

By: Ben Watts, General Counsel (Monitoring Officer)

To: All Elected Members

Subject: Report Under Section 5 of the Local Government and Housing Act 1989

Date: 2nd September 2020
For consideration at: County Council – 10th September 2020

Classification: Unrestricted

Summary: This report is made under section 5 of the Local Government and Housing Act relating to a breach of statutory duties by Kent County Council.

Introduction

1. On 17th August 2020, I formally advised Members that I had been notified by the statutory Director for Children Services (DCS) of an imminent breach of the Council's legal duties arising from the unprecedented pressure being placed on KCC by the arrivals of unaccompanied asylum seeking children.
2. The role of the Monitoring Officer in such circumstances is set out in section 5 of the Local Government and Housing Act 1989. I am required under section 5(2) to prepare a report in circumstances where an action, omission or decision leads to the Council operating outside our statutory duties. For completeness, I have determined that the current situation requires me to write a report which will then be considered by County Council on 10 September 2020.
3. Ultimately, the legislation is in place to ensure that all Members of the Council are sighted on such serious issues. The legislation does not entirely contemplate such a situation where the Leader, the Cabinet Member for Children's Services, the DCS and myself are in agreement around the legal position but that is largely due to the unique circumstances that have led to this declaration.
4. The Leader and Cabinet Member for Children's Services wrote separately to provide further details for Members in relation to the situation and the actions that were and are being taken politically and operationally. Any questions that Members may have politically or operationally are not for response by me and remain for the Leader and Cabinet Member supported and advised by the statutory Director of Children's Services and his deputies.

Breach of Statutory Duty

5. Kent County Council has a range of statutory duties in relation to vulnerable children. The majority of these are arranged within the Children Act 1989 and include dozens of separate duties that the Council is required to discharge regarding vulnerable children. It is important to note that "duties" are mandatory and the responsibility under the legislation is non-delegable.

6. Section 20 of the Children Act is a key duty to provide accommodation for children in need within the Kent County Council administrative area. This means that where children are lost, abandoned or have no appropriate carer/person with parental responsibility that the Council must step in.
7. On 17th August 2020, the DCS advised me that he no longer felt able to safely discharge the section 20 duty to receive children into our care at the port of Dover. In taking that position, he had to reflect on our statutory duty to those unaccompanied minors arriving at the port and balance that with the other duties owed under the Children Act to those children already in the care of the County Council. He also had to consider the likely standard of care that could be offered to any child that arrived at the port and was taken into our care. All children are entitled by law to a minimum of standard of safe and legal care.
8. In the circumstances, I regretfully accept that Kent County Council was unable to meet our statutory duty to accommodate these young people. At that moment, the competing interests of two sets of statutory duties meant that the Council would inevitably fall outside at least one of them.
9. The two sets of statutory duties have been in tension for a number of years and in particular because of the exponential increase in new arrivals at Dover since the beginning of the year. Members have been advised of the efforts by the Council through the Leader, Cabinet Member and senior officers to avoid the circumstances of 17th August coming to pass including escalation and discussion with Government.
10. In applying my mind to the breach of statutory duty, I am satisfied that the relevant Members and Officers were and remain committed to complying with the obligations under section 20 of the Children's Act at the earliest opportunity.
11. Ordinarily, under the Local Government and Housing Act, a Monitoring Officer would be looking at a decision, proposal or omission that was being consciously taken. The legislation presumes that the Monitoring Officer is then provided with an opportunity to prepare a report before the decision is given effect (section 5 (5)(b)). I have accepted that such an opportunity was not possible in these circumstances with the final acceleration of number prompted by the placement of France on quarantine list for COVID-19 purposes.
12. Since the beginning of the year, the number of unaccompanied asylum-seeking children in our care has risen from around 240 to around 600. In addition to this, KCC supports approximately 940 young people as care leavers who were formerly unaccompanied asylum-seeking children in our care. Whilst the numbers steadily accelerated across the year, in just the first few weeks of August there were close to 100 arrivals. In the absence of significant numbers being transferred to other local authorities, the pace and volume of arrivals overwhelmed the Council's service capacity.
13. In an effort to continue to meet all of our statutory duties, as the numbers rose the Council significantly increased capacity whilst support was sought and concerns were formally raised. Having grown capacity, the continuing increases

in numbers could only be met through significantly and unsustainably increasing the caseloads of social workers.

14. On 17 August, the Council's capacity to safely accommodate new arrivals was entirely exhausted. It is important to understand the considerable efforts of the Council through Members and Officers to continue to meet our statutory duties. With 600 in our care now, KCC is nearly 3 times over the government guidelines for the number of this cohort of vulnerable young people that Kent should or could safely look after (0.07% or 230 children in Kent).

Legal Issues

15. For the period that the Council operates outside our statutory duties, we face legal risk, no matter how valid the reasons for our current circumstances. This is because the statutory duties are not optional and not transferable.
16. In my capacity as Monitoring Officer, I seek to ensure that the Council returns to lawfulness as quickly as possible. It is recognised that a number of issues will need resolving in order for the Council to return to lawfulness.
17. The legal mechanism which Parliament has established to address unprecedented circumstances of this sort are powers conferred on the Home Secretary pursuant to sections 69 to 72 of the Immigration Act 2016.
18. To date, the Home Office has administered a scheme that relies on the voluntary transfer of unaccompanied asylum-seeking children as a means of seeking to equitably distribute the burden of discharging local authority functions in respect of such vulnerable young people. It has been suggested that the Home Office is considering introducing a mandatory scheme pursuant to the 2016 Act. Members will be kept updated on developments in this regard and the implications and legal options.
19. The efforts of staff within the service to maintain lawfulness and now return to a lawful position have been considerable. I will continue to review the position on a fortnightly basis with the Cabinet Member and the DCS (or their nominated deputies in absence) and record the outcome of that review.
20. I will keep all Members of the Council apprised at regular intervals and will advise in writing when Kent County Council is able once again to meet all of our statutory duties.