GALLAGHER BASSETT

IICSA: AN ANALYSIS OF RECOMMENDATION 6 OF THE FINAL REPORT FROM THE INDEPENDENT INQUIRY INTO CHILD SEXUAL ABUSE - TO AMEND THE CHILDREN ACT OR NOT TO?

We are opening the new year with a continuation of our series of blogs exploring the final report of the Independent Inquiry into Child Sexual Abuse and the impact of their recommendations made in October 2020. In this article, **Kate Prestidge, Senior Solicitor at GB Speciality**, considers one of the Inquiry's key recommendations, which has thus far received relatively little attention in media publications despite having fairly significant ramifications for the public sector and Family courts in England and Wales.

Recommendation 6 - Ammendant to the Children Act 1989

The Inquiry's 6th recommendation, as stipulated in their final report, is that the Children Act 1989 (the Children Act) is amended to enable Family courts to make decisions about children who are in the care of the local authority. The Children Act is the legislative framework for the current child protection legislation in England and Wales and enshrines the doctrine that the welfare of the child is the Court's paramount consideration.

The Inquiry's proposed amendment would permit children in care to apply to the family courts for an order either mandating or limiting a local authority's exercise of its parental responsibility.

In approving any such application that came before it, the court must be satisfied that there was **reasonable cause** to believe the child was either (i) experiencing or (ii) at risk of experiencing significant harm. If the court considered the **significant harm** test was met, the proposed amendment would allow the court to either:

(i) Prohibit a local authority from taking any steps it would otherwise be entitled to take in exercising its parental responsibility for the child.

(ii) Give directions for determining a specific question that has arisen (or may arise) in connection with any aspect of the local authority's exercise of parental responsibility for the child.

Current Ways in Which a Child in Care Can Challenge a Local Authority's Actions

The proposed amendment does not create an entirely new forum by which a child in care can challenge decisions made by a local authority. However, the currently available options (as follows) are rarely utilised.

- A request can be made for the court to discharge a Care Order – in practice, such an application is likely to have limited success because many children in care will have no alternative carer.

- An application can be made under the Human Rights Act 1998 seeking an injunction for declaratory relief or damages – in such applications, the child will be represented by an adult acting as their litigation friend (often the official solicitor).

- A Judicial Review of the Local Authority decision can be sought – this is rarely utilised by children, and the evidential threshold is high, with the child needing to show that the local authority acted in a way that was illegal, irrational, or procedurally improper.

Rationale for the Inquiry's Recommended Amendment to the Children Act 1989

As part of the Inquiry's extensive remit, they investigated child sexual abuse within several local authorities, including Nottinghamshire and Lambeth Councils. Unsurprisingly, the Inquiry found that children in care were particularly vulnerable to sexual abuse and exploitation, with many finding it difficult to disclose the abuse they had suffered or to receive the help they needed. Despite these findings, those in care are in a different legal position to those who are not because decisions are made on their behalf by the local authority, which acts as their 'corporate parent'. In doing so, it organises their placements and determines who their carers are. With particular reference to children and young people who live in residential care, the Inquiry considered that they might feel they have little control over certain aspects of their lives (by virtue of the local authority making decisions on their behalf). While courts can make orders under S8 Children Act 1989 (child arrangements order, specific issue order, or prohibited steps order) to limit or mandate how a parent exercises their parental responsibility, a court has no such ability in respect of a child in care. This is an issue that has been raised by several senior judges in family courts. These judges have raised concerns about their limited ability to be able to intervene in protecting some of society's most vulnerable children from violation of their human rights or rights conferred on them by domestic law *[Re S (Minors) (Care Order: Implementation of Care Plan) 2002].*

As such, the Inquiry's rationale for this recommendation is that the legal position for children in care should be aligned with those not in care to enable them to challenge aspects of local authority decision-making for themselves.

Is There a Need for Change?

The intention of this recommendation is clear: placing a Looked after child into the same legal position as a child who is not in care. However, it is right to question whether the amendment to current legislation is necessary. In accordance with S22(4) Children Act 1989, a local authority must obtain the wishes and feelings of a child before making any decisions regarding their proposed care. The local authority is also required to make provision of advocacy services for all children and young people who are in receipt of social care services and wish to make a complaint under S26 Children Act 1989.
In addition to the requirements under the Children Act, Ofsted conducts an annual children's social care survey to obtain the views (including any concerns) of children in care. Additional research and surveys are also undertaken by the Children's Commissioner for England and Wales.

There is also the facility for children to submit a complaint about their care under the Local Authority Services Act 1970 to the Children's Commissioner or the Local Government Ombudsman.
The Inquiry's view is that while the above methods provide avenues through which children in care can complain, none of these services changes the legal position of the child in care in the way the proposed amendment would.

Commentary

The proposed recommendation would allow Looked after children to submit applications pursuant to the Children Act 1989, requesting that the court determines their application and gives paramount consideration to the child's welfare. The 'significant harm' threshold would need to be met for the court to intervene in making an Order. Still, the proposed remit for this test is wide: it would include any harm experienced by the child while they are a Looked after child (including third-party harm suffered whilst a Looked after child, such as child sexual exploitation). The Inquiry has also proposed that the burden of proof upon the child is not unduly high, and it should be sufficient for the child to satisfy the court that there is reasonable cause to believe the child might experience harm based on their own account of events.

The powers that are proposed are extended to the court by virtue of this amendment are also wide and include the court having the ability to create alternative care plans, to prohibit a course of action, and to direct a local authority to take steps that the court deems to be in the best interests of the child.

The Inquiry's desire to place Looked after children in parallel with children who are not within the care system is understandable. However, given the plethora of recommendations that have arisen from the Inquiry, it seems right to question whether this proposal is necessary and will achieve what is intended. As outlined above, many options are already available to Looked after children who want to challenge the decisions their responsible local authority made. While the proposed amendment to the Children Act 1989 would streamline those current options, there is concern that the amendment would also prove hugely inhibiting to both children's social services departments and family courts. The amendment would essentially create a newly formed supervisory function exercised by family courts, which invariably carries the risk of courts becoming overwhelmed with the number of applications before them. The care plans for Looked after children are regularly reviewed and updated, and it seems there would be nothing in the proposed amendment which prevents challenges from being advanced at almost every stage of the care planning process. This, in turn, is likely to cause cases to 'drift', both in the sense of progress through children's social services as well as through family courts.

It is important to remember that Parliament entrusted the responsibility of looking after children who are subject to care orders upon local authorities, and it was never the intention for this responsibility to be borne by courts. Although there are obvious advantages to a court presiding over matters, most notably that they can hear all sides of the issue(s) in dispute, the court does not have a close, personal, and ongoing relationship with the child in the way that the local authority does. Neither does the court have the level of knowledge regarding the child that the local authority social workers will hold. There must be a real concern that, if implemented, this recommendation will steer resources away from proactive children's social services work and towards reactive engagement. It is difficult to see how those children in the care system will benefit from such a shift.

Kate Prestidge Senior Solicitor
Gallagher Bassett Speciality

Kate_Prestidge@gbtpa.com 07858 372428
https://uk.linkedin.com/in/kate-prestidge-05332463