

<b>MAYOR AND CABINET</b>			
<b>REPORT TITLE</b>	No Recourse to Public Funds: Findings from officer led review and pilot scheme		
<b>KEY DECISION</b>	Yes	<b>ITEM NO.</b>	
<b>WARD</b>	All		
<b>CONTRIBUTORS</b>	Executive Director for Children and Young People Executive Director for Customer Services		
<b>CLASS</b>	Part 1	<b>DATE</b>	13 May 2015

## **1 Summary**

- 1.1 No recourse to public funds (NRPF) is a term used to refer to people from abroad who are subject to immigration control and have no entitlement to welfare benefits or public housing. Although people with NRPF have no entitlement to most state support, local authorities may owe some people with NRPF a duty of support in terms of housing, subsistence or other services as part of their duties under the Children Act 1989 and the Care Act 2014 or where the refusal to provide support would result in a breach of the family's Human Rights or breach their Treaty rights.
- 1.2 In Autumn 2013, a report presented to the Council's Executive Management Team identified a rapid growth in the number of families with NRPF presenting to the Council seeking financial support under our duties flowing from the Children Act 1989. The report raised concerns about the service issues arising from these pressures and the implications this was having for the consistency and equity of our assessment function. Following on from this report, officers began a review of operational practice. The review identified a number of issues with the Council's operating model which meant that the needs of families were not being consistently and fairly assessed and provided for. Following this review, the Council started a pilot in June 2014 to set up a new team to put additional capacity into conducting assessments and managing cases. This pilot will formally close at the end of May 2015.
- 1.3 As part of their scrutiny role, between July 2014 and February 2015 the Council's Public Accounts Select Committee (PASC) undertook an in depth review of the Council's approach to managing NRPF. Their review was triggered by the significant growth in spend for this client group which had grown from £700k in 2010 to over £5m by the end of the financial year 2013/14.
- 1.4 This report provides background and evidence relating to the legal responsibilities for local authorities, how Lewisham and other authorities are

responding to these in practice and the financial, legal and equalities implications of these. As well as setting out the local authority approach, with options to be considered for the future support for these families, the report also provides details on the engagement process and representations which have been received from other parties who work with this client group.

## **2 Purpose of report**

- 2.1 To provide an overview of the legal responsibilities of the Council in relation to children and families with NRPF.
- 2.2 To explain the Council's current and previous approaches to dealing with applications for support from families with NRPF, including outlining the findings of the officer led review of NRPF between October 2013 and January 2014 and the NRPF pilot which has been in operation since June 2014.
- 2.3 To seek a decision on the preferred option for the ongoing management of NRPF cases following the conclusion of the NRPF pilot at the end of May 2015.
- 2.4 To respond to the recommendations of the PASC as part of their NRPF review which took place between July 2014 and February 2015.

## **3 Recommendations**

It is recommended that the Mayor agrees:

- 3.1 to note the legal responsibilities of the Council in relation to children and families with NRPF
- 3.2 to note the findings of the officer led review and PASC review on the Council's approaches to NRPF
- 3.3 to note the representations from other parties in relation to the Council's legal responsibilities and approaches
- 3.4 It is recommended that the Mayor approve option 2 in this report as set out in paragraph 9.3 of this report to extend the current pilot model for a further year.
- 3.5 That the report be reported to the Public Accounts Committee

## **4 What is NRPF**

- 4.1 NRPF applies to a person who is subject to immigration control in the UK and has no entitlement to welfare benefits or public housing. These restrictions are set out in Section 115 Immigration and Asylum Act 1999.

- 4.2 Whilst most state benefits are classed as ‘public funds’ and therefore people with NRPF are excluded from receiving them, there are some state provided services which are not classed as public funds including assistance from the emergency services and support provided under social services legislation.
- 4.3 Families with NRPF are therefore entitled to present to local authorities seeking support under the Children Act 1989. Section 17 of the Act sets out a general duty upon local authorities to ‘safeguard and promote the welfare of children within their area who are in need’. Under the Act, the local authority has a duty to assess families presenting as in need and have the power to provide services to those children and families which ‘may include providing accommodation and giving assistance in kind or in cash’.
- 4.4 Alongside the above, local authorities also must consider whether the adults within the family presenting are excluded from support under Schedule 3 Section 54 of the Nationality, Immigration and Asylum Act 2002. The categories of people excluded from support are:
- A person granted refugee status by another EEA state and any dependents
  - An EEA national and any dependents
  - A refused asylum seeker who has failed to comply with removal directions
  - A person unlawfully present in the UK
  - A failed asylum seeker with a dependent child

However, although the groups above are excluded from support, the local authority also must consider whether the refusal to provide support would result in a breach of the family’s Human Rights or in the case of EEA nationals would breach their Treaty Rights.

## **5 Profile of people with NRPF approaching local authorities**

- 5.1 Because there is no current system to comprehensively measure the number of people leaving the UK (only those entering), there is no way of measuring with certainty the number of people with NRPF in the UK. However, a study by the London School of Economics (LSE) gave a central estimate that in 2007 there were 725,000 irregular migrants and children of migrants in the UK. The LSE estimates that two-thirds of irregular migrants live in London. Reports estimate that two-thirds of the total number of irregular migrants are refused asylum seekers and at least 50,000 are individuals who have overstayed their visa.<sup>1</sup>

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<sup>1</sup> Migrants Rights Network (2009) ‘Irregular Migrants: the urgent need for a new approach’

- 5.2 Over the last year, records of cases being supported or approaching Lewisham Council have been analysed. The current profile of cases being supported is as follows:
- 47% of families have Nigerian nationality, 37% have Jamaican nationality and 7% have Ghanaian nationality. The remaining 9% of cases are from a diverse range of countries across the world.
  - The majority of families are either visa-overstayers (66%) or have been granted limited leave to remain with NRPF (19%).
  - Data available on NRPF Connect shows broadly similar trends. The most frequently occurring nationalities are Nigerian (36%) Jamaican (18%) and Ghanaian (10%). The remaining 36% of cases are from 91 countries across the world.
- 5.3 It is important to note that local authorities are not responsible for providing support to asylum seekers. This support is provided by the Home Office separately. The families being supported by Lewisham, and indeed all local authorities, usually entered the country on a valid visa which they have subsequently overstayed. They have often been in the country for a number of years. They have typically had children in the country and developed networks to enable them to support themselves and meet the needs of their children for a considerable period of time. Most are not known to social services departments before their presentation to the local authority to seek support under section 17 of Children Act.

## **6 The officer led review of NRPF in Lewisham**

- 6.1 On 18<sup>th</sup> September 2013, Lewisham's Executive Management Team received a report from the Director of Children's Social Care as part of their regular budget monitoring. The report addressed the financial and service delivery pressures associated with supporting people with NRPF. The report identified a number of external factors contributing to the rising costs in this area, particularly linked to Home Office processes. There was a significant lack of communication between the Home Office and the Council which meant that as families' status changed, the Council was unaware of this, or it was supporting families about whom it held inaccurate information. The casework for these families appeared static. Support which could have been given to enable the families to move away from dependency upon the Local Authority was not being provided.
- 6.2 Following on from this report, an officer led review was commissioned to identify whether our current approaches to assessing and supporting this group were fit for purpose to ensure the Council was meeting its duties to children in need, and enabling families to progress to care for their children within a mainstream environment of independent living.

- 6.3 The officer led review of NRPF approaches was conducted between October 2013 and January 2014. During this period evidence on the Council's approach was gathered from interviews with a range of professionals involved with assessing and managing NRPF cases in Lewisham. This included front-line social workers and managers, legal services, fraud officers and the Home Office. In addition, interviews were held with other London local authorities to compare demand levels and approaches for assessment and case management. Existing NRPF clients' views were sought together with those of local solicitors (details of findings in paragraphs 10.2 and 10.3).
- 6.4 Alongside this, detailed analysis of existing caseloads was completed to review the level and type of need triggering presentation. Analysis was also conducted to map growth in demand and the resource implications of this.
- 6.5 The review included individual case analysis to examine how the assessment approach had worked in practice and the evidence which was being used to establish whether an accurate decision on whether there was a child in need to which the local authority owed a duty, and how those children's needs were being met.
- 6.6 The review also included a desk-top analysis of legislation, national and local policy and research on this client group.
- 6.7 On 17<sup>th</sup> January 2014, a report was presented to the Director of Children's Social Care outlining the key findings from the review. These are outlined below:
- 6.8 Demand had risen rapidly over the last five years with the number of cases being supported rising from 31 cases in 2010 to 244 by 2013. The cost to the Council associated with this support during this period grew from c. £700k to over £5m. This cost was predicted to grow to over £8m based on current trends. Our support costs were also not in line with other local authorities. Research conducted by the NRPF Network in 2011<sup>2</sup> suggests that Lewisham's spend on this group at the time was amongst the top third of 51 authorities surveyed. Additionally, evidence gathered from interviews with other local authorities as part of the review identified that by 2013, Lewisham had a caseload of 244 as against 131 cases in Southwark, 41 cases in Islington and 20 in Wandsworth.
- 6.9 Lewisham did not have a specialist team responsible for dealing with NRPF cases. The function was spread across children's social workers who dealt with NRPF assessments alongside their safeguarding and child protection work. This spread of decision making across such a wide group of social workers

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<sup>2</sup> NRPF Network (2011) 'Social Services Support to People with No Recourse to Public Funds: A National Picture'

meant that decision making processes and evidence requirements were not consistent. The model was also not in line with other boroughs with 24 of the 51 authorities surveyed by Islington Council having set up specialist NRPF teams.

- 6.10 Assessment practices were not evidentially led. Time constraints and a lack of training on the complex rules surrounding immigration and entitlements for this group meant that very little investigation was actually being conducted into whether there was evidence to support claims for services. As a consequence the Council was not robust enough in its assessment of a family's history, resources, parenting capacity and whether in fact the family was destitute or homeless. Although detailed data on case acceptances was not collected at the time, service managers reported that at least 50% of cases were accepted for support following presentation to the local authority. The NRPF Network's 2011 report also identified significant variations in the number of cases accepted for support following assessment, ranging from as high as 90% to as low as 0%. The report identified 'the discrepancy in acceptance rates between local authorities is too significant to be explained by trends in client referrals alone, and serves to highlight the inconsistency of practice between local authorities'. For current acceptance rates please see para 8.1.
- 6.11 The significant characteristic of the families presenting for services from a NRPF background is that they are usually self-referring. This means that they present in circumstances separate from the mainstream interagency referral route to children's social care, where background histories and concerns are usually already flagged. This means that there is a heightened requirement upon assessing officers to collect full and accurate detail from the adults as to their histories and circumstances, before deciding on appropriate levels of support. The reasons for presentation for services are also usually quite distinct from families subject to interagency referral. NRPF referrals are, by their nature, overwhelmingly motivated by economic need.
- 6.12 It is of note that, in 2013/14 of the 21,037 referrals received through the interagency network to children's social care, where children's welfare has already been flagged as a possible issue, only 9.8% of families were identified as requiring an in depth Child in Need assessment for services under s17 Children Act.
- 6.13 By way of comparison, although the local authority duty towards children and families with NRPF is similarly derived from the Children Act, over 95% of the families presenting to the local authority have no needs, other than those relating to finance or housing, which would otherwise have triggered social care involvement. Housing, and particularly the affordability of housing in London, was identified as the key driver for presentation to the local authority. In the overwhelming majority of cases there are no other welfare needs.

- 6.14 Resource constraints in the service meant that once a case had been accepted for support, there was very little further involvement with the family to either review ongoing eligibility or to support the family to regularise their position and access mainstream benefits or employment support. This meant that very few cases stopped receiving support each year. The NRPF network's research showed that once again, this was not in line with other Councils who reported that 62% of cases were transitioned away from local authority support within 2 years.
- 6.15 The Council's property procurement and payment processes were administratively burdensome and locating these functions within social care was not enabling the authority to make use of the skills held elsewhere in the organisation which would improve value for money for cases the Council were supporting.

## **7 The NRPF pilot**

### Team structure

- 7.1 The review recommended that the Council invest in the development of a specialist NRPF team for a six month period, to be overseen by a project board chaired by the Director of Children's Social Care to test the impact of more corporate investment in assessing and managing NRPF cases. The team would be responsible for managing elements of the assessment process for all new cases presenting to the authority and ongoing management of cases to support the swifter resolution of local authority support. Funding was agreed for a six month period by our Corporate Expenditure Panel on 21<sup>st</sup> February 2014 and the pilot took over responsibility for assessment of new cases from 16<sup>th</sup> June 2014. The majority of the existing caseload transferred to the new team between July and November 2014.
- 7.2 On 4<sup>th</sup> November 2014, funding was agreed for a further six months to enable the process for reassessing and transitioning historic caseloads to be effectively tested as the length of time required to transition c. 300 cases had meant this had not been achieved in the first six months. The pilot will formally end on 29<sup>th</sup> May 2015.
- 7.3 The funding for the pilot was used to recruit:
- A specialist NRPF manager with experience of social care and immigration related advocacy.
  - caseworkers recruited from social care and housing backgrounds with experience of conducting evidentially led assessment processes for vulnerable children and families.
  - An embedded Home Office worker to conduct immigration status checks and share information with relevant departments to support the resolution of cases.

- A business support officer to manage all payment and performance matters.
- Specialist support in other areas of the organisation for fraud investigation, housing procurement, legal advice.

#### Assessment processes and criteria

7.4 The pilot introduced a revised two stage assessment process for all new cases presenting to the local authority.

- On the first day, all new cases presenting to the authority are seen by a caseworker in the pilot team. The caseworker takes the family through a face to face assessment seeking to gather evidence on the family's needs and eligibility as outlined in paragraph 7.5.
- If it appears on the evidence available that that the family is in need and is not excluded from support then temporary accommodation and short-term subsistence are provided. If the evidence identifies that the family is not in need, or another course of action (i.e. presentation to another authority) is appropriate, the family will be advised of this and given the reasons for this decision. In some cases a human rights assessment will be required which will be completed by the pilot team.
- Families requiring a more in depth assessment will be booked a further appointment for a face to face interview and advised by their caseworker as to the information and evidence required to complete their assessment. This will usually be the next working day. At this appointment, the same need and eligibility criteria as outlined in paragraph 7.5 are used to guide the interview. The difference in the process at this stage is that there is more time and evidence for the caseworker to review with the family.
- The caseworker will usually have to take a number of follow up enquiries after this assessment, for example contacts to landlords, schools, GPs etc. A further face to face interview may also be required with the family. This process usually takes between two weeks and a month but can take longer depending on the complexity of the case and the willingness of the family to engage constructively with us to provide the evidence we have requested. During this time the family will continue to be provided with temporary accommodation and subsistence.
- Following the completion of all relevant assessments, including an in depth Child in Need assessment and/or Human Rights Assessment if they are required, the family will be advised of the decision on whether the local authority considers that there is a child in need in the family to whom the local authority owes a duty.
- If the local authority owes the family a duty, the caseworker will instruct the Council's housing procurement service to identify more settled accommodation for the family. If the Council does not owe a duty, the family will be given notice to vacate the temporary accommodation and



will be advised on the next steps they need to take. This may include a referral to Choices, the Home Office's Assisted Voluntary Returns Programme.

7.5 The key parts of the assessment into the needs of the children and families presenting are set out below. These are in line with the good practice guidance issued by the national No Recourse to Public Funds Network:

- *Which is the appropriate authority to undertake the full assessment .*
  - This includes establishing information such as where the family lives now and has lived previously, where the children attend school and which GP the children are registered with.
  - If following the completion of the triage assessment, the conclusion is that the appropriate authority is not Lewisham then contact will be made to the relevant children's social care department or specialist NRPF team and details of the reason for the referral being made will be given to that department. We have developed a network across our neighbouring boroughs and will always seek confirmation that the relevant authority will undertake their assessment and the family will then be referred and provided with financial assistance to travel to the relevant Council office if this is required.
  - If it is not possible for a referral to be completed on the day and the family is homeless that night, accommodation will be provided until appropriate arrangements can be put in place to ensure an assessment is undertaken by the other authority. This may include a full section 17 assessment if that local authority believes it to be necessary.
- *Whether exclusions apply in line with sch 3 of the Nationality, Immigration and Act.*
  - This involves checking the current immigration status and immigration histories of the adults linked to the family's claim via our embedded Home Office worker, investigating Zambrano rights and reviewing the details of any current applications or reconsideration requests to establish whether these have sufficient grounds to not be deemed 'hopeless or abusive'.
  - If following the completion of the triage assessment, the conclusion is that the family's immigration status may exclude them from support, a Human Rights Assessment is conducted to establish whether a refusal would amount to a breach of their human rights and this includes whether there are any practical or legal barriers to return. This process is supported by our legal team.

- o If the conclusion of this assessment is that there are no Human Rights grounds to provide local authority support, the family is referred to Choices, the Home Office commissioned assisted voluntary returns programme.
- *Whether the family is destitute or homeless and therefore there is a child in need*
  - o The need which triggers presentation to the local authority for the vast majority of NRPF cases is that the family has insufficient funds or housing to meet the needs of their children. In conducting its assessment of need, the authority must therefore establish whether there is evidence of this need.
  - o In assessing whether the family is destitute and therefore in need, the Council uses the definition of destitution outlined in s95 of the Immigration and Asylum Act 1999. This states that someone is destitute if they or their dependants do not have adequate accommodation or any means of obtaining it and/or they cannot meet essential living needs.
  - o As stated by Justice William Davis in a recent application for Judicial Review successfully defended by this authority, insofar as destitution is asserted, this involves a high threshold which the authority is entitled to reach a conclusion has not been overcome based on the information available.
  - o This assessment involves conducting credit checks, reviewing bank statements, identifying previous employment histories and why these have ended, assessing available support networks and why these have ended and establishing whether current accommodation has been legally terminated.
  - o There is clear case law in R(MN & KN) v LB Hackney and R(N&N) v LB Newham - [2013]EWHC 1205(Admin) which entitles Local Authorities to conclude a family is not destitute if the adults do not provide sufficient information to enable a finding of destitution to be made.
- *Whether there are any further safeguarding or children in need concerns.*
  - o The details of cases presenting to the local authority are sent to the children's social care Multi Agency Safeguarding Hub (MASH) for an electronic check to establish authenticity of relationships, to protect children against trafficking or being exploited for accessing resources as well as to check whether other agencies have or do raise safeguarding concerns.
  - o Families are also given the opportunity to tell us during their assessment about any particular concerns. Caseworkers all

have experience working on the front-line with vulnerable people and have received training on the identification of safeguarding issues. If the family, caseworker or MASH assessment raises concerns, these are passed immediately to children's social care for a fuller assessment of the family's needs.

- o If the first phase of assessment identifies the local authority may owe a family a duty under s17 Children Act, temporary accommodation will be provided to the family whilst a full Children in Need assessment will be conducted by an appropriate social worker.
- The outcome of the assessment will be communicated to families at an appointment with their caseworker and is provided in writing if the applicant requests it.

### Casework processes

7.6 In addition to the assessment process above for new cases, the pilot team is also responsible for managing existing cases. Each caseworker has a caseload of approximately 46 cases. They are responsible for:

- Conducting annual reassessments of each case to determine whether the local authority continues to have a duty to support in line with the requirements above.
- Conducting regular immigration status checks on the family, notifying the Home Office of any relevant change of circumstance and providing information to the family's solicitors and/or the Home Office in relation to their application as requested.
- Supporting the family to access mainstream benefits by applying for code changes via the Home Office if the family is eligible for this.
- Dealing with day to day concerns relating to housing and payments and making referrals to other departments (including children's social care) if this is appropriate.
- Helping the family resettle away from local authority support if they are either granted leave to remain or access to benefits. This includes liaising with our in house property procurement specialists to identify private rented sector properties, helping the family to make a claim for benefits and providing them with information on schools, health services and Council services if the family is moving outside of Lewisham as part of their resettlement.

## **8 Impact & learning from the pilot**

### Numbers of new cases presenting and support decisions

8.1 Since the start of the pilot, the new team have made decisions on 277 new cases presenting for support. This is equivalent to approximately 6 new cases presenting each week. Of these 8 are now receiving ongoing support from the local authority and a further 27 have received some form of temporary support during the last year. For 16 of these cases, temporary support is ongoing pending more detailed investigations on their cases. This is an acceptance rate of 13% which is a significant reduction in the number of cases accepted from support on the year prior to the pilot when acceptance rates were over 50%. This rate of acceptance is now in line with acceptance rates reported by our neighbouring boroughs who have recently put in place dedicated teams of this type. For example, Lambeth Council who introduced a dedicated team a few months after Lewisham report that their acceptance rate is now 15%.

8.2 The breakdown of reasons for the local authority determining, following its assessment, that the family is not owed a duty are set out below:

- **Not Destitute (18%).** Nearly all cases still had both accommodation and income (from benefits, part-time working, full time working or a partner working). In a small number of cases, applicants were found to be running a business or generating an income by sub-letting part of their property or illegally sub-letting. Average income £970pm, although there have been cases where income was in excess of £2K pm
- **Fraud Referrals (11%).** These were all significant cases involving complex networks, significant income and/or other assets. In one case the claimant owned undeclared property in Surrey.
- **No Home Office Application or Appeal (10%).** Of which 2.5% never had an application in or an immigration history with the Home Office and so were likely to be an illegal entrant. For those who had made an application, the average time since their last active claim or appeal before approaching Lewisham is 18 months.
- **EU Nationals (9%)** The majority were refused because they were not exercising Treaty Rights but in a few cases applicants were eligible and therefore supported to make a full claim for benefits. One applicant was supported to set up his own business. Most applicants come from Netherlands (originally from Nigeria), Poland, Spain and Portugal.
- **Not Homeless (8%)** Approached before any eviction notice or order granted or illegally evicted by landlord. In all cases of illegal eviction, applicant supported to regain entry.
- **No Evidence to Support Claim at all (8%)** These are applicants who ask for support but have no identity documents, no passport, no proof of where they live or that any accommodation has been lost and no financial information.
- **Stronger History with Another Borough (6%)** Majority referred to Southwark but there have also been small number of cases from Lambeth, Greenwich & Croydon. Other local authorities have included Hackney, Nottingham and Northampton.

- **Refusal to Co-operate (4%)** Mostly this involves not being prepared to sign the consent to Lewisham making necessary enquiries but it has included a refusal to answer any questions at all.
- **Didn't Return for Assessment when given an Appointment (4.5%)**
- **Already Supported by NASS (1.5%)**
- **Domestic Violence Concession (1.5%)** which enables some individuals affected by domestic violence to claim financial support from the Home Office.
- **Failure by Home Office to apply Transitional Rules in Article 8 Repeat Claims (2.5%)**
- **Other (16%)** this includes a wide range of cases including:
  - Applicants who were returning nationals or had a right to return because of settled status
  - People with extensive or sufficient support networks including family and friends
  - Single adults with no care needs
  - Those who had indefinite leave to remain and so entitled to work and/or claim benefits
  - Those whose applications were abusive or hopeless
  - Those already in receipt of support
  - Recent asylum claims yet to be picked up by NASS

8.3 The investment in resource at the initial stage of assessment in clear, evidence led and consistent assessment of the presenting family's needs is the main difference in the new approach against the previous operating model and explains the difference in acceptance levels. The overall framework of assessment has not changed significantly. Destitution and immigration checks were always part of children's social care processes for establishing whether there is a child in need and are in line with NRPF Network guidance; they are also common to most local authorities. However, the extent to which the family's claims of destitution or homelessness were investigated varied greatly in the past. It is now integral to the process. It is a complex assessment which involves gathering evidence from a number of sources to pull together a picture of their actual circumstances and the appropriate response to those circumstances. The level of resource which was in place previously and the fact that it had been disbursed in a fragmented way across a whole social work department meant that the Council did not have the capacity required to undertake adequate assessments. The pilot has addressed this issue.

8.4 The active involvement of our fraud department to help ensure that the evidence we collect is genuine and that the information contained within it accurate has been important to this process. In total, the pilot team have referred 29 cases to our fraud department on the basis of more serious concerns being raised which triggered the need for more thorough fraud investigation.

### Reassessment for existing caseload

- 8.5 In total to date the pilot team have completed full reassessments of 97 cases transferred to the new team since November 2014. The reassessment process has been put in place to ensure that all cases accepted before evidential assessment processes were put in place receive a more thorough investigation of their circumstances. To date, approximately 25% of these reassessments have resulted in a change to the support they receive from the local authority. In the majority of cases this is because caseworkers have identified undeclared income, for example through working.
- 8.6 We are also working with the Home Office family removals service on 38 existing cases who have been receiving local authority support for some time but have not had an application, appeal or reconsideration request for a considerable period. It is our duty under schedule 3 of the Nationality, Immigration and Asylum Act 2002 to notify the Home Office of these cases. We are putting in place face to face sessions with the Home Office to explain return home options and ensure relevant paper-work is served where this is appropriate.

### Case resolution

- 8.7 Since November 2014 when the majority of the existing caseload was fully transferred from children's social care to the pilot team, the Council has been successful in obtaining code changes for 94 families enabling them to access state benefits to which they would otherwise not have been entitled. We have put in place a comprehensive resettlement package for these families, including support to find affordable privately rented properties, make benefit claims, seek work and locate schools and services if they are moving from Lewisham.
- 8.8 We are in the process of investigating how we can provide access to in house local authority employment support to parents who have the right to work but not to claim benefits, who are not entitled to support via Jobcentre Plus. We have also recently agreed to fund a dedicated Home Office decision maker to work solely on cases being supported by Lewisham to seek to have decisions made on their immigration applications more quickly.
- 8.9 Alongside putting in place a more evidentially led and consistent assessment process, one of the key priorities for the pilot was to develop a case-management approach which provided more intensive support for families to whom the local authority owed a duty to ensure that their immigration status could be resolved more quickly. This is a key priority for the Council because ultimately, the best interests of the child are achieved when their parents have a settled immigration status, either in the UK or elsewhere, which enables them to access employment, benefits and state services on a par with their peers.

## Challenge to our approach

- 8.10 The Council's approach has received a high level of scrutiny over the past year. In total we have received 32 representations from solicitors which required detailed responses and 12 pre-action protocol letters. To date two cases have been to court. In both cases, the courts have found in Lewisham's favour. In the most recent case, the high court judge expressly endorsed the phased assessment approach stating: 'There is no dispute as a matter of law that it is open to [Lewisham] to discharge duty by conducting staged assessment. Therefore initial assessment open to [Lewisham] and justified.'
- 8.11 However, it is important to note that Lewisham has recently received a Pre Action Protocol letter challenging the overall approach we take to assessing this group. The claim questions the legal basis of the initial stage of the eligibility assessment which is not only used by Lewisham but is common practice amongst local authorities and is based on the NRPF guidance issued by the NRPF Network. The claim comes from Project 17, a local advocacy organisation which works with families with NRPF. Their website states that their objective is to ensure that local authorities comply with the duties imposed on them by section 17 of the Children Act 1989. Representations received from Project 17 and other advocacy organisations in relation to the Council's approach have been included in this report in paragraph 10.5 and appendices 3 to 5.

## Other boroughs

- 8.12 Over the last year, we have been working closely with our neighbouring boroughs to share our learning from the first phase of the pilot. Bromley, Greenwich, Lambeth and Southwark Councils are now working jointly with us on a Department for Communities and Local Government (DCLG) counter fraud project specifically focused on NRPF cases. The DCLG have provided funding to standardise our assessment process, develop a shared assessment and case management system and to conduct a more thorough analysis of trends in local authority presentations for people with NRPF. The bid is based on the initial evidence from the first six months of the Lewisham pilot which has identified the impact of evidentially led assessment processes. In the longer term we are looking at possible options to deliver the NRPF assessment and case management function as a shared service.

## **9 Options for the future of NRPF assessment and case management in Lewisham**

- 9.1 The current NRPF pilot will end on 29<sup>th</sup> May 2015. The Mayor is therefore asked to make a decision, based on the evidence contained in this report, as to

the preferred option for the future of the Council's approach. Three options have been prepared and are outlined below.

## 9.2 OPTION ONE: Mainstream the pilot as a permanent Council service in its current form

### *Pros*

- 9.2.1 Establishing the pilot team as a permanent approach to dealing with NRPF applications will enable the Council to continue to manage cases as set out in the previous sections of this report. This will mean that dedicated capacity is in place across the organisation to ensure that assessment processes for need when triggered by homelessness and destitution are evidentially and consistently assessed. It is expected that, based on the evidence outlined in this paper, the Council would be likely to accept some form of duty to support in approximately 35 new cases per year. This is of course subject to any legislative changes which may affect the local authority's duties.
- 9.2.2 Investing in the dedicated capacity for an NRPF team ensures that the ongoing work to support the regularisation and resettlement of existing cases could continue. The Council will be able to pursue plans with the Home Office to put in place a dedicated decision maker to expedite decisions on Lewisham families with unresolved immigration status.
- 9.2.3 Establishing the service as a permanent team will make the process for recruiting and retaining skilled and experienced officers in this field easier. This will ensure that the overall quality of decision making remains high and that those receiving services receive better continuity of service.
- 9.2.4 Mainstreaming the pilot will provide a sound base for the Council to pursue stronger joint-working with other London boroughs and build the foundations for a shared service model for NRPF.

### *Cons*

- 9.2.5 Annual investment of £700k will be required for staffing the team and support services and will need to be built into the Council's base budget.
- 9.2.6 This is not the preferred option for the advocacy organisations who have made representations included within this report. The Council is likely to continue to receive challenge from these organisations.
- 9.2.7 Although the pilot has been in operation for a year, the complexity of the service and the length of time it has taken to transition cases to the new team means that there is still a lot that the Council can learn in terms of the overall structure and model which is likely to be required in the longer term. In particular, it is expected that over the next year the Council will be able to notably reduce the number of cases which continue to require local authority support as a result of the work being



done with the Home Office to seek code changes so that families can access benefits and the imminent project to put in place a dedicated decision maker. Based on the successes of this second year in this regard, it may be the case that the level of resource required for a permanent team will be smaller than is currently the case.

### 9.3 OPTION TWO: Extend the current pilot model for a further year

#### *Pros*

- 9.3.1 The benefits outlined in 8.2.1 and 8.2.2 will also be achieved if option two is selected. However, committing to funding for one year only will mean that the benefits associated with the new assessment and case management approaches will only be secured for one year.
- 9.3.2 As explained in 8.2.7, there is a significant amount of work the Council can undertake over the next year to seek to reduce the number of cases requiring local authority support whilst complying with our duties. If the pilot is extended in its current form for a further year, a decision can then be made on the shape and scale of a mainstreamed team which is likely to be at a lower cost than the £700k which is currently the predicted cost for the team.

#### *Cons*

- 9.3.3 One off funding of £700k will be required for a further year of the pilot.
- 9.3.4 This is not the preferred option for the advocacy organisations who have made representations included within this report. The Council is likely to continue to receive challenge from these organisations.
- 9.3.5 The Council will continue to need to recruit to posts within the new structure on a temporary basis although the pressure will be less significant than in the first year of operation when recruitment was on 6 month contracts.
- 9.3.6 The Council would be unlikely to be able to pursue a shared service model during this next year and may need to wait until a more permanent decision on the operating model is taken at the end of the first year.

### 9.4 OPTION THREE: Do nothing

#### *Pros*

- 9.4.1 This is the preferred option of the advocacy organisations who have made representations included within this report. The threatened class action judicial review would probably not be pursued. However, this does not mean the Council would receive no further legal challenge given that individual challenges were issued prior to the pilot commencing.
- 9.4.2 The additional funding outlined could be reviewed and may not be at the same level. However, the Council would still need to consider whether further resourcing in children's social care would be required to enable

social workers to conduct assessments of this type effectively alongside their other safeguarding and child protection duties.

*Cons*

- 9.4.3 It is likely that if the service returns to the operating model in place before the pilot then the issues identified in paragraphs 6.1 to 6.15 will still be concerns. In particular, the Council risks not ensuring that it is appropriately complying with its duties to adequately assess need and ongoing eligibility in line with the Children Act 1989 and the Nationality, Immigration and Asylum Act 1999.
- 9.4.4 The specialist identification of children in need within a largely self-referring cohort would be lost, particularly with reference to the expertise needed to identify those children at risk from trafficking/exploitation issues. Families would lose their single point of contact with the Council. Children within a NRPF family also benefit from the focus of a specialist approach, particularly if their family is assisted early with stable, long term affordable family housing and transition into the mainstream, services not within the resources of a generalist Children's Social Care Service.
- 9.4.5 Establishing the pilot team was a lengthy and complex process and reintegrating the service back to the model in place before the pilot will take considerable time and cause significant disruption and risk for both new cases presenting to the authority and those already being supported.
- 9.4.6 The expertise of the current team would be dispersed and lost to the Council, and to those families benefitting from the support they are receiving to move out of Local Authority support and into mainstream benefits and employment. The case work and focus on this aspect of the work was completely absent prior to the pilot.
- 9.4.7 The estimated costs of continuing with the operating model prior to the pilot for the local authority was estimated to be committed annual spend of c. £15m by the end of financial year 2017/18. The Council would need to consider how to fund this.

## **10 Engagement and Representations from third parties**

- 10.1 In reaching a decision on the preferred option for the ongoing management of NRPF in Lewisham, the Mayor is also asked to note the following engagement, reviews and representations which have informed the pilot and the options presented above:
- 10.2 Before the start of the pilot, we sent 200 questionnaires to NRPF families who were currently being supported by the Council. We asked them a series of questions about the planned assessment process and the ongoing support for families. We received completed questionnaires from 39 families. A summary of their responses is below:

- o 38 people said that they agreed that ‘that having a specialist team will make it easier to know who to contact when you need to’
- o 35 people said that they thought individuals should be asked to provide evidence of where they have been staying when they apply for support
- o 38 people said that checking status with the Home Office at the start of the application process would help to make the process fairer.
- o 35 people said the Council should do more to ensure that support goes to those most in need by asking people about the money they receive from friends, family, religious or other institutions.
- o 36 people answered yes to the question ‘Would having a named caseworker help you?’
- o In terms of the support they would like to receive from their caseworker, the most popular choices were – help to access training (24), improved Home Office liaison (16) and help to access work (14).

10.3 An online questionnaire was sent via email on 27<sup>th</sup> February 2014 to 21 solicitors and representatives who were identified by Children’s Social Care as having regular contact with them in relation to NRPF cases A full list of the organisations who were asked to participate is in appendix 2. The questionnaire covered each of the areas of the assessment outlined in paragraph 7.5 of this report and asked for feedback on the types of checks the authority would undertake. We received 2 responses. As the submissions were anonymous we cannot confirm which organisations responded. However, a summary of the responses is below:

- o One response agreed with the development of a specialist team. The second response stated that ‘This is badly worded and unclear. Is this a single point of contact for Lewisham officers, if they need assistance from colleagues with expertise, or a single point of contact for members of the public. The former is a good idea, the latter not’
- o On the question of what checks the Council should undertake, one response agreed with the checks which should be undertaken and gave no further information, the second stated ‘The law is clear. Lewisham should comply with it. One would expect them to do all these checks as a matter of course anyway. Lewisham need to confirm that they will never let a dispute with another borough get in the way of providing urgent support to somebody in need. The dispute with the other borough can be resolved later’
- o Respondents were asked ‘What one thing would you suggest to ensure that resources are applied fairly and appropriately?’ We received one response to this as follows: ‘The obvious solution is to encourage the UKBA to make decisions in a more timely manner. Lewisham should be doing this. Previously there was legal aid available for these cases, and immigration solicitors could threaten the Home Office with judicial review if they delayed for too long in making decisions. There is no legal aid

anymore, so individuals cannot threaten the home office in this way. The increased costs that Lewisham faces are thus a product of UKBA inefficiency, and legal aid cuts.

- 10.4 The NRPf service manager and other officers have held two face to face meetings with advocacy organisations. The first, on 24<sup>th</sup> July was held with the wider Advice Providers Forum to explain the new process the Council was using and to seek feedback. Project 17 and the Southwark Law Centre amongst other organisations attended this event. The second meeting on 5<sup>th</sup> March 2015 was requested following the PASC meeting on 5<sup>th</sup> February. This was attended by Project 17, Shelter, Eaves, Coram Children's Legal Centre and the Migrants Rights Network.
- 10.5 The chair of PASC has also received written representations on the Local Authority's approach from Project 17, Coram Children's Legal Centre and Shelter. These representations were received as part of its NRPf review, a summary of which is below. These representations are included in appendices 3--5. Officers were given sight of the Project 17 submission and prepared a response to this for the chair of PASC. This is also included in appendix 6. In addition, further correspondence with Project 17 relating to the specific cases raised in their letter to PASC was sent by officers on 17<sup>th</sup> March 2015.

## **11 Public Accounts Select Committee Review**

- 11.1 On 18<sup>th</sup> February 2014, the Public Accounts Select Committee concluded its review of the Council's approach to NRPf and presented its recommendations to Mayor and Cabinet. The report made eight recommendations which fall into three broad themes. Officer responses to these have been included below.
- Recommendation: Exerting pressure on central government to raise the profile of costs being borne by local authorities in supporting families with NRPf.
    - Officer response:
      - The Council's Chief Executive sits on a DCLG steering group whose remit includes representing the local authority position on responding to cost pressures relating to No Recourse to Public Funds.
      - The Mayor's Office will write to the Home Secretary at an appropriate point raising concerns relating to the increased financial pressure being experienced by local authorities in providing support to this group.

- Recommendation: Supporting the NRPF pilot approach for more robust and evidence led assessment approaches and management of procurement approaches to reduce the costs of support.

Officer response:

- o This paper sets out the evidence on the pilot approach and seeks a decision from the Mayor on whether and in what form the pilot should continue.

- Recommendation: Working with other London authorities on a more coherent and joined up approach to working with families with NRPF.

Officer response:

- o The Council is currently working with Bromley, Greenwich, Lambeth and Southwark Councils as part of the DCLG counter fraud project. This will form the ongoing basis of joint working with other boroughs.

## **12 Financial implications**

### Spend for 2014/15

- 12.1 At the start of June 2014 the Council was supporting 286 families with NRPF. The financial commitment for these families was £6.2m. The budget set for this was £350k therefore representing an unfunded budget pressure of £5.85m.
- 12.2 However, the Council had additionally predicted a growth in the number of cases which would be supported. Based on previous rates of acceptance the combined total spend for the 286 cases and new cases accepted during the financial year would make the total predicted spend for the financial year 2014/15 c. £8m.
- 12.3 Following the first year of the pilot, the anticipated year end overspend spend for 2014/15 on NRPF families is £6.0m which is a reduction of £2.0m on previous forecasts.
- 12.4 This is off-set against an investment of £700k in the development of the pilot team and the other associated costs.

### Spend for 2015/16 based on the options outlined above

- 12.5 If the Council pursues options one or two outlined in section 10 of this report which would see the continued operation of the pilot operating model for at least a further year, we would expect to see spend reduce to £4.3m for the financial year 2015/16. This forecast is based primarily on the work to resettle 94 cases who have now been granted access to state benefits. The full effect of the resettlement of these cases is £3.8m but the projection has been

adjusted to account for the fact that resettlement processes are complex and may take a number of months to achieve.

- 12.6 If the Council pursues option three, the 'do nothing' option outlined in this report, spend is projected to rise to c. £8.2m for the financial year 2015/16. This projection is based on the average rate of growth in spend for the financial years 2012/13 and 2013/14 of £2.2m per annum.
- 12.7 Overall, the Council has a legal and fiduciary duty to set and maintain a legal balanced budget each year and must manage the budget accordingly to achieve this.

### **13 Legal implications**

- 13.1 The main body of the report references the principal statutory duties and powers within which the Council supports children in need and their families pursuant to s17 Children Act 1989, and families in which the adults have No Recourse to Public Funds.

13.2 s54 and Schedule 3 of Nationality Immigration and Asylum Act 2002

From 8 January 2003, local authorities' power to house, support and provide other community care services to various categories of immigrants were removed. Paragraph 1 (1) lists the duties and powers of the various Acts for which such persons will not be eligible. The list includes community care services ( as amended by the Care Act 2014) and the Children Act s17, 23C, 24C and 24B and s2 the Local Government Act 2000. There are 5 classes of ineligible persons:

- someone with refugee status abroad (eg granted asylum/refugee status in another EEA country) and their dependants
- EEA nationals and their dependants
- failed asylum-seekers and their dependants certified by the Secretary of State as having failed to take reasonable steps to leave the UK
- refused asylum seekers who have failed to comply with removal directions
- non asylum-seeker immigrants in breach of immigration laws eg overstayers

In order to make the schedule compliant with the Human Rights Act, local authorities have the power or duty to provide services to the 5 ineligible classes if it is necessary for the purpose of avoiding a breach of a person's Convention rights or their rights under the Community Treaties.

- 13.4 Councils acquired new powers to provide temporary accommodation and return travel with the Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 SI No 3078. These

Regulations empower local authorities to make travel arrangements for EEA nationals and refugees to return to their European country of origin. They introduced a new power to provide temporary accommodation to the family of a dependent child in the above 2 categories and to a person who is unlawfully in the UK, provided s/he has not refused to cooperate with removal directions.

13.5 The nature of the duties and powers arising under s17 was recently discussed by Mr Justice Cobb in *R (AM) v Havering LB* [2015] EWHC 1004(Admin), including issues of territorial responsibility.

13.6 The relevant parts of s17 Children Act are set out below:

*Provision of services for children in need, their families and others.*

(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) —

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

(2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

(4) ...

(4A) Before determining what (if any) services to provide for a particular child in need in the exercise of functions conferred on them by this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes and feelings regarding the provision of those services; and

(b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain.

(5) Every local authority—

(a) shall facilitate the provision by others (including in particular voluntary organisations) of services which "it is a function of the authority to provide by virtue of this section, or section 18, 20, 22A to 22C, 23B to 23D, 24A or 24B and

(b) may make such arrangements as they see fit for any person to act on their behalf in the provision of any such service.

(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.

(7) Assistance may be unconditional or subject to conditions as to the repayment of the assistance or of its value (in whole or in part).

(8) Before giving any assistance or imposing any conditions, a local authority shall have regard to the means of the child concerned and of each of his parents.

(9) ...

(10) For the purposes of this Part a child shall be taken to be in need if—

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled, and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—

- "development" means physical, intellectual, emotional, social or behavioural development; and

- "health" means physical or mental health.

13.7 *Section 17* is to be read with *Schedule 2, Part 1* which contains the following:

Para.1(1): "Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area..."

Para.3(1): "Where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs ..."

Para.4(2): "Where a local authority believe that a child who is at any time



within their area – (a) is likely to suffer harm; but (b) lives or proposes to live in the area of another local authority they shall inform that other local authority.”

13.8 Mr Justice Cobb has helpfully commented upon each aspect of the Local Authority:

***The nature of the duties***

- i) *Section 17* imposes general and overriding duties on local authorities to maintain a level and range of services sufficient to enable the authority to discharge its functions under *Part III* of the CA 89: see *R(G) v Barnet* at [20-21]/[79-85]/[91]/[106];
- ii) *Section 17* does not of itself generate a targeted, specific duty to an individual child: *R(G) v Barnet* at [113];
- iii) *Section 17* and *Schedule 2, para.1* and *para.3* together create a duty on the authority to assess the needs of each child who is found to be in need in their area: *R(G) v Barnet* at [32]/[77]/[110]/[117]; *R(VC) v Newcastle* at [21];
- iv) *Section 17* does not impose a duty to provide services, or accommodation: *R(G) v Barnet* at [85]/[93]/[106]/[135]: "a child in need ... is eligible for the provision of those services, but he has no absolute right to them" [85]; *R(VC) v Newcastle* at [21] and [27];
- v) Any refusal to provide assessed services under *Part III* of the CA 1989 is amenable to challenge by way of judicial review: *R(VC) v Newcastle* at [25]; in this respect, discretionary statutory powers must be exercised to promote the policy objectives of the statute: *Padfield V MAFF* [1968] 1 All ER 694 at 699, and *R(J) v Worcester* at [47]; where there is an assessed need for services, any decision not to provide services will be subject to "strict and ... sceptical scrutiny": *R(VC) v Newcastle* at [26];
- vi) In relation to the provision of housing/accommodation to a child in need, there is a specific and separate statutory code; although the local authority has the power to provide accommodation to a family under *section 17*, social services departments should not be converted into quasi-housing departments; *section 17* is primarily designed to accommodate homeless children, not homeless families; in short, *section 17* should not be construed in such a way as to "drive a coach and horses through the housing legislation": *R(G) v Barnet* at [45-47]/[93]/[138];
- vii) *Section 1* of the *Localism Act 2011* ("a local authority has power to do anything that individuals generally may do") was not intended to be used to override a clear statutory scheme, including that set out in *Part III* of the CA 1989 in relation to provision of services; it can however be used by local authorities to enter into contracts or leases: *R(MK) v LB Barking & Dagenham* at [84/85].

### **Who is a 'child in need'?**

viii) The identification of a 'child in need' engages a number of different value judgments, to be determined by asking a range of questions such as "what would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level?" etc: *R(A) v Croydon* at [26]; in the context of providing services, these evaluative questions are better determined by the public authority, subject to the control of the courts by way of judicial review (though see (ix) below); there are no right or wrong answers (ibid);

ix) Assessment of the facts (i.e. whether a child is 'in need') is not readily susceptible to judicial review; where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power: *Pulhofer v Hillingdon LBC* at p.518;

x) A child without accommodation is a child in need: *Northavon ex p Smith* at [p.406], *R(G) v Barnet* at [19];

xi) Where there is a dispute of fact (i.e. on the issue of whether a child is a child in need) in judicial review proceedings, in the absence of cross-examination, the facts in the defendants' evidence must be assumed to be correct (*Westech* at [27]).

### **On whom does the duty to assess arise?**

xii) The duty is placed on the authority in which the 'child in need' is physically present; the key words of the operative section (*section 17(1)*) particularly when read with *paragraph 4(2)* of *Schedule 2* are "within their area": *Stewart* at [23]; *R(M) v Barking & Dagenham* at [15]; (although Bean J in *R(HA) v Hillingdon* contemplated something other than a "simple geographical test" in order to avoid the 'dumping' cases, he does not state what that is);

xiii) More than one local authority can owe a duty to assess under section 17 to the same child in need who may be physically present in their area, at the same time: *Stewart* at [30] (in that case the children attended school in LB Wandsworth and resided in LB Lambeth; both were judged to owe a duty to assess); *R(J) v Worcester* at [13].

### **Co-operation between authorities**

xiv) Where more than one local authority is involved in assessing a child in need or offering services, it is essential that they should co-operate with each other and share the burdens: *Stewart* at [28]; *R(M) v Barking & Dagenham* at [17]; [At [28], in *Stewart*, the Court stated that "In a case where more than one authority is under a duty to assess the needs of a child, there is clearly no

reason for more than one authority to in fact assess a child's needs and there is a manifest case for co-operation under section 27 of the Children Act and a sharing of the burden by the authorities".].

xv) The basic principle that the duty is owed by the authority of the area in which the child is physically present will not generally operate unfairly against one particular authority; the 'traffic' is not all one way: *Stewart* at [30];

xvi) There should be no passing the child "from pillar to post" while the authorities argue about where he comes from: *R(G) v Southwark* at [28(3)]; needs should be met first and redistribution of resources should if necessary take place afterwards (*R(M) v Barking & Dagenham* [17]);

xvii) Specifically in London, local authorities are required under Guidance to "develop and support a culture of joint-responsibility and provision for all London children (rather than a culture of 'borough services for borough children')" (*London Child Protection Procedures: 6.1.2*).

***On whom does the power to provide services fall?***

xviii) There is a power in the local authority to provide services to a child in need who was physically present in its area at the time of the assessment, but who had moved outside its area at the time of provision: *R(J) v Worcester* at [31];

***Where there is uncertainty, how should section 17 be construed?***

xix) *Section 17* should be construed in a way which advances the core aims to promote the welfare and best interests of children in need: *R(J) v Worcester* at [47];

xx) *Part III* of the *CA 1989* was intended to reflect the obligation in *article 18(2)* of the *United Nations Convention on the Rights of the Child* to render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and to ensure the development of facilities and services for the care of children; see *R(G) v Barnet* at [68]."

13.9 The pilot scheme adopted by the Council follows these principles, and reflects the observation in *Stewart* at [28].

13.10. The recommendations made in this report raise a number of legal issues which have been identified by Project 17 in their threatened claim for Judicial Review. The Pre Action Protocol letter is in appendix 8 of this report. The Council's position is as follows:-

13.10.1 Eligibility Criteria

i. Project 17 contend that the Council has erred in law in applying certain eligibility criteria to determine whether a family with NRPf is eligible for support: (a) territorial responsibility; (b) destitution; and (c) not excluded from support under Schedule 3 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”). The Council believes these points are unfounded.

(a) Territorial Responsibility

i. As set out in this report, the Council seeks to determine which local authority is most appropriate to make a comprehensive assessment of an applicant’s needs, and then to signpost the applicant to that authority for detailed assessment and provide support (where required).

ii. Accordingly, where the applicant happens to be in the area of the Council, and her connection with the Council is tenuous but she/ the family has a more permanent or long-standing relationship with another local authority, the applicant will be signposted to that other authority for assessment and support (where applicable). The Council is of the view that this is an entirely lawful approach, and consistent with the judgment of Mr. Jack Beatson QC (as he then was, sitting as a Deputy) in R (Stewart) v. Wandsworth LBC [2001] EWHC 709 (Admin) at [28]:

*In a case where more than one authority is under a duty to assess the needs of a child, there is clearly no reason for more than one authority to in fact assess a child's needs and there is a manifest case for co-operation under section 27 of the Children Act and a sharing of the burden by the authorities.*

iii. If that evaluation will take some time, and if support is otherwise called for, the Council will in the meantime provide the applicant with support.

iv. This approach is also in line with Mr Justice Cobb’s analysis above.

(b) Destitution

i. The Council looks to see whether an applicant can meet her essential living needs. The Council also obtains evidence through the MASH process with respect to the health and development of any children concerned, and to see if there are any safeguarding concerns. In the circumstances, the Council adheres to the principles of section 17(10) of the 1989 Act.

(c) Immigration Status and the Schedule 3 criteria

i. The report sets out that clear enquiries are made as to the immigration status of the applicant, through the in house resource.

ii. The Council considers carefully any intimation that an applicant is a *Zambrano* carer, make enquiries to confirm this is the case, and has provided support where there is evidence that the applicant falls within the *Zambrano* principles. For further details please see Appendix 7.

iii. The report sets out the degree to which the Convention considerations are considered, and that a careful evaluation of an applicant's circumstances in light of Convention principles is carried out.

#### 13.10.2. Failure to comply with the duty to assess

i. The report sets out that a triage process is in place to assess applicants for services. In a recent application for judicial review involving the Council (claim brought by *Esther Giwa*), it was noted by the Administrative Court that there was no dispute as a matter of law that it is open to the Council to discharge its duty by conducting a staged assessment. The initial assessment carried out by the Council in that case was held to be open to it, and justified.

ii. The application of the s17 process / areas to be considered is also commented on by Mr Justice Cobb see (viii ) and ( ix ) above.

#### 13.10.3. Section 149 of the Equality Act 2010

i. This report deals with the approach to the Councils duties under section 149 of the Equality Act 2010 .At the pilot stage, public sector equality considerations have been incorporated. Officers acknowledge that it was recognised the vast majority of applicants for section 17 support were women primarily from Nigeria and Jamaica.

ii. A full Equalities Analysis Assessment (EAA) is attached to this report.

#### 13.10.4 Discrimination

i. The position with respect to alleged breaches of the Equality Act 2010 with respect to *Zambrano* carers is dealt with in the report. The pilot scheme evaluates carefully applicants who indicate status under the principles of *Zambrano*.

#### 13.10.5. Material error of fact

i. It is correct that no judicial review challenges to the Council's decision-making have succeeded. In a small number of cases, decisions have (for a variety of reasons) been revisited with different outcomes. This does not mean that the system is inherently flawed and unlawful.

#### 13.10.6. Best Interests

i. The report sets out how the best interests of children and their families is addressed in the approach of the pilot.

13.10.7 Leading Counsel has read this report, and has advised that a decision to mainstream the pilot scheme (as per Option 2) is lawful and reasonable.

## **14 Best Interests of Children**

14.1 In making the decision, the Mayor should have regard to whether the decision is in the best interests of the children who are affected by the proposed arrangements. In this regard, paragraph 8.9 above should be noted in particular, as well as the comments about children in the EAA.

## **15 Environmental implications**

15.1 There are no specific environmental implications arising from this report

## **16 Equality implications**

16.1 A full Equalities Analysis Assessment has been included in appendix 1.

### **Equalities Legislation**

The Equality Act 2010 (the Act) introduced a new public sector equality duty (the equality duty or the duty). It covers the following nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

16.2 In summary, the Council must, in the exercise of its functions, have due regard to the need to:

- eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
- advance equality of opportunity between people who share a protected characteristic and those who do not.
- foster good relations between people who share a protected characteristic and those who do not.

16.3 The duty continues to be a “have regard duty”, and the weight to be attached to it is a matter for the Mayor, bearing in mind the issues of relevance and proportionality. It is not an absolute requirement to eliminate unlawful

discrimination, advance equality of opportunity or foster good relations. The Mayor should pay careful attention to the EAA.

16.4 The Equality and Human Rights Commission has recently issued Technical Guidance on the Public Sector Equality Duty and statutory guidance entitled “Equality Act 2010 Services, Public Functions & Associations Statutory Code of Practice”. The Council must have regard to the statutory code in so far as it relates to the duty and attention is drawn to Chapter 11 which deals particularly with the equality duty. The Technical Guidance also covers what public authorities should do to meet the duty. This includes steps that are legally required, as well as recommended actions. The guidance does not have statutory force but nonetheless regard should be had to it, as failure to do so without compelling reason would be of evidential value. The statutory code and the technical guidance can be found at: <http://www.equalityhumanrights.com/legal-and-policy/equality-act/equality-act-codes-of-practice-and-technical-guidance/>

16.5 The Equality and Human Rights Commission (EHRC) has previously issued five guides for public authorities in England giving advice on the equality duty:

1. The essential guide to the public sector equality duty
2. Meeting the equality duty in policy and decision-making
3. Engagement and the equality duty
4. Equality objectives and the equality duty
5. Equality information and the equality duty

16.6 The essential guide provides an overview of the equality duty requirements including the general equality duty, the specific duties and who they apply to. It covers what public authorities should do to meet the duty including steps that are legally required, as well as recommended actions. The other four documents provide more detailed guidance on key areas and advice on good practice. Further information and resources are available at: <http://www.equalityhumanrights.com/advice-and-guidance/public-sector-equality-duty/guidance-on-the-equality-duty/>

## **17 Background documents and Report Author**

17.10 There are no background documents to this report.

17.11 If you would like any further information about this report please contact Justine Roberts on 020 8314 7051.

## **18 Appendices**

- o Appendix 1: Equalities Analysis Assessment
- o Appendix 2: List of solicitors invited to participate in consultation for establishing the pilot
- o Appendix 3: Representation from Project 17
- o Appendix 4: Representation from Shelter
- o Appendix 5: Representation from Coram Children's Legal Centre
- o Appendix 6: Officer response to Project 17
- o Appendix 7: Zambrano rights
- o Appendix 8: Pre Action Protocol from Project 17