



Not in Care, Not Counted

A legal loophole: homeless 16- and 17-year olds and unregulated accommodation

Background

For many years, through our casework supporting children and young people in London, Just for Kids Law's (JfKL) youth advocates and lawyers have regularly encountered cases of under 18s (mainly 16- and 17-year olds) who are facing homelessness and do not receive the support they are entitled to from local authority children's services. In many cases, these children have been unlawfully accommodated under housing legislation rather than Section 20 of the Children Act 1989 as should be the case. In others, they are housed under Section 17 of the Children Act 1989, a provision normally applied to families and not intended to be used for children on their own.

This legal technicality gives local authorities a loophole to provide a bare minimum of support to children who are extremely vulnerable, rather than the care they would receive as a looked after child. Children who do not become looked after not only miss out on vital support and contact from a social worker whilst they are a child, they also have fewer legal rights on turning 18. A child in care will become a care leaver on turning 18, and will be eligible for various financial allowances, a safety net should things go wrong with their accommodation, support from the local authority up to age 25 and priority access to social housing. A child accommodated under the Housing Act or Section 17 will not be entitled to any of this and may be left to fend for themselves when they turn 18, and are at risk of becoming homeless should things go wrong and they are found intentionally homeless.

In February 2020, following concerns raised in the media and parliament about the use of unregulated accommodation to house children and young people, the Department for Education (DfE) launched a consultation on *Reforms to unregulated provision for children in care and care leavers*. This is a welcome development. However, in focusing specifically on children in care, the proposals make no mention of the almost 1 in 5 children who do

not receive the correct legal entitlements, as our figures below show. In this briefing, we highlight the situation of these vulnerable children and what needs to change to ensure they are sufficiently protected.

WHAT DOES THE LAW SAY?

Section 20 of the Children Act 1989 establishes that local authority children's services have a duty to accommodate children under 18 who are unable to live with their families. Local authority housing services also have a duty to homeless 16- and 17-year olds as under Part 7 of the Housing Act 1996, they are deemed to be in 'priority need' for housing.

However, the 'Southwark Judgement' of 2009 found that the Children Act duty should take precedence over the Housing Act.¹ This is reasserted in statutory guidance published in 2010 and updated in April 2018 by the Ministry of Housing, Communities and Local Government (MHCLG) and DfE.² This guidance also places a number of additional duties on local authorities, including effective joint working between children's services and housing services underpinned by a written joint protocol.

JfKL's experience of supporting children who do not receive the correct support

Despite the clear legal requirement that a homeless child under 18 will in almost all cases become a looked after child, we still find that in many cases this does not happen. **Between June 2018-2019, a third of the children the JfKL legal team represented were children (under 18), who the local authority unlawfully refused to look after under Section 20.**³ Due to involvement from our legal team, more than three quarters (78%) of children were provided with accommodation from children's services under Section 20. In the majority

of these cases (76%), local authorities conceded following a pre-action letter or a complaint from our legal team. This shows that this is often about local authority so called 'gatekeeping' – or limiting access to - resources and that without our involvement these young people would not have access to the services, accommodation and support they are entitled to. One JfKL youth advocate said *"for local authorities it is a numbers game – if they turn away ten young people, two may get legal support but that is still eight they have managed to avoid giving full entitlement."*

In our experience, it is often arbitrary and a postcode lottery as to which children are given the correct legal status of being looked after and which receive support under the Housing Act/Section 17 of the Children Act. There is very little difference in the children's circumstances and what has led them to be homeless in the first place – usually this is because their relationship has broken down with their family, sometimes involving violence or abuse toward the child. This life changing decision can depend which door of a local authority's services the child walks through, or which staff member they happen to speak to on that particular day.

Local authorities are allowed to house a child aged 16 or 17 without making them a looked after child if this is what the young person decides. The consequences of this decision are supposed to be fully explained to them but very often at Just for Kids Law we find this is not the case. Instead local authorities are pushing children to take the Housing Act/Section 17 option as this is significantly cheaper than having to provide the additional support which children in care receive and then later as a care leaver. We find that often these children are actually at great risk or have suffered harm and should be supported as a looked after child. The joint guidance states that young people should have access to independent advocacy to assist them in making decisions about what type of support they receive if they are homeless. However in our experience this very rarely happens and the vast majority of young people are given no support to make this important decision.

As our casework is London-focused, we sent Freedom of Information (FOI) requests to all local authorities in England to ask how many 16- and 17-year olds they had housed without making them looked after children. We received replies from just over a third of local authorities and based on these, we estimate that over a year more than 2,500 16- and 17-year olds are being housed by their local authority without legally being in care. Full details are below.

Megan's* story

Megan* became homeless when her mother passed away and her relationship with her stepfather broke down irrevocably. Her biological father had been abusive towards her and her mother, and she was not in contact with him. She approached the local authority's children's services department aged 16 on multiple occasions and was told there was no accommodation available for her. During this period she was forced to spend the night in places that were open for 24 hours, such as McDonalds' restaurants, casinos and hotel receptions.

Eventually she was placed in an unregulated placement however she was asked to leave after only two weeks because she let a friend of hers, a child, spend the night at the accommodation, which was a breach of the rules. She then became homeless and sofa surfed again before being housed again in a hostel and eventually in another unregulated placement where she stayed for six months. The only form of support she received throughout this period was in the form of food vouchers and, as a result of her financial difficulties, she became involved in criminal activities. At no point was an assessment of her needs made, or the difference between being accommodated by children's services or by housing services explained to her. When she was 18, she was told her case was going to be closed despite her still wanting and needing ongoing support. She was evicted from her accommodation and became homeless again.

JfKL argued that Megan was a child when she first approached the local authority and should have had her needs assessed and been accommodated under Section 20 and that it should now provide with her leaving care support as a Former Relevant Child. The local authority initially refused to do this, arguing that Megan never accepted formally to be looked after by the local authority. We threatened judicial review proceedings and prior to issuing proceedings, the local authority agreed to treat Megan as a Former Relevant Child and provide her with support as a care leaver (without admitting fault).

*not her real name

How many children are not receiving the correct support?

Of 134 local authorities (39% of all local authorities contacted) who responded with full or partial information, the data provided shows that between 1st April 2018 – 31st March 2019, the total number of 16- and 17-year olds who were accommodated but not made looked after children was 1,010 (592 under Section 17 and 418 under Part 7 of the Housing Act). If this trend is consistent across all 343 local authorities in England, this would mean that in 2018-2019, local authorities would have accommodated 2,585 16- and 17-year olds without making them looked after children. It is important to recognise that this figure obviously does not include children who are 'gatekept' – sent away without being accommodated – which JfKL's experience suggests is likely to be a significant number of children.

For comparison, we also asked local authorities to provide data on the previous year (1st April 2017 – 31st March 2018) and they told us that the total number of 16- and 17-year olds accommodated but not made looked after children was 965 (564 under Section 17 and 401 under Part 7 of the Housing Act). Across all 343 local authorities, this would be 2,470⁴. This illustrates that year on year the situation is not improving. Research by The Children's Society published in 2015 found that 1,800 16- and 17-year olds are housed each year without becoming looked after.⁵ **Therefore responses to our FOI request show that the situation is worsening in spite of updates to the joint guidance which were made in April 2018.**

16- and 17-year olds housed under different legal categories

	1 April 18 – 31 March 19	1 April 17 – 31 March 18
Section 17	592	564
Part 7 of Housing Act	418	401
Total 16- and 17-year olds housed without becoming looked after	1,010	965
Projection across all local authorities	2,585	2,470



*estimate based on responses from 39% of local authorities

We also asked local authorities how many of those housed outside of the correct legal provisions were placed in unregulated accommodation as of 31st March 2019. The responses indicate that at 31st March 2019⁶, 585 non- looked after children were housed in unregulated accommodation (357 under Section 17, 228 under Part 7 of the Housing Act). Across 343 local authorities this would be 1,498.⁷

For comparison, at 31st March 2018 the total was 548 (328 under Section 17, 220 under Part 7 of the Housing Act), which would be 1,402 across all local authorities. Again, this suggests that year on year the situation is not improving and instead is getting worse.

16- and 17-year olds housed in unregulated accommodation under different legal categories

	At 31 March 2019	At 31 March 2018
Section 17	357	328
Part 7 of Housing Act	228	220
Total 16- and 17- year olds housed in unregulated accommodation under different legal categories	585	548
Projection across all local authorities	1,498	1,402

Some of the responses we received suggested a confusion and a lack of clarity on the part of local authorities regarding what does and does not constitute unregulated accommodation. It is possible that some local authorities are confusing unregulated and unregistered provision, or are hesitant about reporting use of unregulated accommodation for under 18s given the media and political scrutiny this sector has recently come under. For example, one London borough told us that they “do not use unregulated accommodation” and yet their own local authority website lists a number of supported housing providers for 16+ young people, and the same local authority’s own Joint protocol for working with 16 and 17 year olds presenting as homeless or at risk of homelessness

Jack’s* story

Jack* was 19 years old when he approached Just for Kids Law (JfKL). He has mental health difficulties, had been known to children’s services since he was very young and had a very difficult relationship with his parents. When he turned 17 he was asked to leave the family home forever. He approached the local authority’s housing department (unaware of the difference between children’s services and housing services) and was accommodated under the Housing Act in an unregulated placement and provided with a £25 food voucher. He was never referred to children’s services, despite the fact he was a child at the time and was not provided with any other support. He had no choice but to start working, despite the impact on his benefits, which he struggled to manage, resulting in him accruing rent arrears. He was at risk of eviction when he approached JfKL for help.

JfKL argued that in failing to assess his needs under the Children’s Act 1989 and to provide him with accommodation under Section 20, the local authority acted unlawfully and that it should now treat him as if he were a Former Relevant Child, and provide him with leaving care services to assist his transition into young adulthood. This challenge was successful and he is now being provided with leaving care services and most of his rent arrears have been cleared.

*not his real name



1 in 5 children housed in unregulated accommodation are not in care

references their young people’s pathway, which they describe as a “specialist housing service offering semi-independent accommodation”.

16- and 17-year olds in unregulated accommodation

To support the consultation, DfE commissioned research on *Looked after children in independent or semi-independent placements* which states that 6,180 looked after children were living in these settings at 31 March 2019. This figure has been widely cited by the Government and organisations in the children’s sector. **However, as our FOI responses show, there are also around 1,500 children in unregulated placements who are not looked after/in care. This means around 1 in 5 children in unregulated accommodation is not looked after.**

DfE’s research and proposals in the consultation are silent on what should happen for these children and whether they will benefit from the reforms to unregulated accommodation which are planned. In the worst-case scenario, the measures DfE are planning to introduce may even make things worse for children who are not looked after. For example if increasing regulation leads to some housing providers going out of the market, this could reduce the supply of places and local authorities may prioritise looked after children to be placed in these settings as they have a legal entitlement to additional support.

Children who are not looked after could then be forced out of semi-independent placements (where they do at least receive some support) into even more basic forms of accommodation such as temporary accommodation. Another risk is that if an increase in regulation brings additional costs for local authorities, some may try to push more children down the Housing Act or Section 17 route as this is a much cheaper option for them.

THE CHANGES WE ARE CALLING FOR

- 1 Government should ensure no child under 18 is placed in unregulated accommodation, regardless of which piece of legislation they are being housed under.
- 2 All settings housing under 18s, regardless of which legislation they are housed under, should be regulated and inspected by Ofsted. This includes independent and semi-independent settings.
- 3 The Government should amend the joint statutory guidance on *Provision of accommodation for 16- and 17- year olds who may be homeless and/or require accommodation* to clarify that as a default position, all homeless under 18s should receive support as a looked-after child (under Section 20) unless they have explicitly said they do not want to, after being made fully aware of their rights and entitlements.
- 4 The Government should urgently take steps to ensure that all local authorities are aware that under 18s are expected to be housed under Section 20 in almost all circumstances and that use of Section 17, the Housing Act or other arrangements should not be routine practice in local authorities' response to homeless 16 and 17 year olds. These steps should include:
 - a A letter from the Secretary of State to remind local authorities of their legal duties.
 - b A duty to report to the Director of Children's Services every time an under 18 is accommodated without becoming looked after.
 - c Delivery of training to local authority homelessness and children's services departments on their duties to 16- and 17-year olds who are homeless.
- 5 Homeless 16- and 17-year olds should always have access to an independent advocate to support them to make decisions about the services and type of support they receive from the local authority. The Government should write to all Directors of Children's Services to ensure that are aware of their responsibilities in the joint guidance to provide independent advocacy to children in this situation.
- 6 The joint statutory guidance should be amended to clarify that young people who are assessed as children in need of support (Section 17) and who refuse to become accommodated under Section 20 (as looked after children) should be given the status of a 'vulnerable 16 or 17 year-old', which would allow greater flexibility of responses but ensure the same level of entitlements and support as 'looked after' status.
 - a The joint statutory guidance should specify that these young people should still have a pathway plan drawn up; specifying what support they should get to address their needs and the entitlements they should have before and after turning 18.
 - b The joint statutory guidance should also be amended to stipulate that where a vulnerable young person is assessed to be in need, but refuses to become looked after, they are allowed to change their mind if the solution they chose does not work for them or if risks escalate and they need to be supported without any further delay .
- 7 Local authorities should regularly gather and publish data on the numbers of under 18s accommodated under Section 17, the Housing Act or other arrangements and in what type of accommodation these children are placed. This should be monitored by DfE and Ofsted.
- 8 Government should ensure that local authorities have sufficient resources to allow them to fulfil their statutory duties to children who should be looked after under Section 20 and provide them with access to independent advocacy.

Endnotes

- 1 R (G) v Southwark [2009] UKHL 26
- 2 Ministry of Housing, Communities and Local Government and Department for Education, April 2018, *Prevention of homelessness and provision of accommodation for 16 and 17 year old young people who may be homeless and/or require accommodation*
- 3 Based on a total of 29 cases
- 4 In our request we also asked local authorities to report numbers housed under any other basis apart from s20 of the Children Act 1989. This captures some informal routes such as supported housing pathways. However in their responses, a number of local authorities reported figures which include children on care orders. To avoid any double counting with DfE's research, we have therefore not included responses to this question in the figures reported here. Therefore the number of non-LAC children accommodated may be higher than our estimate.
- 5 Pona, I. and Crellin, R. (2015) *Getting the house in order: keeping homeless older teenagers safe* The Children's Society
- 6 We asked the question in this date format to replicate the data which DfE collected in its research on *Looked after children in independent or semi-independent placements*.
- 7 As with the question above, this does not include those housed through informal routes such as supported housing pathways in order to avoid double counting with DfE figures on care orders.

ABOUT JUST FOR KIDS LAW

Just for Kids Law is a UK charity that works with and for children and young people to hold those with power to account and fight for wider reform by providing legal representation and advice, direct advocacy and support, and campaigning to ensure children and young people in the UK have their legal rights and entitlements respected and promoted and their voices heard and valued.

ABOUT CRAE

The Children's Rights Alliance for England (CRAE), is part of the charity Just for Kids Law and works with 150 organisational and individual members to promote children's rights, making us one of the biggest children's rights coalitions in the world. We believe that human rights are a powerful tool in making life better for children. We fight for children's rights by listening to what they say, carrying out research to understand what children are going through and using the law to challenge those who violate children's rights. We campaign for the people in power to change things for children. And we empower children and those who care about children to push for the changes that they want to see.

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