State powers and private rights in child protection and safeguarding assessments: the question of balance

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When families are referred to local authorities, the State has power to intervene into private family life to assess whether a child meets section 17 and/or 47 Children Act 1989 thresholds. In 2019/2020 (the latest available data) nine percent of families in England and Wales were referred. Thirty-seven percent did not reach the section 17 threshold, and 88 percent did not meet the section 47 threshold. This is concerning given the available prevalence estimates, suggesting that 25.3 percent of children in the UK may have been abused. A legitimate debate is merited to consider whether State processes of referral and assessment have struck the right balance. We argue that given the apparently high number of false positives and false negatives under the existing policy framework, it is possible that the State may be failing in its primary aim of protecting sufficient abused children and risks potential harm to non-abusive families who are caught in the 'glare' of referral and assessment. We conclude by considering whether the balance between State power and private rights should be re-balanced to more clearly separate section 17 support from section 47 protection, as originally intended in the Children Act 1989.

Keywords: Family law – family rights – child protection – remedies – State power

This article is concerned with the question of balance in relation to State powers and private rights in child protection and safeguarding referrals and assessments. The legal and policy framework sets out an expectation that suitable families will be referred and selected for rationed early intervention provision, and that such intervention should ameliorate family problems that could otherwise escalate into abuse.[1] Despite this expectation, the number of section 31 care order applications is steadily rising, suggesting the possibility that early intervention alone is not the panacea suggested in the early millennium in the Labour Government's *Every Child Matters* agenda.[2]

In this context, a legitimate consideration is whether there are features of the system, rather than simply the characteristics of those entering the system, causing the numbers to rise and whether the earliest stages of the system – referral and assessment – are sufficiently well balanced between the power of the State to intervene following a referral, and the rights of children and/or their families to refuse such interventions. A secondary question is whether these processes are benign, or whether they can cause harm, or exacerbate existing

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[1] Department for Education, *Working Together to Safeguard Children*, DFE-00195-201 (DfE, 2018).

[2] CAFCASS, *Care demand statistics*, available at: www.cafcass.gov.uk/leaflets-resources/organisational-material/care-and-private-law-demand-statistics/care-demand-statistics.aspx (last accessed 31 May 2022) and HM Government, *Every Child Matters*, Cm 5860 (2003).

problems. The trigger for this debate must be the dichotomy in the national data suggesting on the one hand that most referrals and assessments do not meet the threshold criteria, whereas on the other hand, abuse prevalence estimates suggest significant numbers of abused children are 'invisible' to the child protection system.[3]

The consideration concerns two categories of children and their families: those who *are* referred who do not require intervention, and those who are *not* referred who do. Both categories face risks: children who are not referred are at risk of abuse, and too little is known about the outcomes for children who are referred whilst not at risk of significant harm. There is a large body of literature concerning the first category of children,[4] but a dearth of large scale or reliable research concerning the second category. Although existing research is inadequate, it was considered sufficient to be included in the Government's 1995 research into the operation of sections 17 and 47 of the Children Act 1989; *Messages from Research* contains concerning reports that some children and their families who are referred and assessed suffered stress and anxiety sufficient to merit a revised approach.[5] Since the Munro Review, the pendulum has swung back to the position that gave rise to these concerns.[6] In developed child welfare systems, it would, we suggest, be irresponsible to ignore this potential unintended consequence, particularly as the Children Act 1989 explicitly separated consensual and non-consensual processes because it was recognised that unwarranted non-consensual interference into private family life could be damaging.[7]

In addition to the humanitarian issue of whether a proportion of the 88 percent of referred children and their families (who remain their caregivers) are harmed, the data also reveals the acute resourcing problem for social workers and local authorities where consistently high levels of referrals and assessments take place with stretched resources inadequate to deal with this apparent demand.[8] The problem is thus twofold: there are consequences for 'missing' abused children, and the less well understood question of the potential harm caused to 'non-abusing' families. There is no bespoke remedy for them, and neither the legislation nor the statutory guidance acknowledges or addresses the possibility of harm.[9]

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[3] See Devine and Parker, below n 14 and Cawson et al and Radford et al, below n 46.

[4] See, for example, public inquiries and serious case reviews such as Lord Laming, *The Victoria Climbié Inquiry Report*, HC 570 (2003), available at: www.publications.parliament.uk/pa/cm200203/cmselect/cmhealth/570/570.pdf; Lord Laming, *The Protection of Children in England: A Progress Report*, (HMSO, 2009); Staffordshire and Stoke-on-Trent Safeguarding Children Boards, *Lessons to be Learned Briefing No 16: In respect of the death of Daniel Pelka – Coventry, 2* (STSCB, 2013), available at: www.staffordbc.gov.uk/sites/default/files/cme/DocMan1/Corporate%20Business%20and%20Partnerships/Safeguarding/Serious--Case-Review---Daniel-Pelka.pdf, last accessed 31 May 2022; J Radford, Serious Case Review, Under Chapter VIII 'Working Together to Safeguard Children' In respect of the Death of a Child Case Number 14, 24/4/2010 (Birmingham Children Safeguarding Board, 2010)

[5] Gibbons et al, *Messages from Research* (HMSO, 1995).

[6] E Munro, Department for Education, *The Munro Review of Child Protection: Final Report, A Child Centred System*, Cm 8062 (2011), available at: www.official-documents.gov.uk/document/cm80/8062/8062.pdf and DfE, above n 1.

[7] Children Act 1989, s 17, Part III, and s 47, Part V.

[8] R Hood, A Goldacre, R Grant and R Jones, 'Exploring Demand and Provision in English Child Protection Services' (2016) 46(4) *The British Journal of Social Work* 923.

[9] L Devine, 'The adequacy of remedies in respect of unsubstantiated accusations of child abuse' [2017] CFLQ 43.

Over the 29 years since the Children Act 1989 came into force[10] the Government's annual Statistical Release data consistently reports that the majority of referred cases do not meet the threshold of 'reasonable suspicion' of 'significant harm or the risk of it', required to justify progression under section 47. [11] Regardless, all face a continuous assessment, designed to address questions of both risk and need.[12] This raises the question of whether many of the referrals are desirable, either for the increasingly over-stretched resources available or for the families concerned. Aside from the question of whether increased referrals and social work resource decisions to deal with them may be contributing to missed cases of serious abuse, there is a secondary question concerning the outcomes for families after child protection and safeguarding investigative processes have ceased in cases where no evidence of abuse is established. The desire to promote the welfare of children has arguably overridden an adequate level of concern about the impact on the whole family of unnecessary State intervention, hence the lack of substantive research into the outcomes for this group.

The national data is compelling. Over 600,000 families are affected each year. Around 31 percent of safeguarding and child protection assessments[13] following a referral do not yield sufficient evidence of abuse, risk or need to have merited the referral at all.[14] Eighty-eight percent do not yield evidence of abuse or the risk of it sufficient to meet a section 47 threshold.[15] In cases of need under section 17 of the Children Act 1989 a family is still assessed for evidence of significant harm and the risk of it, although this was not mandated in the Children Act 1989. The Act separated sections 17 and 47 into Parts III and V respectively to minimise unwarranted State intervention into private life. The conflation does not derive from the legislation itself, it is found in the evolution of the secondary legislation, *Working Together to Safeguard Children*, which mixes assessment for potential abuse, risk and need into a 'continuous assessment', thus rendering the precise boundaries between the categories and consensual status of all but those falling into a section 47 category virtually meaningless.[16] The previous position gave some protections for families under the provisions of a consensual screening Initial Assessment, lasting up to seven days. This point was upheld in administrative proceedings where a family successfully challenged the lawfulness of enquiries carried out before a family was aware of them, including repeating allegations to agencies and family members.[17]

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[10] In 1991.

[11] This criterion was established in 1995 by Gibbons et al, above n 5.

[12] DfE, above n 1.

[13] For the purposes of this article the use of the term 'assessment' is used in the context of a local authority social work process to decide whether a child is 'in need' pursuant to the terms of s 17 of the Children Act 1989 or 'at risk of or suffering significant harm' pursuant to the terms of s 47 of the Children Act 1989.

[14] L Devine and S Parker, 'Rethinking child protection strategy: learning from trends', Working Paper (Centre for Legal Research, 2015).

[15] Ibid, and Department for Education, *Characteristics of Children in Need*, SFR 52/2016, 3 November (DfE, 2016).

[16] DfE, above n 1.

[17] There is limited case law, suggesting that families have some redress against non-consensual processes, see: *R (AB and CD) v Haringey London Borough Council* [2013] EWHC 416 (Admin), [2014] 2 FLR 63.

The central point of discussion in this article refers to this post-2013 change, following which all families are assessed as if they do, rendering the vast majority in exactly the coercive processes that the Children Act 1989 sought to avoid. Since its enactment in 1991, the progressive lowering of the threshold has been a political decision at a sub-parliamentary scrutiny secondary legislation level. This change over time evidenced in successive versions of *Working Together to Safeguard Children*, coupled with the post-2013 increasingly coercive assessment for all referrals, has reduced the abuse detection ratio from 24 to nine percent. This statistic, whatever the reasons for it, merits consideration.

As *Working Together to Safeguard Children* was developed in updated versions, government-funded research identified that families were triaged towards child protection investigations as a response to need.[18] In recognition that this caused harm and stretching resources, during the mid-1990s there was a 'refocus' towards treating referrals (at least initially) as a request for support,[19] followed by a new focus after the Munro Review in 2011 which recommended a new, continuous assessment which aimed to address need and risk concurrently, over a lengthy time-frame.[20] No impact assessment was undertaken into how this change would affect families. Thus, the question of the impact on families and social workers was not considered outside the Munro Review itself, and the Review did not focus on, or consider, adverse effects. Concerningly, numerous small-scale studies have established that for many families, the process of referral and assessment causes trauma resulting in personal, social, and economic harm, but these have not been developed into a large-scale longitudinal study.[21] There is consequently a paucity of research investigating post-referral trauma, which is a concern because the existing studies raise troubling issues meriting attention. Rather than dismiss these existing studies, we argue here for a debate in response to these issues, alongside well-designed research to gain further insights into the scale and severity of the problem. Given the importance of child protection it is surprising there has not been a focus on investigating the longitudinal impacts on children and families of either over- or under-intervention; case law provides some insights but cannot be said to be representative and nor is there a facility for feedback to the judiciary in relation to the longitudinal outcomes of the cases they adjudicate. The research best addresses this point relating to the outcomes for children entering State care, which consistently reveal such children face significant barriers to success during their adult lives, but this data is gleaned from high-level meta-data, not individual case-level analyses to track specific outcomes.[22] England's austerity measures over the past decade and the recent 'cost of living crisis' is likely

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[18] See Gibbons et al, above n 5.

[19] L Devine, 'Considering social work assessment of families' (2015) 37:1 *Journal of Social Welfare and Family Law* 70.

[20] See above n 6.

[21] See, for example, S Amphlett, *Working in Partnership; coping with an investigation of alleged child abuse or neglect* (PAIN, 1991); D Howitt, *Child abuse errors: when good intentions go wrong* (Prentice-Hall, 1992); H Cleaver and P Freeman, *Parental perspectives in cases of suspected child abuse* (HMSO, 1995); M Bell, *Child protection: Families and the conference process* (Routledge, 1995); M Bell, 'Promoting children's rights through the use of relationship' (2002) 7(1) *Child & Family Social Work* 1; T Spratt and J Callan, 'Parents' Views on Social Work Interventions in Child Welfare Cases' (2004) 34(2) Br J Soc Work 199, 200; L Davies, 'Protecting Children – A Critical Contribution to Policy and Practice Development', PhD thesis, London Metropolitan University (2010).

[22] J Sebba and N Luke, 'The educational progress and outcomes of children in care: editorial' (2019) 45:4 *Oxford Review of Education* 435.

to contribute to a new rise in referrals as families face increasing needs that they cannot meet, suggesting this is a timely moment for reconsideration of how the system is working at the referral and assessment stages.

The purpose of this article is primarily therefore to question whether, given at least the possibility for trauma in some families, the balance can reasonably be argued to be a settled matter. The attempts noted above to re-balance the system since the Children Act 1989 were based on concerns about the inevitable issues either over- or under-intervention would create. This debate should continue, as it would be complacent to assume the balance is now 'right' or that there is no need for further rebalancing responding to the evidence in the statistical data. The question of balance is arguably a more pressing question than at any time since the Children Act 1989 was implemented: 29 annual data releases are now available which reveal longitudinal trends at odds with the trend data available in relation to the estimated prevalence of abuse.[23] These prevalence statistics estimate 25.3 percent of children in the UK are likely to be abused, based on a sample the researchers consider is representative.[24]

In the desire to reduce child abuse, this data suggests the question of balance may need reconsideration in the context of the balance of power. The Children Act 1989 intended Part V to be coercive only where necessary, thus reducing the risk of unwarranted State intervention. The threshold was reasonably high, allowing for the exercise of coercive power only where 'significant harm' or the 'risk' of it is 'reasonably suspected'. England's data shows that only 12 percent of referred children meet this criterion.
The Government data shows that referrals and assessments which do not progress to child protection measures, now form the largest single category of referred families annually.[25] Following referral, the State has significant powers of investigation, data sharing and retention to discharge its statutory duty under section 47 and obligations under section 17. It is ironic that children in families who are not abusing them but whose vulnerabilities may have brought them to the attention of the State are afforded little protection from potential adverse effects of the exercise of coercive State powers. It is not an unreasonable assumption that although large-scale research has not been undertaken into the impact and effect for families of being in this position, there will be inevitable stress associated with a protracted investigation into every aspect of private family life. Previous research considered whether this process might be considered therapeutic, perhaps unsurprisingly concluding that in most cases, it was not.[26]

State powers and private rights in social work assessments

The development of legal protection for children to protect them from parental harm has undoubtedly been influenced by high profile child abuse fatalities and disclosures of historic

[23] HM Government, 'Characteristics of children in need', available at: www.explore-education-statistics.service.gov.uk/find-statistics/characteristics-of-children-in-need (accessed 7 June 2022); and L Radford et al, *Child Abuse and Neglect in the UK today* (NSPCC, 2011).

[24] Radford et al, ibid.

[25] See Gibbons et al, above n 5.

[26] M Millar and B Corby, 'The framework for the assessment of children in need and their families – A basis for a "Therapeutic" Encounter?' (2006) 36 *British Journal of Social Work*, 887–899. doi:10.1093/bjsw/bch321.

abuse. Indeed, it has been argued that 'the media have appeared, at times, to have more influence on child protection policy and practice than professionals working in the field'.[27] Less attention has been given to the complexities and difficulties facing parents who are accused of child abuse or considered to be at high risk of abusing their child, but against whom no evidence of abuse is substantiated. Such families, including the children, must continue with their lives beyond assessment, but evidence from such small-scale research as is available[28] suggests there is the potential for significant long-lasting trauma and distress from the experience, as well as interruption of positive relationships between families and State agencies.[29]

Although the research tends towards these historic small-scale studies, and the methodologies would not be considered sufficient to suggest the result are representative, the value of such research is to raise awareness of the possibility that some families may not fare well following their experience with coercive State intervention. Conducting a statistically representative study presents practical and ethical challenges, but this does not negate the possibility of harm, nor does it negate the question of whether, given the statistics, the current balance serves most of the families referred into it, or those who are not. What can be extracted from the existing research suggests there are three under-researched questions in relation to current policy: First, is referring and assessing increasing numbers of families reducing the prevalence of abuse sufficiently to justify the erosion of private rights and family autonomy? Second, is referral and assessment harming, or does it have the potential to harm families who are not abusing their children? And third, are there adequate remedies for these families? From the data and previous published work giving a detailed exposition on the available remedies, the answers to these questions are arguably 'no', 'yes', and 'no' respectively.

The rationale behind the Children Act 1989 for State powers to intervene into private family life to investigate suspected significant harm is based on sound welfare principles: historically, real dangers existed for children who had no overt protection. Children died from poverty,[30] neglect,[31] cultural practices[32] and deliberate cruelty.[33] The notion of child welfare

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[27] C Goddard and B Saunders, *Child Abuse and the Media*, NCPC Issues No 14 (June 2001), Australian Government, Australian Institute of Family Studies website, 1, available at: www.aifs.gov.au/cfca/publications/child-abuse-and-media (last accessed 31 May 2022).

[28] C Waldegrave, 'Contrasting national jurisdictional and welfare responses to violence to children' (2006) 27 *Social Policy Journal of New Zealand* (March).

[29] See Devine, above n 9.

[30] See, for example, N Spencer, *Poverty and Child Health* (Radcliffe Medical Press, 2000); N Spencer, 'Race and Ethnicity as Determinants of Child Health: a personal view' (1996) 22 *Child Care Health & Development* 327; M Marmot, 'The Social Pattern of Health and Disease', in D Blane, E Brunner and R Wilkinson (eds), *Health and Social Organisation: towards a health policy for the 21st century* (Routledge, 1996), 42–67; C Power, O Manor and J Fox, *Health and Class: The Early Years* (Chapman and Hall, 1991); R Reading, 'Social Disadvantage and Infection in Childhood' (1997) 19(4) *Sociology of Health & Illness* 395; P Sidebotham, J Heron, J Golding and the ALSPAC study team, 'Child maltreatment in the "Children of the Nineties": deprivation, class, and social networks in a UK sample' (2002) 26(12) *Child Abuse & Neglect* 1243; and N Spencer, *Health Consequences of Poverty for Children* (End Child Poverty Coalition, 2008).

[31] See, for example, J Nagler, 'Child abuse and neglect' (2002) 14(2) *Current Opinion in Pediatrics* 251; G Benziman, *Narratives of Child Neglect in Romantic and Victorian Culture* (Palgrave Macmillan, 2011); G Greenwood, *The Seven Curses of London* (Dodo Press, 1869); I Pinchbeck et al, *Children in English Society*, two volumes: (1969) *From Tudor Times to the Eighteenth Century* and (1973) *From the Eighteenth Century to the Children Act 1948* (Routledge, 1969 and 1973); and G Behlmer, *Child Abuse and Moral Reform in England*

as a public responsibility grew from social and political concern over the plight of children as a disadvantaged group. Consequently, the argument supporting a level of State interference into private autonomy is strong. The complexity arises in deciding upon the appropriate level and limits of State interference and the appropriate balance with private rights. This, we posit, should be a question for regular review given the scale of families who have contact with Children's Services Departments for any reason, and the availability of longitudinal evaluative research concerning the demand at each stage of child protection processes, and the characteristics of children within the system.[34]

The reason for the high number of referred children has been argued to be caused by deprivation,[35] politics,[36] or an increased aversion to risk following high-profile tragedies.[37] Once referred, the State powers of surveillance, referral, and assessment in relation to child welfare are demonstrably extensive as the Children Act 1989 confers a duty on local authorities under section 47 which compels them to 'make such enquiries as they think fit' where there is a 'reasonable suspicion that a child found in their area is suffering or is likely to suffer significant harm'.[38] The enquiry takes the form of a wide-ranging assessment, the national template for which is found in the statutory guidance document *Working Together to Safeguard Children.*[39] At local level the means of delivery may differ. The wording of section 47 does not place specific restrictions on the powers of local authorities to investigate, nor does it dictate what form the investigation will take.[40]

Not all referrals relate to suspected cases of significant harm: section 17 of the Children Act 1989 concerns children and their families in need of services. This provision is intended to be supportive and consensual. In theory, a finding of 'need' is not contentious, although some research indicates that families may be unhappy at the suggestion that they are deficient, or

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1870–1908 (Stanford University Press, 1982).

[32] See, for example, 'Factsheet No 23: Harmful Traditional Practices affecting the Health of Women and Children' (Office of the High Commission for Human Rights).

[33] For example: Margaret Waters in 1870 who murdered children boarded out into her care, in J Eekelaar and M Maclean (eds), *A Reader on Family Law* (Oxford University Press, 1994). For an interesting account of the practice of baby farming, see D Haller, 'Bastardy and Baby Farming in Victorian England' (1989–1990) 21 *The Student Historical Journal*: http://loyno.edu/history/journal/1989-0/haller.htm.

[34] R Hood, A Goldacre, S Gorin and P Bywaters, 'Screen, Ration and Churn: Demand Management and the Crisis in Children's Social Care' (2020) 50:3 *The British Journal of Social Work* 868.

[35] K Morris et al, 'Social work, poverty, and child welfare interventions' (2018) 23(3) *Child and Family Social Work* 364.

[36] N Parton, 'Addressing the Relatively Autonomous Relationship Between Child Maltreatment and Child Protection Policies and Practices' (2020) 3 *International Journal on Child Maltreatment* 3, 19–34. Available at: www.doi.org/10.1007/s42448-019-00022-9, accessed 31 May 2022.

[37] BBC News, 'Care Cases "soaring after Baby P"' *BBC News* 24 November 2008, available at: www.newsvote.bbc.co.uk/1/hi/uk/7745497.stm. Also see, for example, R Bennett, 'Why Britain is Failing the Victims of Child Cruelty' (2009) *The Times* 6 April.

[38] Children Act 1989, s 47 states, inter alia, that where a local authority 'has reasonable cause to suspect that a child who lives, or is found, in their area is suffering, or is likely to suffer, significant harm, the authority shall make, or cause to be made, such enquiries as they consider necessary to enable them to decide whether they should take any action to safeguard or promote the child's welfare'.

[39] See DfE, above n 1.

[40] See Eekelaar and Maclean, above n 33.

conversely may feel they have unmet need that the local authority does not recognise.[41] Although families can theoretically refuse their consent, government-funded research conducted relatively soon after the Children Act 1989 was enacted found that refusal to consent to section 17 processes, or a rejection by the local authority of an application for rationed needs-assessed services, could result in escalation to section 47, and that some referrals were deliberately over-stated to be suspected abuse rather than an expression of need.[42] Despite these messages from research, since 2013 the statutory guidance has arguably elevated the risk of system manipulation in both these identified cases by conflating Initial and Core Assessments (used for section 17 and section 47 assessments) into a continuous assessment. This renders all assessments effectively a child protection assessment and consensual parental/professional partnership working meaningless. When faced with a social worker and possibly a police officer unexpectedly at the door families may not be aware they can withhold consent, will not have the opportunity to seek legal advice, or may be afraid of escalation as a consequence of non-compliance.

The question of how this erosion has occurred is under-researched. The intention that State powers would be used coercively only where necessary was supplanted by subsequent legislation in section 11 of the Children Act 1989 requiring many professionals to refer 'signs' in children's behaviour that deviate from the norm. Section 11 was introduced at a time of policy expansion into measuring 'well-being' of all children under the wider safeguarding framework. Taken together, these changes have caused an unprecedented level of State power over the family. The prompt for the 2013 change was the 2010 Conservative/Liberal Democrat coalition. This new government commissioned a review of child protection, carried out by Professor Eileen Munro.[43] She made recommendations which were *inter alia* interpreted in the 2013 version of the statutory guidance, removing the distinctions between assessment types, timescales, and the need for consent.[44] Instead of resulting in the expected reduced bureaucracy and increased efficiency, the national data shows a diminishing ratio of the number of referred children yielding reasonably suspected abuse,[45] indicating a review of the data and a practice review is merited.

The rise in State powers and erosion of private rights, if justified by the need to protect large numbers of abused children from their parents, does not negate the need for consideration of whether an appropriate balance is maintained. The data itself, however, is complex; there is considerable uncertainty surrounding the accuracy of child abuse prevalence estimates despite the NSPCC's research.[46] If it is assumed estimates are reasonably accurate, analysis of the longitudinal data suggests that despite the increase in referrals, there is no corresponding increase in substantiated cases. Instead, an increasingly lower ratio of referrals to

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[41] See discussion in L Devine, *The Limits of State Power and Private Rights: Exploring child protection and safeguarding referrals and assessments* (Routledge, 2017).

[42] Gibbons et al, above n 5.

[43] Munro, above n 6.

[44] See Devine, above n 19.

[45] See Devine and Parker, above n 14.

[46] The two largest studies in the UK were conducted by the NSPCC: P Cawson, C Wattam, S Brooker and G Kelly, *Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect* (NSPCC, 2000); and L Radford, S Corral, C Bradley, H Fisher, C Bassett, N Howat and S Collishaw, *Child Abuse and Neglect in the UK Today* (NSPCC, 2011)

substantiated cases has driven the abuse detection element of the system down to a lower rate of efficiency.[47] As the national prevalence estimates in England do not suggest the level of undetected child abuse is falling,[48] even taking into account uncertainty over their accuracy, this suggests current policy is not achieving its aim.

There is a natural fear of making errors that result in a failure to protect children. The most extreme are errors of under-interference resulting in a child fatality. This concern is legitimate, but it should not override equally legitimate critical examination concerning whether there is sufficient protection for referred families, of whom the vast majority are not harming their children. There are competing and unequal interests involved; the State's welfare agenda championing the interests of the child, whose interests are 'paramount'.[49] However, if children also report trauma following State intervention and they cannot stop the State acting 'in their best interests', it is the responsibility of both government and the research community to understand more of this phenomenon.

Practices of State intervention follow a generally accepted principle that there is a necessary level of interference with individual liberty to protect citizens and society. For example, it is generally accepted that the police should have certain powers to detect crime and take steps to prevent it.[50] However, there is less settled debate about the precise level at which citizens should be policed in their private lives outside the criminal justice system.[51] A comparison between the criminal and public family rationales could assist. A comparison can be drawn between the rationale for interference with personal liberty in a criminal matter, and the rationale for interference following safeguarding or child protection concerns. The ideology for both is the notion the State has a duty to police some citizens in order to protect others. However, although the rationale is the same, its implementation is not: the investigative role of the police is restricted to investigating suspected crime, whereas the role of the local authority is to investigate every aspect of private family life. This is where the interface, and thus the conflict between the welfare and policing agendas, are most evident.[52] It is arguable that local authority social services departments operate the most powerful methods of surveillance and interference in the UK without being constrained by safeguards and controls such as those provided by PACE.[53] It is difficult, therefore, to see precisely where the limits of

[47] See Devine and Parker, above n 14.

[48] When comparing the data in the two NSPCC studies, see Cawson et al and Radford et al, n 46 above.

[49] Children Act 1989, s 1(1).

[50] For debate concerning the morality of State paternalism, see, for example, the Hart/Devlin debate: HLA Hart, *Law, Liberty, and Morality* (Stanford, 1963); P Devlin, *The Enforcement of Morals* (Oxford, 1965). For specific controls over the extent of the power of the police to investigate citizens suspected of a crime, see Police and Criminal Evidence Act 1984.

[51] For example, contentious areas such as the rights of citizens when investigated by the police, or the rights of suspected terrorists, have been the focus of much debate and critique. In relation to citizens' rights and suspected terrorism the controversy over the Anti-terrorism, Crime and Security Act 2001 illustrates the tension between the government's assertion that draconian measures are necessary to protect the public against terrorism, which must be balanced against the rights of citizens not to be deprived of their human rights. This Act was intended to make it easier for law enforcement agencies to track terrorist funds, share information and detail suspects as the Act grants the Home Secretary the power to detain suspected international terrorists without trial if deportation is not possible, because it would endanger the suspects' lives.

[52] For a diagram of the assessment framework from *Working Together* guidance, see above n 1, 22.

[53] Police and Criminal Evidence Act 1984.

local authority powers lie. Private rights are limited and those that exist are only able to be exercised in restricted circumstances. This approach may be justified if these methods were significantly reducing abuse, but this is not evident from analysis of the national data.

Consequences of referrals and assessments for non-abusing families

The pre-2013 post-referral process adopted a seven-day initial assessment to screen families, escalating them into section 47 child protection investigations only where necessary. In theory, this minimised distress to families neither wanting nor needing assessment, and it was explicitly recognised in *Working Together to Safeguard Children* that assessment could cause distress to children.[54] However, the process was argued to create a covert child protection process from the outset.[55] Post-2013, the continuous assessment replaces initial assessment. The most recent available English national data shows that of the 642,980 referrals in the fiscal year 2019/2020, 548,420 (92 percent) yielded no evidence of a 'reasonable suspicion' of 'significant harm' or the risk of it to merit action under section 47. Under this process over half a million families in that fiscal year were subjected to a lengthy, coercive and potentially very frightening and uncertain process. The State gives no policy consideration to how these families cope with the aftermath of referral and assessment. No matter how it is framed, a 'referral' or 'concern' amounts to a suspicion of child abuse or maltreatment under the present framework for assessment.

The question of State-caused harm following suspicions of child abuse is not new. An international body of research grew from the 1980s when formalised processes of child protection prioritising child rights gained traction.[56] As noted earlier, this research does not hold itself out to be representative of all families, and much of it is quite old. However, it is all that exists and provides a snapshot of the experience of the families concerned, reported consistently across all the studies, all the participants and all jurisdictions. Research from the US raised concerns from the mid-1980s onwards. In 1986 Pride identified wide, non-specific definitions of 'child abuse' as a contributory problem concluding that definitions of '… abuse were vague, including inadequate parenting skills, educational neglect, unspecified neglect, lack of supervision, emotional abuse or neglect'.[57] Douglas Besharov, the first director of the US's National Clearinghouse on Child Abuse and Neglect (NCCAN),[58] identified a 'flood of unfounded reports' arising from a formalised referral process.[59] The San Diego Grand Jury[60]

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[54] HM Government, 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children' 00305-2010DOM (TSO, 2010).

[55] L Davies, 'Protecting Children – A Critical Contribution to Policy and Practice Development', PhD thesis, London Metropolitan University (2010).

[56] This model of child protection is evident in the UK, USA, Canada, New Zealand, and Australia.

[57] M Pride, *The Child Abuse Industry* (Crossway Books, 1986).

[58] The clearinghouse is a national resource for professionals seeking information on the prevention, identification, and treatment of child abuse and neglect and related child welfare issues.

[59] D Besharov, 'Unfounded allegations – a new child abuse problem' (1986) 83 *The Public Interest*, Spring, 18–33. Besharov notes at p 22 that in 1984 65% of all reports proved to be unfounded using the criteria that they were dismissed after an investigation by child protective agencies.

[60] In 1991–1992 the San Diego US County Grand Jury considered issues relating to sexual abuse and allegations from cases that had come before the courts. The reports observed at p 1, that '… allegations of in-home

described the American system as inherently biased and unable to detect or correct its errors, devastating the lives of families.[61] In 1988 a further study was undertaken by LeRoy Schultz, who recommended:

> 'More refined measures of subjective distress and disability for those falsely charged should become a future research priority for the university community or responsible private organisations or private practitioners.'[62]

In addition 'compensation for the falsely charged and/or convicted should be instituted or made a part of current victim compensation policy'.[63] Schultz observed: 'Being labelled an abuser may produce the personality characteristics which are later called the causes of child abuse …', leaving the falsely accused at future risk of further allegation as a result of noted 'personality characteristics', or it may be an observation that dysfunction and alteration to personality is a type of traumatic harm.[64] Either is of concern.

In the UK, immediately prior to the enactment of the Children Act 1989, the *Cleveland Public Inquiry* highlighted the damage that can be done to families in cases of suspected child abuse.[65] Contemporaneous research from Paul Griffiths concluded:

> 'Being incorrectly suspected of abuse is a frightening, demeaning and potentially destructive position for parents to be in. Where suspected abuse is discovered to be unfounded, counselling should be offered to parents to help them to recover from the distress of the investigation and its aftermath.'[66]

Counselling, however, will not help alleviate the continued stigmatisation of having an unsubstantiated allegation recorded. It is an inadequate suggestion that does not fully resolve the issue.

In 1990 Darrell Richardson ranks the issue of false allegations and their impact '… as important as child abuse itself'. He refers to the power imbalance between the State and families, considering State agencies have a 'grave responsibility' in relation to investigated families. Richardson's conclusions are that the State is capable of 'thoroughly abusing' families and children through investigation.[67] Jones conceptualises harm as 'system abuse' and 'iatrogenic harm'.[68] Sabrina Luza and Enrique Ortiz describe it as '… the dynamic of shame in interactions between child protective services and families falsely accused of child

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molest/abuse seem to cause the most severe conflict with the system'. See San Diego County Grand Jury (1991–1992) *Child Sexual Abuse, Assault, and Molest Issues* Report No 8, San Diego CA.

[61] T Oellerich, 'Identifying and Dealing with Child Savers' (1998) 10 *Institute for Psychological Therapies*.

[62] LG Schultz, 'One hundred cases of unfounded child sexual abuse: A survey and recommendations' (1989) 1(1) *Issues in Child Abuse Accusations* 29, 37.

[63] Ibid.

[64] Ibid, citing C Webb, *Forgive Me* (Revell, 1986).

[65] See generally: E Butler-Sloss, *Report of the inquiry into child abuse in Cleveland July 1987*, Cm 412 (1988).

[66] P Griffiths, 'The Investigation of Suspected Child Abuse', in W Stainton Rogers et al, *Child Abuse and Neglect: Facing the Challenge* (Batsford, 1989), 173.

[67] D Richardson, 'The Effects of a False Allegation of Child Sexual Abuse on an Intact Middle Class Family' (1990) 2 *Issues in Child Abuse Accusations* 19.

[68] DP Jones, 'Professional and clinical challengers to protection of children' (1991) *Child Abuse & Neglect* 15, 57–66.

abuse'.[69] Shame is recognised to have a negative impact on mental health.[70] They describe shame in this context as:

> '… an internal, subjective experience. The shamed individual sees himself as inadequate, inferior, worthless, and defective. It affects the whole self – emotional, mental and physical.'[71]

Hollida Wakefield and Ralph Underwager conducted a study of 30 families for the support group Parents against Injustice (PAIN) where allegations of sexual abuse were made, concluding all suffered post-traumatic shock.[72]

Jon Prosser considers the '… cost to the child, the person accused, and society', contending that child subjects of unnecessary investigation become victims '… in a way that can be more damaging to them than suffering sexual abuse'.[73] Prosser includes '… financial ruin and lost jobs, families and marriages' in his evaluation of harm.[74] A state of lasting high anxiety was noted, including children's fear of strangers[75] and obsessive retention of information relating to the experience was noted.[76] A 'film loop' effect is described together with 'loss of sleep, loss of weight, loss of sexual relationships between parents, anxiety and depression, mental breakdown and the need to work with a psychiatrist …'.[77]

Potential harm to children is highlighted by several researchers. Gordon Jack found that older children regret having disclosed abuse, although this refers to children removed from their families following assessment.[78] Andrew Cooper, Rachael Hetherington and Ian Katz also report post-disclosure regret, finding that '… children and families drawn into the child protection process frequently find the whole experience traumatic, and sometimes more

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[69] S Luza and E Ortiz, 'The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse' (1991) 3 *Issues in Child Abuse Accusations* 108.

[70] G Kaufman, *The Psychology of Shame: Theory and Treatment of Shame-Based Syndromes* (Springer, 2nd edn, 2004, reprinted from original edition in 1986). Kaufman describes the interrelation between shame and mental health in terms of object relations theory, interpersonal theory, and Tompkins's affect theory, to provide a powerful and multidimensional view of shame. Drawing on his own clinical experience he explains the application of affect theory to general classes of shame-based syndromes including compulsive; schizoid, depressive, and paranoid; sexual dysfunction; splitting; and sociopathic disorders.

[71] See above n 69, at p 111.

[72] H Wakefield and R Underwager, 'The alleged child victim and real victims of sexual misuse' in J Krivacska and J Money (eds), *The Handbook of Forensic Sexology* (Prometheus Books, 1994), citing the report produced by Westminster College, Oxford partly funded by the BBC's Children in Need Appeal: J Prosser and I Lewis, *Child Abuse Investigations: The Families' Perspective* (Parents Against INjustice (PAIN), 1992).

[73] Prosser drew on Wakefield and Underwager's earlier book, see H Wakefield and R Underwager, *Accusations of Child Sexual Abuse* (Charles C Thomas, 1988), 327, cited by J Prosser, 'A Case Study of a UK Family Wrongly Accused of Child Abuse' (1995) 7 *Issues in Child Abuse Accusations* 1, 10.

[74] Prosser and Lewis, above n 72. Prosser undertook an ethnographic case study involving families who had sought help from PAIN. In the study general and specific observations were made about the effects of investigation which were described as 'system abuse syndrome', at 20.

[75] Ibid, 18.

[76] Ibid, 20.

[77] Ibid, 20.

[78] G Jack, 'Discourses of child protection and child welfare' (1997) 27 Br J Soc Work 659, 665.

traumatic than the abuse itself'.[79] Prosser made specific reference to the harm suffered by one nine-year-old child, described as being the most profoundly adversely affected member of her family. She 'hates doctors', is isolated, pulls out sections of her hair and suffers from severe depression.[80] The father's relationship with her suffered. He felt 'bitter' towards his daughter following the experience.[81] Official response to their trauma was 'severely underestimated':[82]

> '… it remains a sad indictment of UK society that no support or therapy is available even to those severely traumatized by wrongful accusations and that there is only very limited redress or compensation for families …'[83]

Placing this in context, it is likely (although not known for sure) that most victims of abuse do not regret such disclosures. The point here is simply that if some do feel a post-disclosure process has let them down, further consideration is merited to try to establish why this is the case, and what can be done to improve matters.

Theoretically, a system premised on support for families would avoid these problems. However, Jones et al found that '… social workers feel and act like besieged gatekeepers to an inadequate and crumbling system of support; they have been pushed remorselessly towards practices of surveillance, monitoring and control'.[84] Much of their work focusses on critiquing policies advocating personal responsibility, claiming that the needs of social work 'service users' can be attributed to their inclusion in minority groups who have traditionally been oppressed and marginalised by society rather than by failure of personal responsibility, or a combination of both.[85] Jones et al's research dates back to 1993, and its findings exemplify the situation as it is today despite being written nearly 30 years ago. The evidence of this locus of concern by the mid-1990s gained traction with the refocussing debate, but the pendulum-swing away from the refocus misses an ideal opportunity to learn from these historic observations.

By the mid-1990s sufficient attention had been drawn to the issue of harm for the government to acknowledge the problem. In the UK a systematic assessment of the 'child protection' system was undertaken and presented in *Child Protection: Messages from Research.*[86] It makes references to a suspicion of child abuse having traumatic effects upon families'.[87] The meta-analysis concluded that '… all the studies confirm the sense of shock, fear and anger felt at the point of confrontation and the lingering bitter aftertaste'.[88] The

[79] A Cooper, R Hetherington and I Katz, *The Risk Factor: Making the child protection system work for children* (DEMOS, 2003), 18.

[80] J Prosser, 'A Case Study of a UK Family Wrongly Accused of Child Abuse' (1995) 7 *Issues in Child Abuse Accusations* 1, 9.

[81] Ibid, 10.

[82] Ibid, 10.

[83] Ibid, 11.

[84] C Jones and T Novak, 'Social work today' (1993) 23(3) Br J Soc Work 195, 196.

[85] Ibid, 205.

[86] Department of Health, *Child Protection: Messages from Research* (DoH, 1995).

[87] Ibid, 44.

[88] Ibid, 43.

effect on parents and children stopped short of being conceptualised within medical discourse although alienation, distress and hardship were reported in relation to the parents. It was acknowledged this made life difficult for the children.[89] Wider harm was also mentioned, described as:

> '… worsening family relationships, leading to recrimination, marital breakdown, economic hardship and sometimes homelessness; all severe setbacks to the child's quality of life.'[90]

Following the findings in *Messages from Research* there was an explicit refocus of social work response to referral in England and Wales away from a 'child protection' investigation towards assessment of 'need', accepted as perhaps an inevitable response to the problems that had been identified.[91] However, this was reversed following the Munro Report and the 2013 changes to the statutory guidance.[92] The post-Munro approach has been to conflate the two approaches, which weakens protections for families against unwarranted social work intrusion whilst increasing the power of social workers. Whilst the law has not changed, policy has moved statutory guidance progressively further away from the legislative intention to separate out consensual and non-consensual processes.

The refocusing debate assumed that the reported cause of harm was an allegation and investigation, rather than a trauma response to State interference per se. The *British Journal of Social Work* published research asking whether 'partnership ideals' and '… service delivery principles of the child welfare model' would have a fundamentally different impact on families to the 'child protection' model of social work.[93] This research also found that systems attempting to incorporate investigations and support usually failed to meet the dual goals[94] because '… technical redefinition of cases at point of referral may not fundamentally change the nature of social work processes.'[95] In other words although the assessment framework resembles an assessment for a 'child in need', it is used as a 'child protection' response.[96] Lauren Devine argues the resultant 'welfare/policing dichotomy' has not been proved to

[89] Ibid, 43.

[90] Ibid, 44.

[91] See, for example, Spratt et al who concluded that: 'It is now regarded as axiomatic that there should be a re-focusing of social work practice, the debate having moved on from why this is necessary to how this may be achieved': T Spratt and J Callan, 'Parents' Views on Social Work Interventions in Child Welfare Cases' (2004) 34(2) Br J Soc Work 199. Research findings consistently linked suspicion and investigation as causing harm rather than the wider issues of power relations and State interference, although it is sometimes difficult to separate out the harm caused by assessment, from harm which occurs later in the process. See, for example, P Dale, R Green and R Fellows, *Child protection assessment following serious injuries to infants: fine judgments* (NSPCC/Wiley, 2005). Other research identified false positive cases as causing 'great suffering'. See, for example, DPH Jones, 'Spotlight on practice: editorial – false positives in the field of child maltreatment' (2001) 25 *Child Abuse & Neglect* 1395.

[92] See above n 1 and n 6.

[93] T Spratt and J Callan, 'Parents' Views on Social Work Interventions in Child Welfare Cases' (2004) 34(2) Br J Soc Work 199, 201.

[94] Ibid.

[95] Ibid, 209.

[96] Ibid, 209.

adequately address either.[97] Trevor Spratt and Jackie Callan conclude that '… whilst the refocusing debate has promoted a reconstitution of child protection work as child welfare work, the concept of risk has continued to preoccupy social workers in their practice in child welfare cases'.[98]

These findings suggest that the question of potential harm resulting from allegation and assessment did not disappear with refocusing, but simply increased the potential numbers affected. Gary Dumbrill, for example, found that parents viewed services as 'inhumane'. He draws on previous research noting that:

> '… in-depth qualitative studies of parental experience … reveal parents viewing services as "inhumane" … parents being afraid of worker power … and parents claiming to be misunderstood by workers and unable to correct these misunderstandings …'[99]

There is one study suggesting that assessment could be a therapeutic intervention of itself. Malcolm Millar and Brian Corby's study reported mixed conclusions. There was some limited consensus that assessment may have been therapeutic (presumably because it forced reflection) amongst families who had sought social work contact or who agreed they had significant problems. Families subjected to non-consensual assessment, however, did not find the process therapeutic.[100] Heather D'Cruz's power relations discourse explains why a 'therapeutic' consensual assessment could be experienced as 'inhumane' by others.[101] The difference is that consensual assessments do not engender the sense of terror reported in non-consenting families. This is why refocusing and inclusion of 'safeguarding' does not solve the problem of an imbalanced power relationship. Further post-refocusing studies[102] describe families as being often 'devastated' and 'bewildered, betrayed, and powerless' in studies where following investigation there was held to be little, or no significant risk and no evidence of abuse.[103] Pamela Davies goes further, framing assessment as 'secondary victimization'[104] caused by the power imbalance.[105] It is clear that simply reframing the

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[97] Devine, above n 19.

[98] See above n 93, at 224.

[99] G Dumbrill, 'Parental Experience of Child Protection Intervention: A Qualitative Study' (2006) 30 *Child Abuse & Neglect* 27, 28.

[100] M Millar and B Corby, 'The Framework for the Assessment of Children in Need and their Families – A Basis for a "Therapeutic" Encounter?' (2006) 36 Br J Soc Work 887, 895.

[101] H D'Cruz, 'The Social Construction of Child Maltreatment: The Role of Medical Practitioners' (2004) 4(1) *Journal of Social Work* 99.

[102] For example G Jack, 'Discourses of child protection and child welfare' (1997) 27(5) Br J Soc Work 659. Jack considered the discourses of 'child protection' and 'child welfare'. He refers to Cleaver and Freeman's 1995 study of 30 families with experience of child protection investigation in four local authorities in the North-West of England.

[103] Ibid, 664. These findings were within the context of the overall study where '… out of six hundred investigations less than ten were categorised as "dangerous" and in only 2% of which did the children concerned require medical treatment'. With such a low incidence of 'significant harm' detected '… the researchers conclude by asking whether the disintegration of family relationships and the lingering suspicion and resentments are too high a price to pay when the majority of cases are minor'.

[104] See J Doak, *Victims' Rights, Human Rights and Criminal Justice* (Hart Publishing, 2008).

[105] P Davies, 'The impact of a child protection investigation: a personal reflective account' (2011) 16 *Child and Family Social Work* 201, 202.

assessment does not address the problem.

The available studies consistently conclude that where it occurs, harm can be severe and long-lasting. Regardless of the historic or qualitative nature, the studies evidence that there is a problem for at least a proportion of the population, and most have been referred to by social workers and social work academics in peer reviewed publications. Where so reported, cases result in severe and long-lasting shock, and the descriptions meet the symptomatic criteria for post-traumatic stress disorder (PTSD). However, such cases would be excluded from formal diagnosis because criterion A, setting out a restrictive set of causal circumstances, would exclude it.[106] It is worth noting that criterion A has changed over time and is an arbitrary and restrictive list of causal triggers. For example, DSM-4 included the sudden death of a loved one, but this is excluded in DSM-5. Presumably, reactions to sudden bereavement have not changed in the general population but the bereaved are no longer able to be diagnosed with PTSD although they are symptomatically identical. Such changes may be a consequence of the links between PTSD and litigation.

Overview of available remedies

The purpose of this section is to provide an overview of the range of remedies available, illustrating the ad hoc and confusing nature of the journey from proving harm to achieving a remedy. The remedies represent a collection of legislative and common law provisions and are included to contextualise the remaining discussion. Notably, there is a lack of specific remedy for any inadvertent harm caused by the State's response to referral. This exposition is not by itself sufficient to provide justification for the introduction of a specific remedy, although Lauren Devine considered the matter in detail in 2017, but any discussion of a State system of (potentially) non-consensual interference into private family life should reasonably include an overview of where remedies can be found.[107]

It is an axiom that all these remedies are predicated on litigation, and to be successful require a finding of fault. This point is fundamental to the discussion in this article, which is to consider the position of inadvertently harmed families (children or their parents), an under-considered question in child protection studies. Other areas where inadvertent harm has occurred as a result of State processes, such as medicine, yields significant literature. This suggests that whilst there has been a dearth of research in child protection, and a corresponding dearth of case law in relation to the early stages of child protection processes, the matter merits consideration. The most relevant literature exists in the medico-legal field, where it is well established that harm occurs, and remedies are required. Ian Kennedy, for example, writes from an ethico-legal stance, arguing that litigation is the forum for apportioning blame, but a no-fault approach can and should be adopted to give some relief to families harmed by medical processes.[108] It is notable that a no-fault approach has not been adopted by government in relation to medical errors so it seems highly unlikely such an approach would be adopted in child protection processes. This does not, however, negate

[106] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM–5)* (APA, 5th edn, 2013), available at: www.psychiatry.org/psychiatrists/practice/dsm (last accessed 31 May 2022).

[107] See discussion in L Devine, 'Considering social work assessment of families' (2015) 37(1) *Journal of Social Welfare and Family Law* 70; Devine, above n 9; L Devine, *State powers and private rights in child protection and safeguarding assessments: Policing parents* (Routledge, 2015).

[108] *R (AB and CD) v Haringey London Borough Council* [2013] EWHC 416 (Admin), [2014] 2 FLR 63.

the need for academic debate in this neglected area.

Challenging whether it is reasonable and rational for a local authority to investigate a family following a referral is likely to be difficult despite the decision in *R (AB and CD) v Haringey London Borough Council*. It seems unlikely that case law will haul back on thresholds for fear of preventing local authorities from investigating cases that turn out to be well founded. In this situation, although outside the scope of this article to discuss in detail, the possibility for alternative solutions such as no-fault damages could be considered for families whose children remain with them and the parents continue to have the responsibility for caring for those children. If alienated and potentially traumatised, pursuing a fault-based remedy may not provide an adequate solution.

In the current framework of remedies, where a family (or its constituent members) consider they have been harmed there are a range of potential common law and statutory remedies available including complaint procedures, judicial review, defamation, negligence, and Human Rights Act 1998 provisions, particularly those concerning Articles 3, 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. Some remedies apply to parents, some only to children. Families are in a very vulnerable position and may find it difficult to make decisions within tight timescales, fearful of attracting more adverse State attention. The available remedies are set out in brief to summarise where aggrieved parents and/or children may turn, as the purpose of this section is to highlight the complexity of the field rather than the complexity of individual case-level decision making.

Aggrieved parents and children may initially turn to the complaint procedure. It is a requirement under section 26 of the Children Act 1989 that:

> '(3) Every local authority shall establish a procedure for considering any representations (including any complaint) … about the discharge by the authority of any of their qualifying functions in relation to the child.'[109]

The complaint procedure can be used in relation to Part V of the Children Act 1989.[110] This process has been shown to be more effective at slowing down assessment because local authorities proceed with more caution, but this remedy does not resolve the distress complained of. Unfortunately, this has a doubly damaging consequence: one of the reasons cited in the Serious Case Review following the death of Khyra Ishaq explaining why social workers failed to complete an assessment was because Khyra's mother complained to the local authority.[111]

Complaint procedures are not designed to address substantial harm and distress and provide a very limited practical remedy. The process must only 'consider', not resolve. If the internal complaint does not provide satisfaction, unresolved issues of maladministration can be

[109] The 'qualifying functions' were originally complaints relating to Part III of the Act, but were extended in 2002 to include complaints under Parts IV and V. The complaint procedure is set out in the Children Act 1989 Representations Procedure (England) Regulations 2006 (SI 2006/1783).

[110] Children Act 1989, Part V, deals with matters relating to the 'protection of children' as opposed to Part III, which deals with consensual family support.

[111] J Radford, 'Serious Case Review Under Chapter VIII "Working Together to Safeguard Children" in respect of the Death of a Child Case Number 14', 26 April (Birmingham LCSB, 2010), 167.

referred to the local authority ombudsman.[112] However, evaluations of complaint processes conclude that complainants had a high chance of dissatisfaction.[113] There are also numerous government reports considering reforms to the complaints system following claims of its inadequacy in sensitive situations.[114] It is therefore difficult to see how traumatised families can achieve satisfaction as a result of a complaint. Time limits are tight, and a family is faced with a decision to complain to the organisation that caused their trauma when in a disempowered and frightened state.

This internal administrative remedy must be exhausted before an application for judicial review is allowed, so families must complain before commencing judicial review proceedings.[115] Judicial review is intended to be used in relation to *ultra vires* acts by public bodies in relation to a decision (act), or failure (omission). Illegality, irrationality and procedural impropriety are potential causes of action, available for families if a complaint has not resolved the issue.[116] However, there is a very short three-month limitation period for commencing actions, creating an additional barrier for traumatised applicants who may also be litigants in person.

Judicial review decisions are limited by section 31(1) of the Senior Courts Act 1981. If successful, the court cannot substitute a different decision. Under the Civil Procedure Rules, Part 54, rule 54.19 the courts may quash decisions of public bodies, and either refer the matter back to the public body and '… direct it to reconsider the matter and reach a decision in accordance with the judgment of the court', or '… in so far as any enactment permits, substitute its own decision for the decision to which the claim relates'. Although redetermination is the most likely outcome, there are other potential remedies: quashing order, prohibiting order, mandatory order, declaration, injunction and damages. Re-

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[112] In J Murphy, 'Children in need: the limits of local authority accountability' (2003) 23(1) *Legal Studies* 103, 130–132. Murphy explains that Children Act 1989, s 84 allows complaints to be referred to the Secretary of State for Health, but this is limited to an alleged failure of the local authority complying with its statutory duties under the Children Act 1989.

[113] S Lloyd-Bostock and L Mulcahy, 'The social psychology of making and responding to hospital complaints: an account model of complaint processes' (1994) 16(2) *Law and Policy* 123; J Coyle, 'Exploring the meaning of "dissatisfaction" with health care: the importance of "personal identity threat"' (1999) 21(1) *Sociology of Health and Illness* 95.

[114] The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 (SI 2009/309) implemented joint complaints procedures for health and social services from April 2009. The following reports are relevant to both: K Simons, *I'm not complaining but … Complaints Procedures in Social Services Departments* (Joseph Rowntree Foundation, 1995); Department of Health, *Our Health, Our Say, Our Care* (DoH, 2006); Health Service Ombudsman. *Making Things Better? A Report on Reform of the NHS Complaints Procedure in England* (National Audit Office, 2005); Healthcare Commission, *Spotlight on Complaints* (HC, 2006); Department of Health, *Learning from Complaints: Social Services Complaints Procedure for Adults* (Care Services Directorate, 2006); Department of Health, *Supporting Staff, Improving Services – Guidance to support implementation of the National Health Service (Complaints) Amendment Regulations 2006* (DoH, 2006); Department of Health, *Making Experiences Count: A New Approach to Responding to Complaints: A Document for Information and Comment* (DoH, 2007); Health Service Ombudsman, *Feeding Back? A Report on Reform of the NHS Complaints Procedure in England* (National Audit Office, 2008).

[115] *R v London Borough of Barnet ex parte B* [1994] 1 FLR 592 and *R v Royal Borough of Kingston-upon-Thames ex parte T* [1994] 1 FLR 798.

[116] In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock laid down that the reason for a judicial review is that the body's decision was based on either 'illegality, irrationality or procedural impropriety'.

determination is the most likely outcome rather than overturning, rendering it an empty remedy for many families as a local authority can reach the same decision using a different route.[117]

Re S (Sexual Abuse Allegations: Local Authority Response)[118] highlights that judicial review is particularly inadequate as a remedy where the local authority argues the applicant is a risk to children, but where insufficient evidence is found to justify protective interventions. The claimant, S, was a consultant gynaecologist whose judicial review challenged a local authority's decision to conduct an open-ended risk assessment. His application was refused. He had been acquitted in the Crown Court of four counts of indecently assaulting his former stepdaughter, K. The jury was unable to agree on another three counts and directed the prosecution that a re-trial was not appropriate, leading to a formal acquittal. S then failed to gain agreement from the local authority that it would not continue to risk assess if he were to move in with his new girlfriend and her children. Scott-Baker J held that:

> 'If *Re H and others* governed the approach in cases such as the present the result would be to prevent local authorities from carrying out effective and timely risk assessments. They would be forced to take care proceedings to identify whether grounds for intervention were present. This would be completely contrary to the principle of non-intervention in children cases. I do not accept that a local authority has to be satisfied on balance of probability that a person is an abuser before intervention is justified.'[119]

The judge expressed '… a good deal of sympathy for someone in the shoes of the defendant',[120] but drew the distinction between the need to establish facts on the balance of probabilities in relation to care or supervision orders, as in *Re H and others (Minors) (Sexual Abuse: Standard of Proof)*[121] and the requirement to investigate when there is '… reasonable cause to suspect a child is likely to suffer significant harm'.[122] In the former, evidence is adduced to *prove* on the balance of probabilities that there is a likelihood of 'significant harm'. In the latter, the duty is on a local authority to investigate if it *suspects* there is a likelihood of significant harm. Given the different standards of proof and underlying purposes of criminal prosecution and social work assessment it is not anomalous that, following criminal acquittal, ongoing social work assessment could be justified. However, one of the main tenets of the applicant's argument in *Re S (Sexual Abuse Allegations: Local Authority Response)*[123] was an objection to *open-ended* assessment without a clear process to bring it to an end: the question of whether it is reasonable to be subjected to open-ended suspicion is a different question to that of whether it is reasonable for someone acquitted in a criminal court to be re-investigated under a different process.

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[117] For a comprehensive research paper see: House of Commons Library (2006) *Judicial Review: A short guide to claims in the Administrative Court*, 06/44 (28 September 2006).

[118] [2001] EWHC Admin 334, [2001] 2 FLR 776.

[119] Ibid, [35].

[120] Ibid, [37].

[121] [1996] AC 563.

[122] *Re S (Sexual Abuse Allegations: Local Authority Response)* [2001] EWHC Admin 334, [2001] 2 FLR 776, [34].

[123] Ibid.

For families who have faced stress and uncertainty with a local authority, these may not be realistic remedies. Using the complaints procedures followed by judicial review may cause fear of facing further assessment if redetermination is the outcome. These remedies particularly do not help families where the local authority has followed procedures, but the procedures do not take account of their distress, or where the local authority argues there is an ongoing risk.

The stigma attached to referral and assessment raises the possibility of defamation as a remedy. Case authority establishes that qualified privilege applies to statements made by professionals in relation to questions of child protection, leaving the possibility for a successful action in situations where malice can be shown.[124] However, the circumstances where this could be demonstrated on the balance of probabilities will be rare. There is no legal aid available for such actions and the costs jeopardy for families is high if they lose. It remains a possible action, but not a realistic one.

Common law negligence has been tested as a remedy in cases of over-interference and under-interference. There is a large body of complex case law and the position changed following the implementation of the Human Rights Act 1998.[125] As a matter of public policy damages are restricted to children. In *X (Minors) v Bedfordshire County Council*[126] Lord Browne-Wilkinson observed that if a remedy in negligence were imposed on local authorities it would have a chilling effect on their work and generally render them more cautious and defensive.[127] This approach is directly at odds with the government's view that public inquiries and serious case reviews should occur in cases of under-interference, which also render local authority social workers more cautious and defensive. This is an unsatisfactory position leaving a disincentive for under-interference and encouragement for over-interference: a power imbalance between the State and the family.

The Human Rights Act 1998 offers some remedy where processes have been breached, but case law has not addressed the potential incompatibility of the Children Act 1989 paramountcy principle.[128] Articles 3, 6 and 8 of the European Convention afford potential for an action but damages are small amounts of compensation usually made only after families have been separated, rendering it of little assistance to families, although it has more impact in cases where the cause of trauma is argued to be the separation of parent and child.[129] The rationale for small sums of damages to be awarded rather than reunification of the family is the welfare principle, interpreted to mean that once a child is removed from their parents, a return of the child would be a further disruption and thus not in their best interests.

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[124] *W v Westminster City Council* [2004] EWHC 2866 (QB), [2005] 1 FLR 816.

[125] See discussion in Devine, above n 9.

[126] [1995] 2 AC 633.

[127] Ibid.

[128] See discussion in J Herring, 'The Human Rights Act and the welfare principle in family law – conflicting or complementary?' [1999] CFLQ 223 and S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25(3) Oxford J Leg Stud 453.

[129] For example *London Borough of Greenwich v EH and AA and A (Children)* [2010] EWCC 61 (Fam).

The consequences of inadequate remedies

Since section 11 of the Children Act 2004 was enacted a more critical debate has emerged concerning the unintended consequences of the power imbalance between the State and families.[130] This does not mean that the system and its rationale is wrong, but there is legitimate argument that embedding a family policing agenda into all State interaction with children causes unintended adverse consequences. As there has not been the expected post-section 11 rise in child abuse detection, these consequences are a priority for policy review. As it stands, the system takes does not provide adequate protection against the exercise of excessive State power, nor does it provide appropriate remedies for harm caused by it.

In addition to inadvertent harm caused to non-abusing families, an important adverse consequence of increased surveillance, referral and assessment may be that children who *do* pass the threshold of significant harm and face life-threatening situations can be missed and left in danger. The recommendations of Serious Case Review reports since the Children Act 1989 show that in some cases children who needed protection became 'lost' in the excess of data that is generated by the expansion of child protection into safeguarding or were wrongly classified as section 17 cases.[131]

In addition to the danger of abused children being missed, the conflation of need and risk in referrals and assessments expands State power by embedding an element of policing from the outset, even in those that do not meet the section 47 criteria. This creates difficulties and complexities around the relationship of social workers with families. Forcing families to 'work with' a social worker who is also policing them can be construed as coercive and controlling. It is not an easy partnership for either party. Some major studies have been conducted into this question with a focus on vulnerable groups, who find themselves repeatedly in child protection processes rather than supportive provision,[132] and families who have contact with the local authority through deprivation rather than abuse.[133]
Fundamentally there is no process in legislation or the statutory guidance to assist families who are caught in assessments containing an element of coercive 'policing' and are harmed by it. This results in a 'twilight' situation where suspicion remains but there is no process of exoneration or redress. When the Children Act 1989 was drafted, the scale of referred

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[130] For example R Anderson, I Brown, R Clayton, T Dowty, D Korff and E Munro, *Children's Databases – Safety and Privacy, A Report for the Information Commissioner* (Foundation for Information Policy Research, 2006), available at: www.fipr.org/press/061122kids.html and L Wrennall, 'Surveillance and Child Protection: De-mystifying the Trojan Horse' (2010) 7(3/4) Surveill Soc 304, available at: www.surveillance-and-society.org, last accessed 31 May 2022.

[131] For example LSCB Haringey, *Serious Case Review: Baby Peter*, Executive Summary (2009), available at: www.haringeylscb.org/sites/haringeylscb/files/executive_summary_peter_final.pdf, last accessed 31 May 2022; J Radford, *Serious Case Review, Under Chapter VIII, 'Working Together to Safeguard Children', In respect of the Death of a Child, Case Number 14*, 26 April (Birmingham Safeguarding Children Board, 2010), available at: www.northumberlandlscb.proceduresonline.com/pdfs/kyhra_ishaq_scr.pdf (last accessed 31 May 2022).

[132] K Broadhurst, D Wastell, S White, C Hall, S Peckover, K Thompson, A Pithouse and D Davey, 'Performing "Initial Assessment": Identifying the Latent Conditions for Error at the Front-Door of Local Authority Children's Services' (2010) 40(2) *The British Journal of Social Work* 352 and K Broadhurst and C Mason, 'Maternal outcasts: raising the profile of women who are vulnerable to successive, compulsory removals of their children – a plea for preventative action' (2013) 35:3 *Journal of Social Welfare and Family Law* 291.

[133] C Webb et al, 'Untangling child welfare inequalities and the "Inverse Intervention Law" in England' (2020) *Children and Youth Services Review* 111.

families, now annually approximately nine percent of families in England, was not envisaged.[134] The consequences of the current legislative and policy combination conferring extensive State power, limited rights to resist for families to resist that power, and inadequate remedies is problematic, particularly given the nine percent of families involved and the evidence that the vast majority of these parents are not found to be abusing their children: The policy is not reducing the amount of abuse estimated in society; the fiscal cost of referrals and assessments is increasing beyond the capacity of local authorities; there is an increased risk of serious cases being 'missed'; and a large number of families are exposed to the potential for State-caused harm and stigma.

A return to the original policy intention?

Given that policy has moved as far as it can towards conflation, if there were to be a change, the pendulum would inevitably swing towards scaling back the conflation between need and risk responses. This would represent a return to the original intention in the Children Act 1989, separating the consensual section 17 in Part III and the coercive section 47 in Part V. Such scaling back could include earlier separation of referrals into one or both of two routes as was originally set out in the statutory guidance: an investigatory route which aims to identify and evidence significant harm (or the risk of it) and a supportive route which establishes if a family needs and wants consensual support.[135] Such a structure, if revisited, could include protections and safeguards for families during the investigative process, including a new inclusion of a remedy, possibly financial or via supportive services, for those harmed by the process. Careful thought should be given to how trauma should be mitigated and by whom. This suggestion runs counter to prevailing ideology and policy to locate sections 17 and 47 together, but the quantitative evidence of the efficiency reduction in detecting and addressing child abuse, together with the evidence from other studies of the harm caused by referrals and assessments, provides strong evidence for such a review.[136]

Current outcomes do not suggest that the system is working particularly effectively or without harm. A re-balanced system with clearer delineations at an earlier stage between questions of need, met through welfare provision, and questions of protection, addressed through the public family justice system, may assist in returning the outcomes nearer to those indicated by the statistical trends. In addition to the quantitative data, there is a wealth of knowledge to be gained from social workers, practitioners, the judiciary, and the families themselves to underpin any new approach. It may be that it would require separate assessment/investigatory processes to different evidential thresholds: an 'identify and evidence' approach to suspected child abuse would be a forensic process whereas a supportive service approach would not. This approach would enable greatest dedicated focus on the cases where children have been, or are at risk of being, significantly harmed, delivered in a more robust investigatory framework with protections for families from protracted

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[134] The number of families in England in 2015 is estimated at 6,708,800. See ONS, *Families with dependent children by number of dependent children by UK countries and English regions* (ONS, 2015). There were 635,600 referrals in 2015, giving a ratio of 9.47%.

[135] Department of Health, Home Office, Department for Education and Employment, *Working Together to Safeguard Children* (TSO, 1999).

[136] See above n 41.

investigations and a Code of Practice, analogous to PACE.[137] Social workers are currently less controlled than the police in relation to the lack of a Code of Practice to regulate their methods of investigation. Families who need provision of services need a non-coercive service, focussing on family support. A clearer framework of this nature may be indicated, taking account of due process and evidential thresholds where allegations are made. This amounts to a more clearly delineated approach to the original framework set out in the primary and secondary legislation. Such a model would inevitably contain a robust process for enabling section 47 investigatory measures to be instigated if, during section 17 processes, an issue of 'significant harm' arose. The suggestions set out here would enable the evidential outcomes, roles, remits and consequences of all involved to be clearer. The suggestion made here is not radical, nor does it involve any change to the legislation. It simply suggests a re-balancing back towards its original intention. Social workers need to be able to focus on supportive social work where it is needed, particularly in climates of austerity such as that currently experienced in England.

These suggested policy changes are a step in a new direction, and simultaneously a step back to alignment with the intentions of the primary legislation. These suggestions do not remove any of the current abilities of the State to fulfil its statutory duties towards families and children; but enable a more precisely defined framework with clear accountabilities. A move away from coercively assessing need at a very low threshold of referral could also result in resources being redirected towards greater universal service provision. The relentless accumulation of data collected to identify low level concerns and in order for families to check their eligibility is a high price for families to pay for basic welfare services. The fiscal cost of mixed referrals and assessments for even basic supportive services is a high price for the State to pay.

Conclusions

A system of State power, which does not adequately balance the interests of those affected by it, is open to civil liberties criticism and argument that it is opressive. It is ironic that a principled ideology intended to protect society's most vulnerable members is open to criticism for its excessive use of State power. Expecting individual families to mitigate their own losses is unacceptable and runs counter to notions of family support.

The child rights model (as opposed to the family support model) underpins Part V of the Children Act 1989. This model does not prioritise family support but intervenes on the grounds that there is a duty to prioritise the protection of children over the removal of wider family rights. This was only intended to be exercised when a child was 'reasonably suspected to be at risk of significant harm', not in all cases where a family may fall into a statistical risk category or a child's behaviour may deviate from the State's expected ideals. This model takes no responsibility for harm caused by its means of identifying children for referral, or of the consequences of assessment. The framework prescribes that the State must demonstrate it has discharged its statutory duty to investigate reasonably suspected significant harm: any harm caused by the State's actions in discharging that duty is ignored. This leaves the mitigation of harm with the family members, including the child on whose behalf the State

[137] Police powers are regulated by the Police and Criminal Evidence Act 1984. There is no similar Code of Practice for the regulation of social work assessments.

has intervened. The 88 percent of referred parents who are potentially affected by this are left to parent their children under traumatic circumstances when they may already have been under stress prior to the referral. The children may also be traumatised, placing additional strain on the parents to help their children recover.

It is not unreasonable to suggest policy makers should be responsible to ensure any unintended adverse consequences of their policies are addressed, particularly in child protection investigations where there is an inherent power imbalance. In the modern assessment framework, the balance of power has moved back to the pre re-focussing position identified in 1995, without adequate consideration of the harms identified in the refocussing debate. These harms will apply to more families now, representing the much larger numbers of referred families. If potential harm is an inevitable by-product of this state system, it follows that adequate remedies should exist. The current position, however, leaves families seeking a remedy from the inadequate avenues available, or to mitigate any damage unaided. This is not an acceptable position given the scale of the problem and the recent data trends indicating the numbers may continue to increase, or at least remain consistently very high.