



Disabled Children's Social Care – Briefing #3

Hierarchy of the law

About this briefing

This is one of a series of briefings written by the Council for Disabled Children and Research in Practice. These have been developed to help practice leaders and service managers promote greater understanding across the children's workforce of the complex and often confusing legal and policy landscape around disabled children's social care.

They accompany the resource [Using a needs-led eligibility framework to provide services to disabled children and families \(June 2024\)](#).

Introduction

The legal rights of disabled children and their families to receive support from local authorities are shaped by three levels of law – primary legislation, secondary legislation and government guidance. Alongside case law or common law (see below), these form the legal regime governing the rights of disabled children.¹

- 1 Primary legislation** are Acts of Parliament, such as the *Children Act 1989*, the *Chronically Sick and Disabled Persons Act 1970*, the *Children and Families Act 2014* and the *Care Act 2014*. For disabled children and their families, this is where 'basic rights and duties' are generally spelled out (Broach & Clements, 2020, p. 72). (See Briefing #4 'Understanding powers, duties and entitlements' for a discussion of rights and duties.)
- 2 Secondary legislation** is law created by ministers under powers given to them by an Act of Parliament. Secondary legislation often 'fills in the details' (UK Parliament, n.d.) of an Act by prescribing measures, timescales or processes that need to be followed to make an Act operational and which enable the law to be enforced.

Secondary legislation will often have 'regulations', 'orders' or 'rules' in its title (Broach & Clements, 2020, p. 72; UK Parliament, n.d.). For example, the Special Educational Needs and Disability (SEND) Regulations 2014 were made under powers conferred by the *Children and Families Act 2014*.

Secondary legislation can also be used to set a date for when the provisions of an Act will come into force (House of Commons Library, 2016; UK Parliament, n.d.).

Primary and secondary legislation have both been 'approved' by Parliament and so carry the same legal weight (Broach & Clements, 2020, p. 72).

- 3 Guidance** is advice issued by the government setting out how the law should be complied with. Some guidance issued by government departments is advisory rather than mandatory, but statutory guidance (e.g. *Working together to safeguard children*) and codes of practice (e.g. *Special educational needs and disability code of practice: 0 to 25 years*) have greater force. Such guidance is often referred to as 'binding' (Broach & Clements, 2020, p. 72). The guidance set out in *Working together to safeguard children*, for example, 'should be complied with unless exceptional circumstances arise' (Department for Education, 2023, p. 9).

¹ For a full discussion of the categories and types of law as they relate to disabled children and their families, see Chapter 2 '[Legal fundamentals](#)' of Broach and Clements (2020, pp. 57–94).

Disabled children and their families – statutory and practice guidance

The most important duties relating to disabled children are often to be found in statutory guidance (Broach & Clements, 2020, p. 72). For example, *Working together to safeguard children* sets out what a local authority has to do to assess and meet the social care needs of a child in need (under section 17 of the *Children Act 1989*). A decision to provide services under section 17 should explain ‘which services are to be delivered, and what actions are to be undertaken, by whom and for what purpose’ (Department for Education, 2023, pp. 63–64).

Practice guidance, such as the ‘non-statutory advice’ *Short breaks for carers of disabled children* (Department for Education, 2011), has less force. This means local authorities have more freedom to depart from the guidance if they have ‘sound reasons for doing so’ (Broach & Clements, 2020, p. 73). Nevertheless, a local authority must still take non-statutory advice into account when reaching a decision, and the courts may rule that a decision is unlawful if it deviates significantly from the government’s practice guidance (pp. 73–74).

Case law

Case law, or common law as it is also known, refers to the law that is made by judges’ decisions in court. It is an important and distinctive feature of our legal system (Broach & Clements, 2020, p. 72). The role of the courts is to ‘interpret the intention of Parliament’ and to ‘give effect’ to a law’s ‘ordinary meaning’. The courts must also interpret the law ‘in a way that does not conflict with international human rights standards’ (Broach & Clements, 2020, p. 72).

It is a particular feature of the English legal system that any gaps left by legislation can be filled by the courts. (Broach & Clements, 2020, p. 59)

International human rights conventions

International law has become an important source of law for disabled children alongside domestic legislation, regulations and statutory guidance (Broach & Clements, 2020, p. 59).

For example, the European Convention on Human Rights (ECHR) was incorporated into UK domestic law through the *Human Rights Act 1998*. Before that Act came into force (in 2000), an individual had to take their case to the European Court of Human Rights in Strasbourg, whereas alleged breaches of the ECHR are now routinely dealt with by domestic courts (Broach & Clements, 2000, p. 62). Several articles of the ECHR are particularly relevant for disabled children and their families, including Article 8 the right to respect for family, home and private life (see Broach & Clements, 2020, pp. 63–67).

Two other international human rights conventions are particularly relevant for disabled children and their families:

- > UN Convention on the Rights of the Child (UNCRC)
- > UN Convention on the Rights of Persons with Disabilities (UNCRPD)

Unlike the ECHR, neither convention has been incorporated into English law, but both have been ratified by the UK. Their provisions are subject to what is known as ‘interpretative obligation’ – i.e. English law must be interpreted so that, as far as is possible, it does not conflict with the obligations of an international treaty (Broach & Clements, 2020, p. 68).

Key points

- > Disabled children's rights are shaped by three levels of domestic law – primary legislation, secondary legislation and statutory guidance. Many of the most important duties relating to disabled children are set out in statutory guidance.
- > Case law (or common law) is an important and distinctive feature of our legal system. Any 'gaps' left in legislation can be filled – and precedents set – by judges' rulings.
- > International conventions are an increasingly important source of law for disabled children. Even if an international convention (e.g. UN Convention on the Rights of Persons with Disabilities) has not been incorporated into domestic law, English law must be interpreted as far as possible not to conflict with its requirements.

References

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