Rethinking Child Protection Strategy: Exploring the limits of State power and private rights in respect of the adequacy of child protection and safeguarding complaint processes and legal remedies

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Abstract:

When families are referred to local authority children’s social care departments the State has considerable power to intervene into private family life in order to establish whether a child meets the s.47 Children Act 1989 threshold of whether they are ‘suffering or likely to suffer significant harm’. This is done by a process of assessment set out in statutory guidance. In the majority of cases (93%) there are insufficient grounds to conclude that this is the case. Research has established that the process of referral and assessment, particularly when it is non-consensual can cause significant damage to families with long lasting effects. The effects are described as akin to those of post-traumatic stress disorder (PTSD). In such situations families can use local authority complaints systems and a variety of pre-existing statutory and common law remedies, however there is no medical or legal recognition of this type of damage being able to be caused by the exercise of State power and no specific remedy to deal with it. Existing remedies are strictly time limited, do not have sufficient remit to address the level of harm caused and do not take into account the fear of further trauma from renewed contact with State agencies. Our research considers whether the balance between State power and private rights should be re-thought in light of this unintended consequence and we suggest a revised framework to redress this imbalance.

Keywords: Family law, children’s rights, parent’s rights, complaints, remedies, state power, private rights

Introduction

This paper discusses the limits of State powers and private rights. This discussion focusses on the adequacy of the complaint process and wider legal remedies for families following child protection and safeguarding investigative processes in cases where no evidence of abuse is established.

This is an under-researched area but one that merits detailed consideration. Around forty per cent of safeguarding and child protection assessments following a referral do not yield evidence of abuse, risk or need. In referrals responding to a family’s need under s.17 Children Act 1989 a family is still assessed for significant harm and the risk of it. This approach conflates abuse, risk and need into a continuum, rendering the precise boundaries between the categories and consensual status of all but those falling into a s.47 category.
virtually meaningless. The results of our research into the number of families in this category over the past twenty five years in England indicate that there is not only a large cumulative number of families in this category, but that the category is expanding as a consequence of successive government policies of early intervention and low threshold referrals. Other research has established that for many families the process of referral and assessment causes trauma resulting in social and economic harm.

Referrals and assessments which do not progress beyond assessment now form a significant category of referred families annually. This paper’s focus is on those families. In such situations the State has significant power of investigation, data sharing and retention in order to discharge its statutory duty under s.47 Children Act 1989 and obligations under s.17 Children Act 1989, but there is no responsibility to mitigate any harm caused by the referral and assessment process itself. 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 the effects of the exercise of coercive State powers.

The balance between State power and private rights is weighted in favour of the State. The rationale is to protect children. However, just under half of referred families are not abusing their children, nor do they meet the s.17 ‘in need’ criteria. Our research findings show that rather than detecting more abuse, the lowering of the threshold and reliance on referrals of low level concerns and behavioural signs has reduced the abuse detection ratio from 24% to 7% since the Children Act 1989 came into force. As well as reducing the abuse detection ratio this policy fails to take account of the increased number of families placed at risk of harm by the exercise of State power. In such situations the question of how the State mitigates such harm must be considered: how do families raise and address their concerns and are remedies adequate? If state processes for addressing harm are inadequate then policy and potentially legislative change is indicated in order to take account of this unintended consequence.

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 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”. Less attention has been given to the complexities and difficulties facing parents who are accused of child abuse, or who are considered to be at high risk of abusing their child, but against whom no evidence of abuse is substantiated. Such families, including the children,

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4 There is limited case law suggesting that families have some redress against non-consensual processes, see AB & Anor, R (on the application of) v The London Borough of Haringey [2013] EWHC 416 (Admin) (13 March 2013)
5 ‘Rethinking Child Protection Strategy’ was funded by the Economic and Social Research Council grant number ES/M000990/1, 2014-2016.
7 Ibid, n.3
9 Ibid, n.3
must continue with their lives beyond assessment, but evidence from research worldwide suggests significant long-lasting stress, trauma and distress can result from the experience as well as interrupt positive relationships between families and State agencies.11 Our research identified three under-researched questions in relation to current policy:

1. Is referring and assessing increasing numbers of families reducing the prevalence of abuse?
2. Is referral and assessment harming families who are not abusing their children? and
3. Are there adequate remedies for these families?

The rationale 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 as a result of poverty,12 neglect,13 cultural practices14 and deliberate cruelty.15 The notion of child welfare as a public responsibility grew from social and political concern over the plight of children as a disadvantaged group. Consequently, the argument supporting State interference into private autonomy is strong where there is a reasonable suspicion of abuse, to both identify cases of child abuse and to avoid lingering, ongoing suspicions stigmatising a family in non-abusing families.

The complexity arises in deciding upon the appropriate level and limits of State interference and the appropriate balance with private rights.

State powers of surveillance, referral and assessment in relation to child welfare are demonstrably extensive. The Children Act 1989 sets out a duty on local authorities under s.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’.16 The enquiry takes the form of a wide ranging assessment, the national template for which is found in Working Together to Safeguard Children.17 At local level the means of delivering that template may differ. It is of note that the wording of s.47 does not place specific restrictions on the powers of local authorities nor does it dictate what form the

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11 Ibid, n.6
16 S.47 Children Act 1989 c.41 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’.
enquiry will take. In some instances, before parents are asked for their consent a form of investigation has already started via inter-agency inquiries and information sharing about a family.

Not all referrals relate to suspected cases of significant harm. S.17 Children Act 1989 also 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 some families may be offended, intimidated and demeaned by a suggestion that they are deficient, or conversely may feel they have needs that the local authority does not recognise. Although families can theoretically refuse to consent to assessment in referrals meeting the s.17 threshold, assessment could be escalated to take place under s.47 in order for a local authority to proceed. 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 they may be afraid of the consequence of non-compliance.

The Children Act 1989 intended that State powers would only be used coercively where necessary. This has arguably been supplanted by subsequent legislation in s.11 Children Act 1989 requiring many professionals to refer 'signs' in children’s behaviour regardless of the cause for them. In practice these signs represent behavioural characteristics which are deemed to deviate from the norm. S.11 was introduced at a time of policy expansion into measuring wellbeing of all children under the wide framework of 'safeguarding' rather than simply identifying children who fell into a s.17 or s.47 category. This was reflected in statutory guidance from 2013 onwards where the boundaries of consent in relation to s.17 referrals and assessments were rendered unclear. These changes have caused an unprecedented level of State power over the family in relation to assessment.

Suggestion that this rise in State powers and erosion of private rights is justified by the need to protect large numbers of abused children from their parents is weak. There is considerable uncertainty surrounding the accuracy of child prevalence estimates. Even assuming the estimates are reasonably accurate the evidence from our longitudinal data findings indicating that despite the policy drive to increase referrals, no corresponding increase in substantiated cases of significant harm are reported. Successive prevalence studies do not suggest the level of undetected child abuse is falling; even taking into account the uncertainty over the accuracy of the prevalence estimates, there is little of substance to indicate the current policy is making a significant difference. An increasingly lower ratio of referrals to substantiated cases has driven the abuse detection element of the system down from 24% to 7%. As a policy for detecting and addressing child abuse, increased State power following lowering the threshold for referral is not yielding strong evidence that it is successful if the measure is detection and reduction of child abuse.

There is a natural fear of making errors that result in a failure to protect children. The most extreme examples concern errors of under-interference that result in a child dying as a result of abuse. This concern is very legitimate but should not override equally legitimate critical examination of whether there is sufficient protection afforded for referred families, of whom

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18 Ibid, n.16
22 Ibid, n.6
the vast majority of whom are not harming, let alone killing, their children. There are competing and unequal interests involved; the State’s welfare agenda championing the interests of the child, whose interests are ‘paramount’. It must be remembered, however, that children cannot stop the State acting ‘in their best interests’ but may become part of a fearful and traumatised family following assessment.

Practices of State intervention follow a generally accepted principle that there is a necessary level of interference with individual liberty in order to protect society and individual citizens. For example it is generally accepted, at least as a theoretical concept, that the police should have certain powers to not only detect crime but also to take steps to prevent it. However, there is debate about the precise level at which citizens should be policed in their private lives outside the criminal justice system. Child protection and safeguarding systems and processes exemplify the issues. 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 from harm. However, the 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. Assessment does not only investigate the reason for the referral, but assesses every aspect of a family’s private life. 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. It is difficult, therefore, to see precisely where the limits of local authority powers lie. Conversely, private rights are limited and those that exist are only able to be exercised in restricted circumstances. In this situation some families report extreme and long lasting fear and trauma following the experience of assessment. This manifests itself as aversion to further contact with State agencies, social and economic withdrawal including loss of friends, housing and jobs,

23 S.1(1) Children Act 1989
24 For debate concerning State paternalism in a moral sense, see for example the Hart/ Devlin debate which focussed upon the tensions between individual liberty and Government controls over citizens’ behaviour. Hart questioned that the conventional morality of a few members of the population should be justification for preventing people doing what they wanted to do (as long as it did not harm others). See: Hart, H.L.A. (1963) Law, Liberty, and Morality, Stanford University Press, Stanford. Devlin, however, considered that any category of behaviour was capable of posing a threat to social cohesion. Therefore, moral laws are justified to protect society against the disintegrating effects of actions that undermine the morality of a society; Society has the right to defend its own existence. See: Devlin, P. (1965) The Enforcement of Morals, Oxford University Press, Oxford. 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
25 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. Article 5, Human Rights Act 1998, guarantees the right to liberty and grants protection against detention without charge. Since this provision violates Article 5 the Home Secretary had to assert that the UK is in a ‘state of public emergency.’ This introduction of anti-terror legislation in the UK in the wake of 9/11 attacks, adds to a significant debate in relation to citizens’ rights when suspected of a crime, which had previously led to the introduction of the Police and Criminal Evidence Act 1984 in an attempt to create a balance between the powers of the police and the rights of citizens.
27 Police and Criminal Evidence Act 1984
disrupted relationships between parents and children and symptoms of distress in both parents and children.  

Available remedies: complaints and judicial processes

For a family in this position there is a confusing and piecemeal array of potential remedies, none of which specifically address the particular type of harm reported. Such families are in a very vulnerable position and may find it difficult to make decisions within tight timescales and may be fearful of attracting more adverse State attention. The available remedies are piecemeal, drawn from a number of common law and statutory provisions including complaint procedures, Judicial Review, defamation, negligence and Human Rights Act 1998 provisions particularly Articles 3, 6 and 8.

Aggrieved parents would initially be expected to turn to the complaints procedure particularly if an application for Judicial Review is intended to be sought. It is a requirement under s. 26 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.

The complaint procedure can be used in relation to Part V of the Children Act 1989 and can also be used in relation to assessments carried out under the statutory guidance. This process has been shown to be effective in slowing down assessment, if not resolving a family’s distress. Unfortunately this has a doubly damaging consequence: one of the reasons noted in the serious case review following the death of Khyra Ishaq to explain why social workers failed to complete an assessment was that following their unsuccessful visit, Khyra’s mother lodged a complaint with the local authority about the visit and the proposed assessment.

Complaint procedures are not designed to address instances of substantial harm and distress to families and therefore provide a very limited practical remedy. The process only has to consider, not resolve. If the internal complaint does not provide satisfaction to the complainant, the unresolved issues can be referred to the local authority Ombudsman in relation to questions of maladministration. Several evaluations of complaint processes conclude that complainants had a high chance of dissatisfaction. There are also numerous government reports considering reforms to the complaint system following claims of its inadequacy in sensitive situations in response to research findings indicating that complainants do not obtain satisfaction. It is therefore difficult to see how parents likely to

28 Ibid, n.6
29 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)
30 Part V Children Act 1989 deals with matters relating to the ‘protection of children’ as opposed to Part III which deals with consensual family support
32 In: Murphy, J. (2003) ‘Children in need: the limits of local authority accountability’ Legal Studies, Vol 23, Issue 1, 103, at pp 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.
34 The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 implemented joint complaints procedures for health and social services from April 2009. The following reports are relevant to both: Simons, K (1995) I’m not complaining but ... Complaints Procedures in Social Services Departments, Joseph Rowntree Foundation, UK; Department of Health. (2006) Our Health, Our Say, Our Care
be distressed and frightened will 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.

Internal administrative remedies must be exhausted before an application for Judicial Review is allowed, so families must use this process before commencing proceedings. Judicial Review is intended to be used in relation to ultra vires acts by public bodies either in relation to a decision, or failure to make a decision. Illegality, irrationality and procedural impropriety are potential causes of action. They are therefore available for parents to use if the complaint procedures have not resolved the issue. However, there is a very short three-month limitation period for commencing actions which creates an additional barrier for potentially traumatised applicants who may also be litigants in person.

Judicial Review decisions are limited by s 31(1) Senior Courts Act 1981 c.54. The court cannot substitute different decisions following successful applications. Consequently, even a successful applicant will find a quashed decision is merely sent back to the local authority for determination. The local authority is then open to the possibility of reaching the same decision for a second time, this time using a different route. 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. Even if successful, of the range of potential remedies it is redetermination that is the likely outcome rather than overturning of a decision, rendering it an empty remedy for many families.

A further issue is that Judicial Review has been found to be very limited as a remedy in cases where the local authority argues the applicant is a risk to children. R v Swindon BC highlights the problems faced by a claimant in relation to his challenge of a local authority’s decision. The claimant, S, was a consultant gynaecologist who sought Judicial Review of 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 the daughter, K, of the woman with whom he had been living. The jury was unable to agree on another three counts. The jury directed the prosecution that a re-trial was not appropriate, leading to a formal not guilty verdict. Despite his acquittal the claimant failed to gain agreement from the local authority that they would not continue to risk assess if he were to move in with his new girlfriend and her children. Scott-Baker, J. held that:

36 In: Council for Civil Service Unions v Minister for the Civil Service [1985] 1 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’. 37 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 HMSO, London, UK 38 [2001] EWHC Admin 334
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.\(^{39}\)

The Judge expressed ‘a good deal of sympathy for someone in the shoes of the defendant’,\(^ {40}\) 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\(^ {41}\) and the requirement to investigate if a local authority has ‘reasonable cause to suspect a child is likely to suffer significant harm’.\(^ {42}\) In the former, evidence is adduced to prove on the balance of probabilities that there is a likelihood of ‘significant harm’ unless an order is made. In the latter the duty is on a local authority to investigate if they suspect 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 R v Swindon BC\(^ {43}\) was an objection to open-ended interference into private life without a clear process of resolution 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.

For parents who have already undergone significant trauma with a local authority these may not be realistic remedies. Using the complaint procedures followed by Judicial Review if the issues are not resolved may raise their fear of facing future assessment if redetermination is the outcome. These remedies particularly do not help parents who find the local authority has followed procedures correctly but that those procedures do not take account of their distress or where the local authority argues there is an ongoing risk. Such an assertion is very difficult to disprove. Defamation is a potential remedy as there is undoubtedly a stigma attached to referral and assessment. There is limited authority concerning parents who have tried to use defamation as a remedy which established that qualified privilege applies to statements made by professionals in the discharge of their duties in relation to questions of child protection.\(^{44}\) This leaves the possibility for a successful action in situations where malice can be shown. However, the circumstances where this is possible to demonstrate on the balance of probabilities are likely to be rare. There is no legal aid available for such actions and the costs jeopardy for families is high. It remains a possible action, but not perhaps a realistic one for the majority of families.

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. As a matter of public policy damages are restricted to children.\(^ {45}\) In X (Minors) v Bedfordshire CC\(^ {46}\) 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.

\(^{39}\) [2001] EWHC Admin 334, at [35]
\(^{40}\) [2001] EWHC Admin 334, at [37]
\(^{41}\) [1996] AC 563
\(^{42}\) [2001] EWHC Admin 334, at [34]
\(^{43}\) [2001] EWHC Admin 334
\(^{44}\) W v Westminster CC and Anca Marks and James Thomas [2004] EWHC 2866 (QB)
\(^{46}\) X (Minors) v Bedfordshire CC [1995] 2 A.C. 663
in their approach. 47 This approach, however, 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, enabling a power imbalance between State and family which is at odds with principles of reasonableness and proportionality.

The Human Rights Act 1998 offers some remedy where processes have been breached, but the case law has not addressed the apparently incompatibility of the Children Act 1989 paramountcy principle. 48 Articles 3, 6 and primarily 8 afford the potential for an action but damages are limited to small amounts of monetary compensation usually only after families have been separated. The rationale for small sums of damages to be awarded rather than reunification of the family relies on the welfare principle, which has been interpreted to mean that once a child is removed from their parents a return of the child would be a further disruption and is not, therefore in their best interests. The Human Rights Act 1998 can perhaps surprisingly be seen to be of little meaningful assistance to families harmed by referral and assessment although it has limited impact in cases where the cause of trauma is argued to be the separation of parent and child. 49

The consequences of inadequate remedies

The enactment of s.11 Children Act 2004 prompted a more critical debate concerning the unintended consequences of the power imbalance for families. 50 This debate does not conclude that the system and the rationale for it is wrong, but there is legitimate argument that embedding a family policing agenda into all State interaction with children results in unintended consequences. When taken in the context of the data demonstrating that this policy has not resulted in the expected level of abuse detection these consequences are a priority for policy review. At present the system does not take adequate account of the needs of the family to have protection against excessive State power nor does it provide appropriate remedies for harm caused.

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 are still in danger as a result of categorisation errors at the referral and assessment stage. Our research analysed the recommendations of serious case review reports since the Children Act 1989, and found 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.

In addition to the danger of children becoming ‘lost’ in the system, the conflation of need and risk in referrals and assessments expands State power by embedding an element of policing at all stages, even those that do not meet the s.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 the social worker or the family.

47 [1995] 2 A.C. 663
49 See for example London Borough of Greenwich v EH and AA and A (Children) [2010] EWCC 61 (Fam)
The fundamental problem is that there is no process in the legislation or the statutory guidance to assist parents who are caught in assessments that contain an element of coercive ‘policing’ and are harmed by them. These parents are left in a ‘twilight’ situation where suspicion remains but there is no process of exoneration or redress. The problem is therefore not adequately prioritised and considered in conjunction with the processes of child protection investigations themselves. When the Children Act 1989 was drafted the scale of referred families, now annually approximately 5% of families, was not envisaged.

When summarised, the consequences of the current policy of extensive State power, limited rights to resist that power and inadequate remedies can be seen to cause a number of problems: The policy is not resulting in a reduction of 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 resultant State-caused harm and stigma.

A new direction for assessments, investigations and remedies

Suggestions concerning a framework for policy change include a scaling back of the conflation between need and risk responses and a return to the original intention of the separation in the Children Act 1989 between Parts III and V. This could include earlier separation of referrals into either an investigatory model which aims to identify significant harm (or the risk of it), and a supportive model which aims to establish what consensual support a family needs. This would include protections for families in the investigative process and specific understanding that the exercise of State power may cause ongoing family trauma which is contrary to effective family functioning unless addressed in a non-punitive manner. Careful thought should be given to how this trauma should be mitigated and by whom. This suggestion runs counter to dominant ideology and policy to locate ss.17 and 47 together but the quantitative evidence of the drop in efficiency in detecting and addressing child abuse, together with the evidence from other studies of the harm caused by referrals and assessments indicates a policy review.

Current outcomes do not suggest that the system is working particularly effectively, or is without harm. A redesigned system with clearer delineations between questions of welfare and questions of justice would enable greatest dedicated focus on the cases where children are significantly harmed, delivered in a more robust investigatory framework with protections for families from protracted investigations and a Code of Practice, perhaps analogous to PACE.51 Social workers are less controlled than the police in relation to the lack of a Code of Practice to regulate their methods of investigation. A clearer framework is needed of due process and evidence thresholds where allegations are made, in tandem with the ability for professional social workers to focus on non-blame focussed, supportive social work where it is needed. Social workers themselves are under immense pressure from their dual welfare/policing role, and risk blame and public and professional censure when an adverse event occurs. Consideration should be given to the question of whether a specific remedy should be introduced to address the problem without the stigma of being ‘fault based’. Such a remedy should recognise that the type of harm reported could be caused without individual fault. It is simply a consequence of the exercise of State power. To support these families where no abuse is found their trauma should be recognised as such, possibly within the framework of PTSD.

Individual harm and the wider harm to society of this phenomenon will not be recognised and addressed unless referral and assessment are considered in a justice discourse as well as a welfare discourse. The system needs to be rebalanced back to evidence based practice with skilled investigation of fact and clear outcomes, including a mechanism for removing

51 Police powers are regulated by the Police and Criminal Evidence Act 1984. There is no similar Code of Practice in relation to the regulation of social work assessments
lingering suspicion from parents where indicated. Issues of the difficulties of exoneration following referral and assessment are analogous to the early stages of a criminal investigation. In such investigations the position on record keeping as regards criminal allegations where prosecution and conviction do not follow, are more precisely defined and controlled.

The suggestion of these policy changes is a step in a new direction but there is a pressing need for a rebalancing to take place in order for the system to work as it was intended. These suggestions do not take away 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. Funds could be redirected away from increased referrals and assessments towards increased universal provision of early intervention. This needs to be refocussed away from assessed need at a very low threshold involving extremely intrusive loss of privacy for a family, towards greater universal services and an additional layer of subsidised universally available services for families that need and want them. The relentless collection of data collected to identify low level concerns, and collected in order for families to check their eligibility for children in need services is a high price for families to pay for basic welfare services.

Conclusions

A system of State power which does not adequately balance the interests of those affected by it is open to criticism that it infringes civil liberties and is oppressive. It is concerning that a principled ideology intended to protect some of the most vulnerable members of society has become 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 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 model takes no responsibility for harm caused by its means of bringing children to the attention of the State, or of the consequences of assessment. The framework prescribes that the State must demonstrate it has discharged its duty to investigate to decide whether to protect a child: any harm caused is incidental to that aim. In this model the mitigation of any harm vests with the family members, including the child on whose behalf the State has intervened in order to decide whether to take further action. The irony is that harm to the child and their family caused by referral and assessment is ignored.

There is a responsibility for policy makers to ensure any unintended adverse consequences are addressed particularly in cases where there is an inherent power imbalance. The current position leaves families to find a remedy from the few avenues available to them via statutory and common law provisions. The question of harm is consequently inadequately addressed, particularly in cases where there is insufficient evidence to progress beyond assessment. As the issue is insufficiently considered and remedies are inadequate a new framework with a targeted remedy to mitigate this unintended consequence is an important area for review and reform.