



Social Services and Well-being (Wales) Act 2014

Response to the Consultation on

Part 6 Draft Code of Practice

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1. About Family Rights Group

Established in 1974, Family Rights Group is the charity that works with parents in England and Wales whose children are in need, at risk or are in the care system and with members of the wider family who are raising children who are unable to remain at home.

Our expert advisers, who are child welfare lawyers, social workers, or advocates with equivalent experience, provide advice to over 6000 families a year via our free and confidential telephone and digital advice service. We advise parents and other family members about their rights and options when social workers or courts make decisions about their children's welfare.

We also campaign for families to have their voice heard, be treated fairly and get help early to prevent problems escalating. We champion Family Group Conferences and other policies and practices that keep children safe in their family network.

Our advice service is totally overwhelmed. Funding constraints mean we can only advise four in ten families contacting us for advice. The sole funder of the advice line is currently the Department for Education and the funding is for families in England seeking advice. However, in reality we have continued to also advise families from Wales including those with looked after children. Both funding pressures and the imminent divergence in the law on looked after children between England and Wales, means this will become unsustainable from April 2016.

2. Our comments on the Code of Practice

The following comments address how parents and wider family members are involved in plans and decisions for a looked after child. We have indicated some places where these points need to be specifically addressed but we would hope that, during the revisions to the code, these points will be applied throughout. References to 'the Act' are to the Social Services and Well-Being (Wales) Act 2014. The CA89 is the Children Act 1989.

2.1 Consultation with parents and others with parental responsibility in decision-making for looked after children

It is particularly important to involve parents and wider family members in making plans for looked after children because a significant number of children in care are reunified with their family, indeed 92% of looked after children and care leavers will eventually return home (92%) (Bullock et al 1998).

Whilst we welcome the aspirational nature of the Act, we feel that significant improvements are required to the draft Care Planning, Placement and Case Review (Wales) Regulations 2015 and Code of Practice in order that the Act's aims and objectives are fulfilled. It is disappointing that in some important aspects, such as kinship care and children returning home from care, the Regulations and Code are

less robust and comprehensive than recent English regulations and guidance on these issues.

Care Planning: Consultation with parents

Throughout the time a child is looked after, parents have parental responsibility for their child (and others who have acquired it retain parental responsibility for the duration of the order- s.2 CA 1989). They also have a right to respect for family life in relation to all local authority decision-making about their child (s.6 HRA 1998). These rights are reflected in section 6(4) of the Act, which require that the local authority must have regard to the views, wishes and feelings of the parents when making decisions about looked after children. Accordingly parents should be consulted about decisions relating to their child when they are looked after. Case law has also established that where there is to be any change to a care plan following the making of a care order, the parents must be consulted about the proposed change otherwise there may be a breach of their human rights.¹

Unfortunately, the emphasis in the way that the draft code treats parents and others with parental responsibility under the Act is not consistent. Whereas it is very explicit that the local authority must have regard to the views, wishes and feelings of parents and others with parental responsibility (as appropriate) in relation to decisions about *placements* of looked after children (page 15 and 32), it is not clear that they must be consulted in the *care planning* process. On page 14 it says that families will be able to participate in the assessment and care and support planning process, but it does not say how, and it does not set out the need for consultation.

The same emphasis should be applied to guidance on consulting parents/ others with paternal responsibility in relation to LAC reviews.

We therefore recommend that:

- the wording on page 32 should be reiterated with equal emphasis in the section on care planning process (pages 14-15) in relation to having regard to the views of parents and others with parental responsibility; and
- throughout the code, careful attention should be given to ensuring parents are appropriately consulted throughout the time their child is looked after.

Agreement of parents/others with parental responsibility to the care plan for an accommodated child

A similar point arises in relation to the care plan for an accommodated child. Regulation 4(5) of the Care Planning, Placement and Case Review (Wales) Regulations 2015 specifies that the care plan must be agreed with either the young person themselves if they are 16 or 17 or in all other cases with the parent and any

¹ R (on the application of H) v Kingston Upon Hull City Council & KS, AS, SS, TS and FS (Interested Parties) [2013] EWHC 388 (Admin); Re M (Care: Challenging Local Authority Decisions) [2001] 2FLR 1300; Re L (Care: Assessment: Fair Trial) Proceedings: Disclosure of Local Authority Decision-Making Process) [2002] 2 FLR 730; Re: G (Care: Challenge to local Authority's decisions)[2003] EWHC 551 (Fam), Family Law June 2003, 389; G v N County Council (Family Division; McFarlane J) ;(2009) 1 FLR 774; Re DE [2014] EWFC 6

other person with parental responsibility. The plan for an accommodated child must therefore be agreed with the parents/others with parental responsibility. In our experience of case work we find this is often overlooked, and we consider that it is a deficit in the current Vol 2 CA89 guidance.

We therefore recommend that, as well as consulting with parents/others with parental responsibility about the plan, it should also be clearly spelt out in the Code that their *agreement to the plan is required*.

Delegated responsibility

We welcome the guidance on page 56 (3rd para) that the local authority should work with the parents to help them understand the benefits to their child of delegating authority to the foster carers, but **we recommend that this** should also include explaining to them what they can do if further on in the process they become unhappy with authority being delegated.

2.2 Early identification of wider family options before a child becomes looked after and the use of family group conferences

The research evidence is that most children in kinship care (aka family and friends care) are doing significantly better than children in unrelated care² – in particular they feel more secure and have fewer emotional and behavioural problems and are also doing better academically. This is despite them having suffered similar adverse experiences in the past as those living with unrelated carers in the care system³ and yet getting little or no support. Exploration of wider family options is therefore critical to achieving optimal outcomes for looked after children when they cannot remain with their parents; and the earlier wider family placements are identified, the fewer moves the child is likely to experience. Indeed it may result in appropriate avoidance of care proceedings (Masson et al 2013; Broadhurst 2013). It is also consistent with the child's right to respect for their family life (Article 8 ECHR).

Recent case law has highlighted the importance of considering wider family options before a permanence plan outside the family can be pursued legally. In *Re B (A Child) [2013]*,⁴ the Supreme Court held that orders contemplating non-consensual adoption are very extreme things, a 'last resort', 'only to be made where nothing else will do'. In the case of *Re: B-S (Children) [2013]*,⁵ the Court of Appeal considered the practical implications of this and held that the court can only reach such a conclusion that nothing else will do if it has considered evidence on all the options which are realistically possible, together with an analysis of the arguments for and against each option. Recent statutory guidance in England⁶ emphasises the importance of identifying wider family early, not least because it can reduce the need for the child to become looked after and minimise the number of moves for a child who may already have experienced trauma and abuse. It says:

² Selwyn et al 2013

³ Farmer & Moyers, 2008

⁴ *Re B (A Child) [2013] UKSC 33*

⁵ *Re B-S [2013] EWCA Civ 1146*

⁶ DFE, *Court orders and pre-proceedings*, 2014

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf

- It is important wider family are identified and involved as early as possible as they can play a key role in supporting the child and helping parents address identified problems. Where problems escalate and children cannot remain safely with parents, local authorities should seek to place children with suitable wider family members where it is safe to do so. (para 22)
- Enabling wider family members to contribute to decision-making where there are child protection or welfare concerns, including when the child cannot remain safely with birth parents is an important part of pre-proceedings planning. (para 24)
- Family Group Conferences⁷ are an important means of involving the family early so that they can provide support to enable the child to remain at home or look at alternative permanence options... ***Local authorities should consider referring the family to a FGC if they believe there is a possibility the child may not be able to remain with their parents, or in any event before a child becomes looked after unless this would be a risk to the child*** (para 24)

We strongly recommend that the approach to identifying wider family options early, set out in chapter 2 of the English guidance, including the emphasis on wide use of family group conferences, is followed when Wales issues updated Volume 1 Guidance.

2.3 Effective support for kinship care arrangements

Research has also highlighted the impact of the lack of support for kinship care arrangements. Those family and friends carers who get the least support from local authorities are the ones who are bringing up the children with the highest levels of emotional and behavioural difficulties (Hunt and Waterhouse, 2012). Many kinship care households end up in severe financial hardship as a result of raising a child in their family⁸. Nearly half have to leave their jobs or cut their hours⁹. A high proportion of kinship carers have limiting physical conditions or disabilities and often their own relationships come under strain. The main determinant of access to support is the child's legal status, in particularly whether they are in or out of the care system rather than their needs¹⁰;

The Department of Education issued statutory guidance on family and friends care in 2011 which sets out expectations for support to be provided in English authorities to kinship care arrangements (including a requirement for every local authority to have a family and friends care policy) irrespective of the legal status of the child.

We are very concerned that the guidance given on page 31 of the draft Code in relation to placement of looked after children with a kinship carer is very unclear, and in some crucial respects wrong. Any placement of a looked after child, who is voluntarily accommodated under s76 of the Act (s20 of the CA89), must be in accordance with s81 of the Act. For a child who cannot be placed with parents, the

⁷ For more information about FGCs see <http://www.frg.org.uk/involving-families/family-group-conferences>

⁸ Hunt & Waterhouse, 2012

⁹ Aziz et al 2012

¹⁰ Hunt & Waterhouse 2013

next option is a placement with an individual who is a relative, friend or other person connected with the child. This person must also be a local authority foster carer (s81(6)(a)). The guidance at page 31 of the draft Code suggests that it is only in respect of a child that is subject of a care order, that the kinship carer must be approved as a foster carer. This is completely confusing the effect of the provisions of s81 (following s22C CA89) which were made to ensure that where there was a need to provide a child with accommodation, all options are considered to be 'placements' and the child remains looked after. Moreover if a local authority have decided that a child is in need of accommodation under s76 of the Act, and have decided that the best placement option is with a kinship carer, this is a placement under s81(6) and the child remains looked after. The paragraph at page 31 of the draft code ignores the extensive case law on this issue¹¹ and confuses a placement with a kinship carer with returning home from care. The law on provision of support from the local authority is very different in each of these circumstances.

Recent changes to the Care Planning, Placement and Case Review (England) Regulations¹² provide that before deciding to return the child home, Children's Services must carry out an assessment of what services and support the family and the child might need when he/she returns home¹³. The outcome of this assessment will be included in the child's care plan. If the plan includes some services and support, Children's Services must monitor the impact of the services and support they are providing and review the plan once the child returns home. Unfortunately these changes have not been incorporated into the Care Planning, Placement and Case Review (Wales) Regulations 2015.

We strongly recommend that

- Guidance equivalent to that issued by the DfE in 2011 is issued as a matter of urgency to ensure that family and friends care arrangements are properly made in accordance with the provisions of the Act and supported to enhance outcomes for children and prevent placement breakdown.
- The draft Code should be amended to properly reflect the law in relation to placement of looked after children who are voluntarily accommodated, in particular with regard to placement with relatives, friends or other connected persons;
- Separate guidance should also be issued on returning home from care, and the regulations amended to include provision for support for children returning home, following recent amendments to the Care Planning, Placement and Case Review (England) Regulations 2010 reg 39. We are concerned that while there is repeated emphasis in the draft Code for arrangements to be made for accommodated children to live with other family members or connected person, without remaining looked after, the details as to how those

¹¹ **Southwark LBC –v- D** [2007] EWCA Civ 182; [2007] 1 FLR 2181: **R (on the application of A) Coventry City Council** [2009] EWHC 34 (Admin); **R (SA) v Kent County Council** [2011] EWCA Civ 130

¹² New reg 39, CPPCR(England)Regulations 2010

¹³ Ibid, Reg 39(2)

family and friends carers are to be supported are completely absent (for examples, pages 31, 55)

2.4 Independent advice for families

It is critical that families are able to access independent advice when their children are looked after. For example, they may need advice about:

- their rights and options, including the importance of engaging with social services, to maximise the chances of a child safely remaining within their family network/returning home from care;
- the circumstances, if any, in which their child can return home from care;
- the concept of permanence and how this might impact on return home,
- contact and how to make this positive for their child and them including how to manage their own expectations of contact;
- consultation, exercising parental responsibility and delegated authority;
- the implications of agreeing to a baby or child being accommodated where the local authority is satisfied that the child ought to be placed for adoption, as this will trigger the duty in s.81 SSWWA 2014 to place the child with prospective adopters, from which the child is unlikely to return home.

Theoretically families can access legal advice from solicitors who specialise in children's law. However, without the assistance of legal aid, this route is prohibitively expensive for most families whose children become looked after. Under current rules, only those parents whose children are subject to care proceedings will be entitled to full legal aid. Pre-proceedings, those parents who receive a letter before proceedings will be entitled to level 2 legal help. Parents of a child who is voluntarily accommodated have no access to legal aid. Parents of a child who is already subject to a care order, who wish to apply to discharge that order or challenge a change to the care plan are not automatically entitled to legal aid. Kinship carers may be able to get legal aid on a means tested basis if they are a party to care proceedings. The reality, therefore, is that legal advice from a solicitor is not available to many families whose children are looked after.

We are not aware of any specialist advice service in Wales that can advise families on these matters. Historically, Family Rights Group has advised families on these issues but with the divergence in the law between England and Wales, this cannot continue unless there is specific funding for us to develop Family Rights Group (Wales) advice service in partnership with a relevant local agency. We have discussed this possibility with Children in Wales and with the previous Children's Commissioner for Wales who identified the need for a specialist advice service for families in Wales.

The importance of parents and relatives being to access independent advice is acute, not least because it will maximise the chances of children safely remaining in, or returning to, their family network. This is consistent with the preventative

aspirations of the Act (s.15) and the remarks of the Minister on 16th March 2015 that there are too many children in the looked after system and that more should be done to support families to raise their children safely and promote their well-being. We note the absence of any guidance on the need to support parents following the permanent removal of their children. Recent research by Broadhurst et al (2015) has highlighted the high number of mothers who are subject to repeat care proceedings, the young age of many of these mothers and the reduction in time between pregnancies the more children that they have removed. It is therefore essential that the support needs of parents following the removal of their children is addressed effectively, both for the adults' sake but also to reduce the numbers of children who have to be taken into care in the future.

2.5 Long term foster placements

Recent changes to the Care Planning, Placement and Case Review (England) Regulations¹⁴ have provided a **definition of “long term foster placement”**. Children's Services must make sure that foster carer has agreed to care for the child **until the child leaves care**. *Before a child can be placed in a long term fostering placement* Children's Services must have

- prepared a placement plan ;
- taken into account the child's wishes and feelings;
- informed and consulted the IRO about the plan; and
- consulted the child's relatives (where appropriate).

Also, they must be sure that this placement will safeguard and promote the child's welfare, and be sure that the long term foster carer intends to be the child's foster carer until he/she leaves care. Before deciding to make a long term foster placement, Children's Services must carry out an **assessment** of the child's current and future needs, and the ability of the foster carer to meet these needs. The assessment should consider what support and services are necessary to ensure the placement meets the child's need.

We recommend that this definition and associated requirements are included within the Care Planning, Placement and Case Review (Wales) Regulations, and similar guidance be included within the draft Code.

2.6 Reviewing plans for looked after children

Guidance on the role of the IRO

Chapter 4 of the draft Code details the role and functions of the IRO. This chapter is just 5 pages long. This contrasts with the current guidance 'Independent Reviewing

¹⁴ Care Planning, Placement and Case Review (England) Regulations, Reg 22B

Officers Guidance Wales' which is 25 pages long and the Independent Reviewing Officers Guidance in England which is 68 pages long.

Recent case law and a report from Ofsted¹⁵ shows that the role and functions of the IRO are becoming more challenging and complicated as the number of cases relative to the number of IRO is increasing. Their independence is also an issue. There is a greater need than ever for clear and comprehensive guidance for the persons who fulfil this role.

IF it is intended that the Code will replace the current IRO guidance, we would recommend that as a minimum the guidance currently set out in that document should be replicated in the Code.

2.7 General points affecting the use of the Code by practitioners

- The Code in its draft form does not include section or paragraph numbers. This means it is very difficult to reference a particular part of the code.
- The code does not contain specific cross references to any of the regulations – it would be much more useful to practitioners if the relevant paragraphs of the regulations (in addition to the sections of the Act) were referenced at the appropriate places, as it is currently done in the Vol 2 CA89 Guidance.
- The Code does not always set out the time limits that apply to certain duties such as preparing the care and support plan (within 10 days of placement, Reg 4(3)), carrying out reviews of LAC (first review 20 days, Reg 39)
- The terminology used is, in some parts, inconsistent. For example, under s54 and s83 of the Act refer to 'care and support' plans for children who are assessed as in need by the local authority, or are looked after. But the regulations, as Reg 4 – 6 refer to 'care' plans. The draft Code refers to 'care and support' plans.

¹⁵ A and S (Children) v Lancashire CC [2012] EWHC 1689 (Fam) 21 June 2012; 'Independent Reviewing Officers: Taking up the challenge?' (June 2013)