editorial

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Capital punishment for children's services: a new legal policy?

Recent adverse changes to the interpretation of aspects of the Children Act 1989 have deleteriously combined with amendments to limit accessibility to the legal aid budget. A closer enquiry highlights that contradictions within government policy and the law have significant implications for struggling families, with adequate assessment and treatment being consistently withdrawn. As children's needs are left increasingly unanswered, the evident cycle of neglect and deprivation of children is obviated by the clinical situation within the Cassel hospital, the only remaining National Health Service (NHS) in-patient resource for whole families.

In my clinical work within psychotherapy and child psychiatry, I have had mounting cause to be concerned for children's welfare within the NHS in recent years. This concern has arisen from witnessing the cuts in funding of care to children and families, as provided by the state. Both legislation and governmental policy continue to silently and surreptitiously erode the rights of these children and families to adequate assessment and treatment, tightening the noose around their future and having together brought family life to the brink of catastrophe.

To begin with, I should explain the context of my experience within the NHS at the Cassel Hospital, Richmond, as well as the work undertaken there by a dedicated and highly specialised team of health professionals. The 'Cassel' is a therapeutic community and the only existing NHS residential hospital for families in the UK. Over the past 25 years, it has secured an international reputation of excellence, both clinically and in the courts, where most referrals come from. Families are referred when concerns come to light about the child's welfare. Questions have arisen about the child's past emotional experience and current situation, either in the context of care within the family itself or in terms of the difficulties that face the family as a whole. Most referrals, therefore, are when the child (or children) is subject to care proceedings, which are in turn legally enforced by section 38 (6) of the Children Act 1989, wherein 'the court . . . may give such directions as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child.'

Working for welfare

Common to any family presenting is the fact that the levels of neglect, abuse, suffering and general psychological distress that they display cannot be adequately addressed and managed by local health and social services. Instead, consideration has turned to our specialist intervention and to the psychosocial work undertaken at the Cassel, comprising psychotherapy for the parent and child as well as specialist nursing input.

Concerns are usually raised by social services, with the questions to be addressed being, 'What is best for this child's welfare? Should they remain in the family and should that family be supported with a therapeutic intervention or should they be removed, fostered or adopted away?'

In addition to this important assessment, the Cassel then offers, where appropriate, a residential therapeutic treatment, so that families can subsequently return to their local communities 'rehabilitated'. Any return is geared towards secure family life free of the neglect, abuse and deprivation that the child had so often experienced prior to an intervention. The ethos of the work undertaken, then, is towards recognising, containing and understanding the traumatic experiences of the child and their family, so that the result is a different, healthier future together, if at all possible. This is our goal.

From welfare to unfair

This Cassel work is in keeping with the welfare principle of the Children Act 1989, which states that 'the child's welfare is paramount in deciding all questions about his upbringing' (White *et al*, 1990). Changes to the interpretation of the Children Act legislation now threaten our therapeutic goal and the children's welfare, in direct contravention of the welfare principle upon which the Children Act is founded. Our hospital is one forum in which the consequences to the welfare of children and families, as a direct result of these decisions, can be clearly and painfully attested to. This is not, then, simply another narrative bearing testament to the looming closure of a national resource, but a story of the wider national threat to family life as a consequence of legislative changes. If, nationally, we are to embrace the legal notion that 'there is no right to be made a better parent at the public expense' (Kent County Council *v.* G & Others [2005]) – that is to deprive a child of the possibility of an enabling, supportive environment to promote his or her care – then surely also the sentiment that 'every child matters' must become 'every child matters little.'

In summary, these changes arose out of Kent County Council disputing their legal obligation to fund the treatment of a child at the Cassel, as set down by the Children Act. In the ensuing deliberation, the Lords of Appeal, in November 2005, upheld the argument of Kent County Council that section 38 (6) of the Children Act legally required them to fund only an assessment rather than a treatment of a child. Prior to this, that section supported courts in ordering any local authority to fund for the child the much needed residential assessment and treatment. This had been in recognition of the fact that it is both dangerous and a clinical nonsense to separate the two.

A medical example may best highlight this point, before applying it to psychosocial distress, which is what we concern ourselves with at the Cassel. If, as clinicians, we suspect a child of having appendicitis, we may then treat that condition and assess the response to treatment to confirm that assessment. If they are getting better, then the treatment was correct and the child recovers. Thus, response to treatment requires an assessment and so the two are not clinically distinguishable. To separate these aspects of care is highly dangerous. 'Assessment must include the capacity to respond to treatment, and hence any distinction between the two is quite false' (Kennedy, 2001). The decision by the Lords of Appeal, none the less, re-introduced the legal distinction between assessment and treatment. This equates to a clinician being able to assess a child as having appendicitis and then at the point of treatment the child being removed from that possibility and sent home for their appendix to burst.

Consider, too, the parallel with adult screening assessments, should they become dislocated from a treatment. Would a woman content herself with the trauma of a mastectomy because trastuzumab treatment has been deemed a separate issue of expense, regardless of her diagnosis of breast cancer and the inherent uncertainty? Indeed, such decisions to remove these potentially life-saving interventions do not go unchallenged when they do arise. Why must the decisions around saving a family life be of any less import?

Obviously this situation is not in keeping with the 'welfare principle' of the Children Act and children's needs are assuredly not being given the primacy of importance that they should be. The decision by the Lords of Appeal merely centred upon an interpretation of the wording of that section of the Act and whether that interpretation was correct. It ignored the spirit of the Act, however, and in doing so the decision set itself in opposition to the welfare principle. That decision is also at odds with current government guidelines for providing for the welfare of a child, which of course the law should reflect.

The Department of Health, within its policy, dictates that assessment should include 'a realistic plan of action (including services to be provided), detailing who has responsibility for action, a timetable and a process of review' (Department of Health, 2000). This would appear to be common sense – after all, would any clinician be content with diagnosing appendicitis in a child and then sending them home? A duty of care surely dictates that their condition be treated (i.e. 'action' taken) and that they be regularly reviewed. The same Department of Health initiative also states that local authorities have 'a duty to safeguard and promote the welfare of children in their area who are in need and to promote the upbringing, wherever possible by their families, through providing a range of services' (Department of Health, 2000).

Policy and people

How do these nuances of changes in the interpretation of law and empty policy statements apply specifically to the struggling family? The situation here is even more dire than set out above. Thankfully medical cases, such as appendicitis, can still be assessed and treated. Services are supported and funded to provide for such an ailment. However, with the cases presenting via social services, the 'ailment' that we, as clinicians, are dealing with is a psychosocial one. It cannot be cut out or operated upon. We must assess the child's welfare in the context of their family, via their right to a residential assessment and, where appropriate, a treatment to promote the chance of a family life. Social services were previously legally obliged to fund this chance, as the alternative was removal of the child from the family and potentially a lifetime in the care system.

With the legal obligation removed, this latter option is now all too readily seen by social services as a cheaper and acceptable immediate alternative for children, ignoring the fact that 'the long-term outcomes of children in care are also devastating . . . [children] are over-represented in a range of vulnerable groups including those not in education, employment . . . teenage mothers, young offenders, drug users and prisoners' (Department for Education and Skills, 2006).

To sit opposite a deprived teenage mother, working well in an assessment of the psychosocial difficulties facing her and her child, who then faces losing her child because no treatment for her difficulties is forthcoming and legally ensured, is harrowing. I have done this and seen the distress caused to both mother and child as they face being ripped apart. We now face, in law, a loving mother being separated from a thriving child because of empty governmental promises and lack of money. Make no mistake, this is happening.

Moreover, the situation is not economically sensible. To sit contented with a life in care as a viable option with devastating outcomes highlights the probability that these children, too, will become parents who struggle, with children in need of an intervention. Is it not economically sensible to address this cycle of abuse and neglect and to provide an endpoint? A recent cost–benefit analysis found no statistically significant difference in terms of costs to the local authority, in those groups of children afforded a Cassel intervention compared with those never admitted (Jones, 2008). Moreover, intervention affords the possibility that the 'endpoint' to abuse and neglect is finally reached. The issue of cost, then, would appear redundant as an argument.

We should consider, for example, the very case in which Kent County Council disputed their legal obligation to fund a treatment, culminating in the unfortunate decision taken by the Lords of Appeal.

The family was indeed afforded a treatment at the Cassel, while the Appeal decision was ongoing, and the family and child are now doing exceedingly well as a united family and with no ongoing contact with the care system. The long-term benefit, even in terms of cost, should therefore be clear. To argue that such an intervention is costly and therefore should not occur is nonsense and short-termism. Cycles can be stopped and repetitions curtailed.

Sadly, families presenting with similar problems are now no longer assured such access to treatment at our hospital, nor indeed nationally. The Royal College of Psychiatrists produced a press release in December 2006, following an article written in response to this travesty (Jones, 2006), conveying the real concerns to children's well-being as a result of this legal change.

Legislating for deprivation

Alongside the section 38 (6) issue, though, children's services have been further detrimentally affected by a more recent change affecting access to legal aid. Previously this had been made available as a help to social services in their legal obligation to fund. New legislation has now removed the possibility of part-contributions from the legal aid budget towards the residential assessments for families. It is remarkable that the changes in interpretation around section 38 (6) were cited in the House of Lords as the reason for removal of the help in funding of these assessments from the legal aid budget, as though in fact two wrongs do make a right. It was argued that the strain upon the budget resulted from those initial changes to the interpretation of this section and would be rectified by removing access to legal aid in this aspect of care proceedings. In fact, the responsibility of a local authority to legally fund an assessment under section 38 (6) had never changed, nor had the requests for part funding from the legal aid budget to fund these assessments. What was actually being proposed in the House of Lords was that the responsibility to fund these assessments be moved solely to a local authority. This met with staunch objection as the consequences to children were realised: 'The Lord Bishop of Worcester: . . . It seems that we are confronted yet again with an inadequacy in the way in which we calculate costs and savings. If we could only look rather further ahead than we do, we might find that the funding that is being withdrawn would have been a very good investment even in the narrow area of legal aid, let alone in the human area of the care of children' (Hansard, 25 July 2007, Column 894). The fact that this decision was passed regardless has merely compounded an already grave problem facing residential care institutions, children and families. In the widest context, the insidious starvation of an institution by cutting off of funding is all too familiar. The Henderson hospital, another therapeutic community, faces closure as a direct result of the prevailing government ethos of 'community care' at the expense of clinical need.

At the Cassel, the situation is further complicated by specific changes to law and lack of a meaningful, effective policy. Whereas struggling families' lives have been transformed here, vulnerable families are now much less frequently being referred by legal parties for a consideration for assessment, much less a treatment. Judges are less inclined to order that families be referred for a residential assessment, both because of the increasing problems in securing the funding and because of the doubt of progressing to a treatment phase.

Moreover, the consequences to the legal aid changes were anticipated. The Association of Lawyers for Children was opposed to the changes to the legal aid budget due to concern over the impact upon children's welfare. In responding to the Legal Services Commission's proposal, they stated that, 'the Legal Services Commission expects a Rolls Royce service at the cost of an Ambassador. The decisions made and resultant proposals represent a significant risk that children's interests and safety will not be properly represented in the care system. This is likely to lead to erroneous and dangerous decisions being made for children and unfair decisions for parents. Will such a process be made transparent to the press and public?' (Association of Lawyers for Children, 2007).

Even within the Legal Services Commission, 'some concern was expressed about the impact the proposals may have upon the continued viability of residential assessment units and on children in proceedings. Respondents suggested funding should be the subject of multi-departmental negotiation and agreement and some were of the view that they could not support the proposals until alternative solutions to funding are agreed' (Legal Services Commission, 2007).

These protests went unheeded, though, and the decision was made by the Legal Services Commission to proceed at the expense of children. No alternative provision from health and social services to assess and treat this vulnerable patient group was sought, secured or instituted. No one was left accountable for funding a response to the cries of these children and families in their suffering.

On the clinical coalface, as a result of these combined legislative changes, children and families are now being denied access to an appropriate assessment of their significant needs, much less a treatment. This is a devastating reality for all concerned – bearing witness to the most deprived and neglected portion of society being legally bound to that horrid position.

Conclusions

To date, Susan Kramer, Liberal Democrat MP for Richmond Park, has passionately lobbied to secure an adjournment debate in the House of Commons in July of last year, in recognition of the gravity of the 'section 38 (6) situation' and the threat to children. Within that debate, the responding Labour Minister, Ivan Lewis, (parliamentary under-secretary at the Department of Health) stated that there had been 'identified a major problem as a consequence of a court judgement. It has changed some of the decisions that have been made within the health service in terms not only of the assessment but of the treatment of families in such circumstances . . . an anomaly and possibly an unintended consequence.' He claimed 'responsibility for ensuring that the Department looks specifically at the consequences of the court judgement, its impact on the way services have related to families and, where appropriate and necessary, that the Department makes changes to ensure that those families have access to the kind of treatment that would give them the best chance of getting through those difficult and stressful life experiences and coming out of the other end with as decent a life as possible' (www.theyworkforyou.com, accessed 5 July 2007), going on to promise the delivery of a personal response within weeks.

The actual response, 3 months later and by letter, was 'that the Government has never expressed any expectation about what would happen, by way of treatment . . . following any assessment under s38 (6) of the Act . . . [and] the Government has no plans to amend legislation to the judgement'. The commitment to children's and families' future welfare, as present within a girth of policy documents, was not evident in this reply.

In the interim, the changes to the legal aid budget have compounded the problem. Instead of countering such changes at any level, the government has sat in silence, while the situation at the Cassel has continued to worsen, reflective of the national crisis to children and families. If the government's commitment to families continues to lie fallow, the chance for many children to have a happy family life will be left in tatters as they fall silently into the dark uncertainty of a life in care.

Both policy and law need urgent attention. In the words of Dietrich Bonhoeffer, anti-Nazi activist, 'the test of the morality of a society is what it does for its children' (http://en.thinkexist.com/quotes/Dietrich_Bonhoeffer/). The pressing question is, 'Can the government both recognise and pass the test now upon it?'

Declaration of interest

None.

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