plans for adoption in 2014 has been in part attributed to Re B and Re B-S, and the situation has been considered so serious that the Adoption Leadership Board were obliged to issue a special briefing paper on the issues in November 2014 which included a guide to clarify the meaning of the key court judgments. It is too early as yet to assess what the impact of this guide might be but anecdotal evidence suggests that the reduction in numbers of plans for adoption is continuing.

Conclusion

There is both a moral and a legal duty on the State to intervene when children's needs are significantly compromised. However, this duty and associated powers must be exercised in ways which promote family life and children's safety, stability and identity. Some of the judicial decisions in England recently would suggest that the recommendations being made to the courts are not adequately focused on the need to promote family life and concerns among the judiciary about the quality of local authority assessments and reasoning.

In Northern Ireland, there are concerns that more timely decisions are needed in order that children's needs may best be met and calls for earlier support for families before difficulties become entrenched. For those children requiring alternative care, there continue to be discussion about how delays in the court process can be minimised, and how permanence for children can be achieved. It is important that the calls for reform of the family justice system in Northern Ireland draw upon the experiences from elsewhere, including England, and include consideration of the appropriate role of adoption.

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