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Striking a balance between the best interest of the child and the need to keep families together

Report[1]
Committee on Social Affairs, Health and Sustainable Development
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Summary

The Committee on Social Affairs, Health and Sustainable Development reaffirms that children have the right to be protected from all types of violence, abuse and neglect. But they also have the right not to be separated from their parents against their will, except when absolutely necessary in the best interests of the child.

Despite the existence of clear international and European standards in this area of children's rights, there continues to be a lack of uniform application in decisions on child removal, adoption, placement and reunification. Further action to bridge the gap between these standards and their implementation is thus needed.

The Parliamentary Assembly should recommend that Council of Europe member States focus on the process in order to achieve the best results for children and their families alike. Member States should secure child-friendly processes throughout removal, placement and reunification, give the necessary support to families in a timely and positive manner, ensure that child welfare systems are open and transparent and that all personnel involved in removal and placement decisions are suitably qualified and regularly trained. Member States should put in place special safeguards where children have been removed from the family home, and end abusive practices.

1. Reference to committee: Doc. 13971, Reference 4224 of 24 June 2016.

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A. Draft resolution[2]

1. Recalling its Resolution 2049 (2015) and Recommendation 2068 (2015) "Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States", the Parliamentary Assembly reaffirms that children have the right to be protected from all types of violence, abuse and neglect. But they also have the right not to be separated from their parents against their will, except when competent authorities subject to judicial review determine that such separation is absolutely necessary in the best interests of the child. Even when such separation is necessary, children have the right to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the child's best interests.

2. Despite the existence of clear international and European standards in this area of children's rights, there continues to be a lack of uniform application in decisions on child removal, adoption, placement and reunification across Council of Europe member States. Further action to bridge the gap between these standards and their implementation is thus needed, as well as improved data collection and research which could inform policymakers on how to implement these standards in the best possible way.

3. The Assembly reaffirms that the best interest of the child should be a primary consideration in all actions concerning children, in accordance with the United Nations Convention on the Rights of the Child. However, the implementation of this principle in practice depends on the context and the specific circumstances. It is sometimes easier to say what is not in the best interests of children: coming to serious harm at the hands of their parents, or being removed from a family without good cause.

4. It is with this caveat in mind that the Assembly reiterates the recommendations it made in Resolution 2049 (2015) and recommends that Council of Europe member States focus on the process in order to achieve the best results for children and their families alike. Member States should:

4.1. secure child-friendly processes throughout removal, placement and reunification: this includes guaranteeing full child participation by having properly trained and educated staff speak to and listen to the child, whose views should not only be heard, but also taken into account;

4.2. give the necessary support to families in a timely and positive manner with a view to avoiding the necessity for removal decisions in the first place, and to facilitating family reunification as soon as possible: this includes the need to build better collaboration with parents, with a view to avoiding possible mistakes based on misunderstandings, stereotyping and discrimination, mistakes which can be difficult to correct later on once the trust has gone;

4.3. ensure that child welfare systems are open and transparent with a view to bolstering the legitimacy of and trust in the system; this includes the necessity for decisions to be well-documented at all stages of the process and for court proceedings to be low-threshold, child-friendly and accessible, as well as for improved data collection and research;

4.4. ensure that all personnel involved in removal and placement decisions, including judges, are suitably qualified and regularly trained (including on international and European standards), have sufficient resources to take decisions in an appropriate (neither rushed nor delayed) time frame, and are not overburdened with too great a caseload;

4.5. seek to end abusive practices, such as frequent recourse to the unwarranted complete severing of family ties, the removal of children from parental care at birth, to basing placement decisions on the effluxion of time, and to adoptions without parental consent;

4.6. where children have been removed from the family home, ensure that:

4.6.1. such decisions are a proportionate response to a credible and verified assessment by competent authorities subject to judicial review that there is a real risk of actual and serious harm to the children involved;

4.6.2. removing children is a last resort and is done for the shortest possible period of time;

4.6.3. where possible, children are cared for within the wider family unit so as to minimise the disruption of family bonds for the children involved;

4.6.4. the facilitation of family reunification is always a central consideration in any proceedings, and that families receive appropriate support from the child welfare systems in this regard;

2. Draft resolution adopted unanimously by the committee on 26 April 2018.

4.6.5. visitation and contact arrangements facilitate the maintenance of the family bond and work towards reunification unless manifestly inappropriate;

4.6.6. all related court proceedings are independent, with the equality of arms guaranteed, as well as parity between the resources available to the family and to the child welfare system;

4.6.7. religious, ethnic and cultural background and sibling bonds are taken into account when placing children in alternative care;

4.7. ensure appropriate checks and balances are built into the child welfare system, including regulatory oversight and parliamentary scrutiny where necessary.

B. Explanatory memorandum by Mr Valeriu Ghiletchi, rapporteur

1. Introduction

1. The well-being of children across Council of Europe member States is a subject that is of particular interest to me as a father and politician. I have also been privileged to have been appointed, by the Committee on Social Affairs, Health and Sustainable Development as rapporteur on a number of different reports on issues related to children's rights in recent years. In the present report, I will consider one of the most far-reaching interventions that the State can make with regard to family life – the removal of children from their parents and their out-of-home placement.

2. It is important to recognise the extremely difficult situation that child protection agencies regularly face across Europe in keeping children safe from harm. On the one hand, they may be criticised for intervening in situations where children were not at serious risk of harm. On the other hand, they may be criticised for intervening too late where children have actually come to harm. There is a balance to be found between ensuring that families are kept together and that vulnerable children are protected effectively.

2. Focus of the report

"We do not help the children who suffer awful violence, but whom we don't find, by removing other children from their parents who do not need to be removed", a Norwegian psychologist

3. From the outset, it must be emphasised that the removal of children from their families constitutes a significant disruption in the lives of both children and parents, and should only be seen as an act of last resort where a child is subject to a real risk of serious physical or psychological harm. The United Nations Convention on the Rights of the Child (UNCRC) is very clear on the gravity of this intervention, stating in Article 9 that "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child".

4. Furthermore, Article 8 of the European Convention on Human Rights (ETS No. 5) makes it clear that citizens are entitled to respect for their private and family lives. Expanding on this provision, the European Court of Human Rights has said in the case of *R.M.S. v. Spain* that "[t]he Court takes into consideration the fact that it is an interference of a very serious order to split up a family. Such a step must be supported by sufficiently sound and weighty considerations in the interests of the child".

5. The Parliamentary Assembly has previously recognised the importance of the issue in its Resolution 2049 (2015) "Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States". The Parliamentary Assembly notably registered its concern about the violation of children's rights when social services take children into care too rashly and do not make enough effort to support families before and/or after removal and placement decisions. "These unwarranted decisions usually have a – sometimes unintended – discriminatory character, and can constitute serious violations of the rights of the child and his or her parents, which are made all the more tragic when the decisions are irreversible (such as in cases of adoption without parental consent)."[3] Ms Olga Borzova's report[4] devoted several pages to an explanation of the legal situation at international and national level, and to an overview of the facts and figures, which I thus do not wish to repeat here.

6. Against this background, I have been very concerned to learn that there have recently been cases where child protection services have taken children away in circumstances where the removal appears to be an overhasty reaction to allegations, rather than a measured decision on the basis of established facts.

7. Once again, we have to be conscious of the extremely difficult nature of the work of child protection services. Due to the high stakes involved, I understand that mistakes can be made when it comes to taking away children in the interest of their own safety. It is an unfortunate reality, but we have to acknowledge that child protection services will not be right 100% of the time. In my view, one of the essential questions will therefore be whether there are sufficient safeguards in place in national child protection systems to ensure that specific agencies are able to make the right decisions about the possible removal of children.

3. Assembly Resolution 2049 (2015), paragraph 6.
4. Assembly Doc. 13730.

8. In April 2016, a year after having presented Ms Borzova's report on social services in Europe to the Assembly in her absence (in my capacity as then Chairperson of the Committee), I had the opportunity to raise this matter with the then Council of Europe Commissioner for Human Rights, Mr Nils Muižnieks, during his annual activity report to the Assembly. His response was categorical, stating that: "Taking children away from their parents is a broader issue and here the utmost caution is required because we have to think: what is the best interest of the child? The best interest of the child is almost always to be with the parents. Only in extreme and exceptional cases, where the child can come to serious harm because of the parents' behaviour, should a child be taken away temporarily from the parents. We need to intervene to support families so that they can remain together and children can be with their families. Removing children from their parents should be done only as a last resort and for a very short period."[5]

9. Without anticipating any judgments of the European Court of Human Rights, I believe that we can already note that, as a basic rule, child protection services across Europe should be subject to robust checks and balances which i) minimise the risk of incorrect decisions being made and ii) ensure that, if incorrect decisions are made, they are reversed as soon as possible to minimise disruption to family life and to effectively protect children from harm. In the present report, I would like to examine whether these principles are effectively applied in different Council of Europe member States.

10. I must underline that it is not my intention to focus on a specific country in the present report; the matter is of concern with a view to the practice of all member States of the Council of Europe. However, Norway was highlighted in the motion for a resolution as a country facing particular issues. I therefore decided to undertake a fact-finding visit to the country on 7 and 8 March 2018, which was excellently organised by the Norwegian delegation and its Secretariat, to take a more general look at the national protection system without focusing on the details of specific cases. I will describe the situation in Norway in a separate chapter of this report.

11. Originally, I had also intended to examine in-depth the situation prevailing in Austria, which seems to stand out as only very rarely removing or restricting parental rights of one or both parents (and as not admitting adoption after removal decisions), but due to budgetary limitations, this proved impossible in the end.

3. The situation in Norway: a case study

"Why are so many people so angry with Norway?", a Norwegian social worker

12. The case which prompted the motion, and ultimately the report, was a decision taken by the Norwegian Child Welfare Services in 2016 where, based on allegations of corporal punishment (which is illegal in Norway), the five children (including a three-month-old baby) of a Romanian-Norwegian family were taken into care by the Norwegian Child Welfare Services in what I consider troubling circumstances: The family's two eldest daughters had already been taken into emergency custody straight from school, when the two eldest sons were picked up, whilst, on the following day, the Child Welfare Services came back to take away the baby as well. Finally, the children were split up and sent to three separate foster homes around the country.

13. In this particular case, the response of the *Barnevernet* in taking away all the children without any prior intervention or warning shocked the global Romanian community, and there were large protests held at several Norwegian embassies. Consequently, the Romanian Government decided to send a special delegation to Norway to investigate the case, and after a period of intense international pressure, the *Barnevernet* closed the case and released the children back into the care of their parents. The family has now left for Romania because of fears that the *Barnevernet* would take their children away again.

14. In addition to this particular case, which made it into the headlines of many European media, the European Court of Human Rights has begun to look into various other cases – it has now communicated several cases concerning the *Barnevernet* to the Norwegian Government.

15. Allow me to share with you the information I gathered during my recent fact-finding visit. While the aforementioned case prompted the motion for a resolution at the origin of this report, the aim of this report was not to look into this case. During my fact-finding visit, I was able to gather a lot of information on how the system in Norway is set up and functions, as well as on the statistics and the most recent developments. First of all, allow me to note that, at the end of 2016, 1.1% of children in Norway were living in alternative care.[6]

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5. Council of Europe Commissioner for Human Rights Nils Muižnieks in the presentation of his Annual Activity Report 2016 to the Spring Session of the Assembly on 18 April 2016.

16. The Norwegian child welfare system, in its current form, was created in 1992. It is a complex system with many checks and balances and procedural safeguards, which, if described in detail, would fill more pages than this report can devote to the matter. Central to understanding its functioning is that, in Norwegian legislation, the best interests of the child is held to be a fundamental consideration in actions and decisions that affect children in Norway – this provision, based on Article 3 of the UNCRC, was introduced into Norway's Constitution in 2014. Also central is the prohibition, since 2010, of all forms of violence against children. This includes "violence in connection with the upbringing of the child, frightening or annoying behaviour, or other inconsiderate conduct towards a child".[7]

17. Perhaps the easiest way to explain the Norwegian system is to follow the path of a hypothetical case of a child and its family in the child welfare system: A child welfare case starts when someone notifies the Child Welfare Services *(Barnevernet)* in the municipality of a concern regarding a child – there are 422 municipalities in Norway, and 295 municipal or inter-municipal Child Welfare Services across the country. This "note/message of concern",[8] as it is known, can come from a neighbour, a friend or a relative, but also from public authorities such as teachers, health personnel or police officers.[9] A child welfare case can also start when the family itself asks for assistance, but these are not the majority of cases.[10] The number of "notes/ messages of concern" increases every year, from just over 37 000 in 2008 to just over 58 000 in 2016. The municipal child welfare service must, at the earliest opportunity, and within one week at the latest, examine each "note/message of concern" it receives and assess whether each individual report shall be followed up by an investigation.

18. In practice, relatively few "notes/messages of concern" seem to be dismissed outright,[11] so that an investigation will usually start; the originator of the letter may be contacted to provide more information, or the child's parents may be directly contacted. The parents can be called to attend a meeting at the Child Welfare Services' offices, or the Child Welfare Services may inform the parents (in advance) that they will meet them at the child's home. The Child Welfare Services will gather all the necessary information, if necessary with expert assistance, in order to make an informed decision within three months at the latest (up to six months in special cases) on whether measures should be implemented or the case should be dropped.

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6. At the end of 2016, 12 591 children were placed outside the home – a steadily increasing number, up from 7 863 in 2003 (Information document on the Norwegian child welfare system provided to me by *Bufdir*, the Norwegian Directorate for Children, Youth and Family Affairs, p. 5). With a child population of about 1.14 million, this means 1.1% of children in Norway are living in alternative care. In Ms Borzova's 2015 report, the lower range included countries with less than 0.5% of the child population in care, the middle range with up to 0.8% in care, and the higher range with up to 1.66% in care. A 2015 report from the Council of the Baltic Sea States Secretariat on Family Support and Alternative Care indicates that, in 2013, the percentage of children in alternative care ranged from 0.8% of the total child population under age 18 to 2.3% in the region, with a medium of 1.22% (the countries included in the survey were Denmark, Estonia, Finland, Germany, Iceland, Latvia, Lithuania, Norway, Poland and Sweden). In Oslo, 4.4% of the child population comes into contact with the *Barnevernet* every year, with 0,7% of the Oslo child population being taken into care every year (either as a voluntary or a compulsory measure), of which 86% move into foster families (statistics provided to me in my meeting with the Oslo *Barnevernet).*

7. Information document on the Norwegian child welfare system provided to me by *Bufdir*, op. cit., p. 3.

8. The correct legal term would be "notifications to the child welfare services*"*, but all our interlocutors, including *Bufdir*, actually used "letter of concern."

9. Anonymous calls and letters are also accepted. In the meeting I had with families, the system of "notes/messages of concern" was criticised as it encouraged persons with a grievance to make up or exaggerate allegations. According to them, once the system had started investigating, it was not with a presumption of innocence: parents felt they had to prove their innocence, which could be difficult (if not impossible) in particular with allegations of sexual violence or "emotional neglect". I admit that the feelings of the families I met with may not be representative.

10. According to research findings from the New Child Welfare Project (NCW) at the Norwegian University of Science and Technology (NTNU), about a third of all families which come into contact with the child welfare system in Norway do so because parents ask for help (findings of Professors Graham Clifford, Willy Lichtwarck, Edgar Marthinsen and Halvor Fauske, available from Professor Lichtwarck).

11. According to *Bufdir,* 18% of letters of concern are dismissed without investigation. Paragraph 4-3 of the Norwegian Child Welfare Act stipulates the criteria for initiating an investigation.

19. This first investigation phase is reported by many families to be the most stressful; the general public's view of the *Barnevernet* is not overwhelmingly positive,[12] and many families fear that their children will be taken away from them – in particular, if they are not of Norwegian origin.[13] Many families are unsure what will happen and whether they would benefit from legal representation (for which there would be no legal aid at this point: there is free legal aid once the case is brought before the Social Welfare Board, and for later appeals).[14] Parents can thus be on the defensive: this is also because the majority of municipalities use a "checklist"-system which has been criticised as wrongly equating the presence of risk factors with the severity of the actual case.[15] It is also unclear how far the view of the child concerned is solicited and taken into account at this stage of the proceedings.[16]

20. In slightly less than half of cases investigated,[17] the investigation will lead to measures to assist the child and its family at home (at the end of 2016, 22 000 children were receiving measures from the child welfare services by the end of the year).[18] This assistance can take several forms, from financial support, general advice and guidance to support parental skills, to ensuring that the child is given a place in kindergarten, etc. Mothers with young children can also voluntarily agree to move into one of 15 supervised family institutions (*Sentre for foreldre og barn*) for short periods of time, to be assisted – and assessed.[19] These measures, so far, have usually been voluntary, i.e. the parents give their consent to them.[20] In 2016, amendments were passed to the law which make it possible to impose such measures on families without their consent (these decisions can only be taken by the County Social Welfare Boards, and the possibility is rarely used). Families can also agree voluntarily to have a child placed outside the home.

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12. Trust towards child welfare in the general adult population has increased somewhat. In 2011, only 23% of the adult population had a high degree of trust (NCW research findings, op. cit.). A 2017 representative study on the nation's attitude towards the child welfare body (https://www.bufdir.no/Global/Befolkningenes_holdninger_til_barnevernet.pdf) found the following on the impression of the Norwegian Child Welfare Body:

– 6% has a very good impression
– 37% has a quite good/rather good impression
– 28% has neither a good or bad impression/neutral impression
– 17% has a quite bad impression
– 6% has a very bad impression
– 6% doesn't know

This contrasts with the finding of the NCW in 2011 that 70% of parents who used child welfare services had a high level of trust in the service, while only 42% of users reported a good impression in 2017 (37% had a bad impression).

13. 25% of children subject to care orders in 2015 had a mother who was not born in Norway (Information document on the Norwegian child welfare system provided to me by *Bufdir*, op. cit., p. 13.)

14. As regards legal aid, when the case is appealed to the District Court, according to a recent newspaper article, the parents' attorney will initially be paid for the hours spent in appeal proceedings based on public rates. However, the judge can reduce the payment if he thinks the lawyer has spent a lot of time on the case. The child welfare body's attorney receives a salary per hour, and the judge cannot reduce this salary. There thus seems to be a question of a lack of equality of arms in practice. https://www.aftenposten.no/meninger/kronikk/i/qnbJle/Barnevernets-bruk-av-advokater-utfordrer-rettssikkerheten-for-foreldre-og-barn--Thea-Totland.

15. "Weaknesses in the child welfare system for assessing cases", Associate professors: Svein-Arild Vis, Camilla Lauritzen, Sturla Fossum (University of Tromso) and researcher Karen J. Skaale Havnen, https://forskning.no/meninger/kronikk/2018/02/svakheter-i-barnevernets-system-undersokelse-av-saker. Families I met also criticised the "woolly" categories, such as "future possible emotional harm", as did lawyers I met ("inability to comfort a child" – after a vaccination, for example – or "inability to set boundaries", or "lack of parental ability").

16. In a report of 22 June 2017 entitled "Failure and betrayal" by a Committee appointed by Royal Decree to analyse 20 cases in which children had suffered severe violence, sexual abuse/exploitation or neglect, one of the failures identified was a complete lack of communication with the children or a lack of communication in a safe or secure way. https://www.regjeringen.no/contentassets/a44ef6e251cd443396588483e97402ab/no/pdfs/nou201720170012000dddpdfs.pdf.

17. According to the Proposition to the Storting (legislative proposal) 73 L (2016-2017), in 2015, 42% of the cases investigated led to measures to assist the child and its family (see paragraph 3.4.3).

18. Information document on the Norwegian child welfare system provided to me by *Bufdir*, op. cit., p. 5.

19. According to the families I met, eight out of 10 mothers leave these institutions without their children because they are taken into care by the State; I was also told by psychologists that the threat of having their children forcibly removed has made the homes a high-pressure environment.

20. According to the State Secretary Mr Tom Erlend Skaug (Ministry of Children and Equality), 80% of *Barnevernet* measures are currently voluntary measures.

21. If the *Barnevernet* believes that the child needs to be removed from its parents after the investigation, it has to apply for a care order at the relevant “County Social Welfare Board”, of which there are 12 across the country. These boards are quasi-judicial and independent decision-making State authorities composed of a judge,[21] an expert (usually a psychologist) and a lay person. A care order may be made if:

– there are serious deficiencies in the everyday care received by the child, or serious deficiencies in terms of the personal contact and security needed by a child of his or her age and development;

– the parents fail to ensure that a child who is ill, disabled or in special need of assistance receives the treatment and training required;

– the child is mistreated or subjected to other serious abuses at home;

– it is highly probable that the child’s health or development may be seriously harmed because the parents are unable to take adequate responsibility for the child.

22. During the course of 2015 (the latest year for which numbers are available), 1 545 children were made subject to a care order issued by a County Social Welfare Board. The number of new children under the care of the Child Welfare Services increased by 52% between 2008 and 2012, followed by a reduction of 10% from 2012 to 2015.

23. A care order issued by a County Social Welfare Board can be appealed to the District Court. I was informed during my fact-finding visit that, in about 90% of cases, the County Social Welfare Boards issue the care orders applied for,[22] and also that in about 90% of cases, the District Courts uphold these decisions. Few cases can be appealed to the Court of Appeal or Supreme Court, as it is necessary to receive leave to appeal.[23] Parents can subsequently file for a revocation of a care order once per year. In 2017, decisions for 508 children were handed down following such revocation requests; 173 of the children concerned were returned to their families (34%). Parents benefit from free legal aid throughout the process, once the application for a care order has been made.

24. The parents I spoke to feel that they have little chance of regaining their children once a care order is made, and this impression is indeed borne out by the above statistics – though children are eventually returned to parents in 50%-60% of emergency care orders.[24] My interlocutors in Norway explained that this was because only the most serious cases resulted in a care order in the first place. I am certain that we can all agree that, indeed, in cases of serious abuse, violence and neglect (including sexual abuse and/or exploitation), it is in the child’s best interest to be taken into alternative care promptly, and not to be returned to the parents unless circumstances have changed considerably.

25. However, I was made aware of several cases which, like the case which inspired the motion for a resolution on which this report is based, and indeed the case at the origin of the latest judgment by the European Court of Human Rights, *Strand Lobben and Others v. Norway* of 30 November 2017,[25] are much less clear-cut. As one of the psychologists I spoke to (who sits on one of the County Social Welfare Boards) remarked, “we do not help the children who suffer awful violence, but whom we don’t find, by removing other children from their parents who do not need to be removed”.

26. Several of my interlocutors[26] with direct contact with children who had been taken into care reported that these children usually believed with hindsight that the care order had been the right decision, and had, in some cases, even saved their lives;[27] however, many had found the process of being taken into care unpredictable and frightening. They also felt that they had had little possibility to participate, and that their preferences – such as being placed with their extended family – had not been listened to.[28]

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21. Legally speaking, the chairperson of the board is not a judge (with the special privileges according to the constitution), but a civil servant (with the same qualifications as a judge). *Child welfare removals by the State, a cross-country analysis of decision-making systems*, edited by Kenneth Burns, Tarja Pösö and Marit Skivenes, Oxford University Press 2017, p. 48.
22. Following adversarial hearings which usually last two to three days. Information given to me during my meeting with the Central Unit of the County Social Welfare Boards in Oslo.
23. There was a change in the law in 2005, subsequently making it difficult for cases to reach the higher courts, in particular the Supreme Court. This was criticised by some of our interlocutors in Norway, but not by all, as there is also an advantage for children (and their parents) of reaching legal certainty at some point.
24. Statistics provided to me in my meeting with *Bufdir.*
25. Application No. 37283/13. This case has since been accepted by the Grand Chamber.
26. For example, the Ombudsman for Children, the NGO Save the Children, and psychologists I spoke to.
27. However, I was also made aware of one case in which a teenage child – now an adult – who had suffered severe physical violence (and who had been “through” several foster families) believed with hindsight that he would have nevertheless been better off staying with his parents.

27. If there is a risk that a child will suffer material harm by remaining at home, the head of the local *Barnevernet* or of the prosecuting authority can immediately issue an emergency care order without the consent of the parents. This order must be sent to the County Social Welfare Board for approval, to be approved by the Chair of the Board (the judge) as soon as possible, but normally within 48 hours of receipt. If a decision is made by the County Social Welfare Board to approve the emergency order, the parents can appeal the decision. The County Social Welfare Board must, after a hearing, consider and decide the appeal within a week. The parents may also request a judicial review of the Board's decision.

28. If an emergency order is made and the Child Welfare Service finds it necessary to file for a care order, an application must be sent to the County Social Welfare Board as soon as possible, and within six weeks at the latest. 1 342 children were the subject of an emergency care order in 2017. The number of children subject to an emergency care order increased by 70% between 2008 and 2013, followed by a reduction of 17% from 2013 to 2017. There are large differences between counties in the number of children subject to care measures and in the number of emergency placements.[29]

29. The way emergency orders are implemented are often described as stressful and "frightening" by both children and parents. Reports give account of children being collected at unsuitable times or taken out of class at school, and, in some cases, force and coercion being used with or without the involvement of the police.[30] The high number of children subject to emergency care orders (1 555 in 2015, against 1 545 "ordinary" care orders, many of which were a follow-up to an emergency care order) begs the question as to why the Child Welfare Services do not intervene earlier, in a way which would be less traumatic for children and their families?

30. In this context, the fact that only 80% of all professionals working in the Child Welfare Services have formal qualifications (a Bachelor's degree in child welfare as a minimum) is of some concern – especially because the proportion of workers lacking formal qualifications seems to be even higher outside Oslo. According to the psychologists I met, the Norwegian Child Welfare Services have been applying complex theories linked to child psychology and early development research (such as the attachment theory) for the past years – sometimes out of context. I believe it is quite possible that not all social workers have the required training to understand such theories, and may thus apply them incorrectly, with tragic consequences for children who are wrongly assessed and do not receive the help they need, and thus risk being removed too late from their families, or being unnecessarily removed.

31. When a child is the subject of a care order (emergency or otherwise), he/she will usually be entrusted to a foster family if he/she is under 12. Children in the 12-18 age-bracket are usually more likely to be placed in an institution. Nine out of ten children in care are in foster homes.[31] While foster care is usually less stressful for a child than institutional care, on average, children move foster care homes 3.5 times during their placement.[32] A further problem is posed by the high number of siblings (6 out of 10) separated when being placed in foster care. Notwithstanding practical problems of finding foster families willing and able to take in large sibling groups, it bears noting that the European Court of Human Rights has been particularly critical when siblings were separated.[33]

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28. As a rule, children above 15 years of age are parties to the case. Furthermore, all children have the right to be heard in their own case. The County Social Welfare Board can appoint a spokesperson for the child, if the child so wishes. The spokesperson can then bring forward the child's views to the board meeting.

29. The Norwegian Forum for the Convention on the Rights of the Child, Supplementary Report to Norway's Fifth and Sixth Periodic Reports to the UN Committee on the Rights of the Child, 2017, p. 19. According to one of the psychologists I spoke to, some municipalities have tried – and succeeded in – reducing the number of emergency placements by up to 90%.

30. Ibid., pp. 19-20.

31. Foster homes are far cheaper for the government than institutions. The cost of placing a child in an institution in Oslo ranges from 8 000 to 23 000 NOK per day (statistics provided to me in my meeting with the Oslo *Barnevernet).*

32. I was made aware of one case where the child had been moved 17 times. It appears that foster placement care can be terminated if the child welfare service believes the needs of the child cannot be met in a timely manner. It is also often quite difficult to find foster families which share the ethnic/cultural/religious background of the child. According to statistics cited by the psychologists I met, only half of fostered children stay in contact with their foster families after becoming adults. In Oslo, there is also an "age" mismatch: most foster families would like to foster children in the 0-4 years age bracket, but most children in need of foster care are aged 10-11 or older. Thus, on average, 30-40 children in Oslo are in need of a new foster family at any one time (statistics provided to me in my meeting with the Oslo *Barnevernet).*

33. As Ms Olga Borzova noted in her report on the subject: Doc. 13730, paragraph 81.

32. Like in other countries, the outcomes for children in alternative care in Norway in general are not good – there are higher rates of drug/alcohol abuse, suicide, violent death, etc.[34] However, recent amendments to the Norwegian law encourage placement within the child's "network" of wider family and friends,[35] which should lead to more stable foster care and better outcomes.

33. What struck me most in Norway regarding children in alternative care were the extremely rare and short (as well as often only supervised) visitation rights of the parents, often as short as two hours four to six times a year.[36] This is particularly worrying as I learned that there are cases in which babies are removed from their mother's care shortly after birth.[37] With such short and rare visitation rights, the cards are stacked against the natural mother to ever be reunited with her child (as in the case of *Strand Lobben and Others v. Norway*), as the pure passage of time may change the best interest determination for the child.[38] Adoption after placement is relatively rare in Norway, except for children placed very young.[39]

34. When a child is taken into care, Family Counselling Services (a service independent of the *Barnevernet*) has been assigned a special responsibility to offer services to parents who have lost custody of their child, although the *Barnevernet* remains responsible for following up on both the child and its parents.[40] Family Counselling Services offers help with processing emotions, as "losing custody of one's child is among the most severe crises a parent can experience",[41] advice and counselling, and support groups and programmes.

35. Norway is halfway through a reform of its child-welfare system, including probably, in the near future, a reform of the County Social Welfare Board system (which may be given the status of a court), and the development of a mediation system.[42]

4. Developments and concerns in Council of Europe member States

36. In her 2015 report, Ms Borzova had identified several concerns in Council of Europe member States. First, a lack of support to families with a view to allowing a child to stay in the family or be reunited after temporary removal. In Ms Borzova's words: "There are a number of circumstances which can make it difficult for parents to fulfil a child's need to be nurtured, recognised, empowered and to have a structured upbringing, when, in principle, they would like to be good parents. These can be personal, such as alcohol or drug abuse or psychological problems …, but also socio-economic, such as extreme poverty (which can result from factors outside parents' control such as unemployment and discrimination)."[43]

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34. "Health status of children in care, Disability and mortality 1990-2002", Lars B. Kristofersen, NIBR Report 2005: 12.
35. Already now, 25% of children are placed within this network (statistics provided to me in my meeting with *Bufdir).*
36. The main reason which was given to me by all my interlocutors on the reason for such rare and short visitation rights was that this was in the best interest of the child: but this was not the only reason put forward. I was told foster parents tended to complain that children were unsettled by meeting their biological parents, and thus wanted to spare them this "traumatisation". While we certainly all agree that there are cases where this is indeed the case, it should be borne in mind that there may be a conflict of interest of foster parents in some cases, and that, in other cases, children may simply be unsettled because they miss their parents and would like to be reunited with them.
37. According to statistics provided to me by the Norwegian parliamentary delegation, care orders in the County Social Welfare Boards were passed for 16 newborn children in 2008, whilst in 2017 care orders in the County Social Welfare Boards were passed for 25 newborn children.
38. Indeed, as Ms Olga Borzova noted in her report, "the European Court of Human Rights abhors basing placement decisions on the effluxion of time". Doc. 13730, paragraph 70.
39. Babies can be adopted by the foster family after two years. In 2017, there were 58 "forced adoption" decisions taken, up from 13 in 2009, but down from 65 in 2014 (information document on the Norwegian child welfare system provided to me by *Bufdir*, op. cit., p. 14).
40. In this respect, the *Barnevernet* has the right to collect information from Family Counselling Services. The latter also has the obligation to inform the *Barnevernet* if they have serious concerns about the welfare of a child (information from a *Bufetat* leaflet on "family counselling for parents who have lost custody of their child"). Despite these service offers, four parents who had lost custody of their child committed suicide in summer 2017 alone (information from my meeting with psychologists).
41. Information from the *Bufetat* leaflet on family counselling, op. cit.
42. There is currently a pilot project involving five County Social Welfare Board boards. 600 cases have been referred to mediation (undertaken by a judge and a psychologist). The results have been quite encouraging: a third of cases get voluntary assistance after mediation, a third of cases result in parents agreeing to foster home care without a hearing, and a third go to a normal hearing before the Board after mediation, but with better communication established between the parties.
43. Doc. 13730, paragraph 40.

37. Second, Ms Borzova had pointed to a lack of resources and/or qualified personnel in many member States: she believed it "crucial to ensure that the personnel involved in removal and placement decisions is suitably qualified, has sufficient resources to take decisions in an appropriate (neither rushed nor delayed) time frame, and is not overburdened with too great a caseload".[44]

38. Third, Ms Borzova identified and criticised a number of practices "which can only be labelled as abusive, even if they are well-intended", namely the unwarranted complete severing of family ties, often in combination with removing children from parental care at birth; basing placement decisions on the effluxion of time; and recourse to adoptions without parental consent. [45]

39. Fourth and finally, Ms Borzova mentioned other problematic issues, ranging from insufficient data collection via discrimination to over-decentralisation in the organisation of social services, and the separation of siblings.[46]

40. Three years after the publication of Ms Borzova's report, I am afraid there are few positive developments to report in most member States. Insufficient data collection resulting in incomplete and difficult-to-compare datasets remains a problem which does not facilitate the task of researchers and academics trying to compare different models with a view to making recommendations to improve practices. In a recent cross-country analysis of decision-making systems in child welfare removals by the State, the authors remarked on the dearth of data and of research on the removal/placement of children: "It is striking that for such an important area of State power, there is such an enormous knowledge gap. This should be of concern to policymakers, legislators, and those with an interest in human rights and the operation of the rule of law."[47]

41. As the authors rightly point out, this knowledge gap also raises questions of how we can know that decisions regarding removals are high-quality and legitimate: "Although child welfare systems are all built on the principles of family preservation and the principle of the 'best interests/well-being of the child', there are few systematic empirical studies on how these principles are balanced … Neither child welfare laws, development theory, or child welfare research provide clear, definite answers concerning what is in the best interests of children generally, not to mention of individual children in a given set of circumstances. Laws, theories and research also do not give exact answers in identifying *when* to intervene in a family, *which* services would help, and *when* the risk to a child is so great that the child should be removed from the care of her or his parent(s), and *when* this removal should be permanent."[48] It thus does not inspire confidence that, for example, in England, the risk-prediction model that councils have been using for assessments has been shown to be very inaccurate – 97% of 10 000 parents whom the system would have flagged as potential abusers did not go on to harm their children, while 17% of parents who later did would not have been.[49]

42. It appears that, in most countries, the number of interventions and removal decisions has, if anything, gone up rather than down in the past years. It is a bit puzzling that the preventive, "service-oriented" approach of child welfare systems (such as practised in the Nordic countries) has not led to fewer removal decisions; though "risk-oriented" systems such as the English, Irish and Swiss ones have not fared any better.[50] Several possible explanations for these trends have been put forward:

– the high degree of "child-centrism" in "service-oriented" systems (which often includes a zero-tolerance policy for violence of any kind);

– a growing need for intervention due to a higher incidence of unemployment, marginalisation and/or extreme poverty, and a cut in services in "risk-oriented" systems making it impossible for at-risk parents and families to cope;

– and growing risk-aversion among social workers in both systems due to a few highly-publicised tragedies of children dying at the hands of their parent(s).

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44. Ibid., paragraph 62.
45. Ibid., paragraph 63.
46. Ms Borzova actually devoted separate sub-chapters to the issues of discrimination and insufficient data collection; however, the emphasis is not on this in the adopted texts.
47. Child welfare removals by the State, a cross-country analysis of decision-making systems, op. cit. p. 237.
48. Ibid., p. 237.
49. Study referred to in "The troubling surge in English children being taken from their parents – from cradle to court", *The Economist*, 22 March 2018.
50. Child welfare removals by the State, op. cit., p. 228.

Discrimination and disadvantage may also play a part in the story: in most countries, it is not the high class/ high income parents who end up most entangled with the child welfare system, but rather the poor, the uneducated, migrants and refugees, national or religious minorities, parents with a history of mental illness or substance abuse, or a criminal past, or single mothers. As one Norwegian lawyer told me: "If you don't fit the normal box, you have a problem."[51]

43. This problem is compounded by the fact that many child welfare systems are working under enormous strain: even in Norway, a rich country which has always invested heavily in children and their welfare, 20% of social workers do not have the qualifications they would need, and the lack of trust in certain quarters in the *Barnevernet* adds to the strain of a difficult job, sapping motivation. In England, social workers (and courts) labour under even stricter time constraints than in Norway: care proceedings (even those which will lead to a "forced adoption" order) have to be concluded within 26 weeks. There is also the question of attitudes – do child welfare officers see themselves as helpers or inspectors? The Assembly's 2015 recommendation that States "ensure that the personnel involved in removal and placement decisions are guided by appropriate criteria and standards (if possible in a multidisciplinary way), are suitably qualified and regularly trained, have sufficient resources to take decisions in an appropriate time frame, and are not overburdened with too great a caseload"[52] seems far from being fulfilled.

44. One of the central recommendations of the Assembly in 2015 was to end abusive practices (see paragraph 38 of this report), including removing children from parental care at birth, completely severing family ties and having recourse to adoptions without parental consent except in the most exceptional circumstances. Unfortunately, developments have gone quite the opposite way: in systems such as the English one where child protection policy places front and centre the child's need for permanence, defined as a right to lifelong secure relationships of care, recent years have not only seen an unprecedented rise in care proceedings, but also in "forced adoptions", raising the question whether the official threshold bar – "when nothing else will do" – is really being respected.[53]

45. Indeed, there is cause for concern when nearly a quarter of mothers in care cases have previously lost a child. England is currently running two innovative pilot schemes aiming to change that statistic: One is "Pause", which runs in 18 of the 152 English local authorities and aims to prevent mothers who have already lost one child to social services having subsequent children taken away, by combining the use of long-term contraceptives with counselling and support to meet their housing and educational needs. A second initiative is family drug-and-alcohol courts, which 22 local authorities offer to addicted parents as an alternative to care cases and adversarial hearings.[54]

46. There is considerable controversy about the use of "s.20 voluntary accommodation" powers in England to remove a new-born infant from a mother's care. It is not uncommon for the local authorities to remove infants on this basis, given that care proceedings cannot be brought prior to a child's birth. A number of high-profile appeals court cases have raised significant disquiet about action to secure a mother's agreement to the "voluntary" removal of her infant, within hours of actual delivery.[55]

47. This is not the only area where it is unclear how "voluntary" voluntary agreements really are, in all Council of Europe member States. If you know that the State can also use coercive powers against you, and you know that "fighting" the State may be seen as a lack of co-operation or a lack of understanding on your part of your child's rights and needs, you may be coerced into "voluntarily" agreeing to measures (including removals) in the hope that the State's intervention may remain minimal.

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51. Or, as was noted with regard to the system in Germany in "Child welfare removals by the State" (pp. 109-110): "The public acceptance of the system may have to do with the fact that state interventions in child protection tend primarily to involve citizens from disadvantaged groups with weak lobbies, and thus fit with a perspective that emphasizes the need for getting tough with members of society who are not performing according to general expectations. Only a few cases concerning excessive intervention through child removals have resulted in public scandal."
52. Assembly Resolution 2049 (2015), paragraph 8.8.
53. Child welfare removals by the State, op. cit., pp. 174-196.
54. "The troubling surge in English children being taken from their parents – from cradle to court", *The Economist*, op. cit.
55. Child welfare removals by the State, op. cit., p. 183. Indeed, the European Court of Human Rights has qualified such a removal as "an extremely harsh measure" and "drastic", and has thus posited that a new-born can be removed from his or her mother only for "extraordinarily compelling reasons" (European Court of Human Rights, *K. and T. v. Finland*, judgment of 12 July 2001 (Grand Chamber), paragraph 168).

5. Conclusions and recommendations

48. As the researcher Karen Broadhurst wrote last year: "The child protection legislative and policy landscape is shaped by a battle of *ideas* – ideas that are theoretical, moral and political."[56] In this battle of ideas, the Parliamentary Assembly has come down squarely on the side of the rights of the child: "Children have the right to be protected from all types of violence, abuse and neglect. But they also have the right not to be separated from their parents against their will, except when competent authorities subject to judicial review determine that such separation is necessary in the best interests of the child. Even when such separation is necessary, children have the right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests."[57]

49. However, what is in the best interest of the child? Who determines this, and on what basis? As we have seen (see paragraph 41), different systems, different countries, and different people (social workers, lawyers, legislators, etc.) will balance the children's and parents' rights differently at different times, and will also interpret what is in the best interest of the child differently. There is no one correct answer in my personal opinion: the answer will be influenced by history,[58] culture, religion,[59] and other factors unique to every system. It is easier to say what is not in the best interest of the child: to suffer serious harm at the hands of their parents or to be removed from a family without good cause. We have to recognise that no system is going to be correct 100% of the time.

50. So the question remains: Where to draw the red line? 50 countries worldwide, many of them Council of Europe member States, have a zero-tolerance policy on violence against children. I can agree that "even weak violence can be very harmful to children" (as one of the judges presiding a Norwegian County Social Welfare Board said to me). I am personally convinced, however, that measures must remain proportionate. Thus, for example, "annoying behaviour, or other inconsiderate conduct towards a child" should not, in and of itself, lead to a child's removal from its family, especially not permanently. Measures should instead be taken in such cases, in my view, to educate parents in non-violent, positive parenting.

51. In this context, I would like to underline that the UNCRC gives the right to children as well as parents to stay together, and all relevant United Nations and Council of Europe standards and bodies agree that the removal of a child from his/her family should be a last resort, and that the goal should be to reunite the child with his/her family as soon as possible. This also encompasses the State's obligation to create the circumstances which will make such a reunification possible, for example through a child keeping a relationship with their biological parents through appropriately long and frequent visitation and contact rights. Struggling families need help, not punishment. As one psychologist I met put it: "Will forcing parents really make them better parents, or wouldn't it be better to win their trust and convince them to change their behaviour?"

52. Indeed, the European Court of Human Rights has also underlined that "it is in the child's best interests that his ties with his family be maintained except where the family has proved particularly unfit … It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing".[60] In this respect, I would also underline that – according to the psychologists I spoke to – longitudinal studies have shown that long-term foster care and "forced adoptions" are not a privilege, but rather a risk factor for children's life chances.

53. Coming back to the "battle of ideas" – there is a fair share of ideology, not just competing ideas in the area of child welfare. As one psychologist told me, if families are no longer deemed that important, the government may harbour the illusion that it can provide a "better" family for the child. What is the role of society in this battle of ideas? Should families be required to accept help to comply with what society believes

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56. Child welfare removals by the State, op. cit., p. 175.
57. Assembly Resolution 2049 (2015), paragraph 1.
58. Thus, for example, in Germany, "the decision-making process involved in the removal of children by child protective services is significantly shaped by the constitutional framework, which protects parental rights against undue state influence. This strong rule-of-law perspective can partly be understood in the historical context of Nazi-Germany, which was a period of systematic and strategic interference of the state into family life" (Child welfare removals by the State, op. cit., p. 109). Similarly, Ireland's child-welfare system has also been significantly shaped by its tragic history of the "Industrial School System" (ibid., p. 146).
59. The 2012 Amendment to the Irish Constitution has removed the description of the rights of the marital family as "inalienable", opening the door to the possibility for children born to married parents to be placed for adoption with and without the consent of their parents (ibid., p. 165).
60. *Y.C. v. the United Kingdom*, Application 4547/10, judgment of 13 March 2012, paragraph 134.

the child needs? What is “good enough” care in the eyes of society? – Are we becoming “overprotective” of children, and thus demanding “perfect” parents? Are parents the “last enemy” in a democratic, secular society where the social construct is that you can “build” another family?

54. I think the only way we can ensure that the rights of the child win this battle of ideas is to focus on the process. We need to secure that the process is child-friendly throughout, and puts into practice the relevant United Nations and Council of Europe guidelines and standards. We need to pay more than lip service to child participation. We need to have properly trained and educated staff (such as child psychologists) speak to and listen to the child, and we need to take the child’s views into account. We also need to build better collaboration with parents (not at the expense of the child, of course), because good communication can help avoid possible mistakes based on misunderstandings, stereotyping, discrimination, etc., all of which can be difficult to correct later on once the trust has gone. We need to make sure child-removal decisions are well-documented and that court proceedings are child-friendly and accessible (personally, I am not convinced that adversarial procedures are really always the best option, in particular at the start of a case).

55. We also need to look at the question of the dynamics in the system: Are social services allowed to “lose” a case? How far are social services allowed to go to “win”? Systems usually do not like to be criticised – they will go on the defensive, and/or into denial; the more closed the system, the more rule-oriented it is, the less it will admit failure and show empathy. We should stop building systems which “inspect whether families are good enough” behind closed doors, and instead offer help and support to families, and build open, transparent systems in which both children and parents can have confidence. This also means truly putting an end to the abusive practices described by Ms Borzova already in 2015: such as frequent recourse to the unwarranted complete severing of family ties, to the removal of children from parental care at birth, to basing placement decisions on the effluxion of time, and to adoptions without parental consent. There is a need for proper checks and balances which work in practice, not only on paper. There is also a need for true independence in these systems to ensure that there is adequate impartial oversight of these life-changing decisions, and limiting mistakes and miscarriages of justice as far as possible. I personally believe parliamentary inquiry committees can also be helpful when things have really gone badly wrong.

56. I hope to be able to count on your support for my proposals based on these conclusions which I have included in the draft resolution, with a view to finding the right balance between the best interest of the child and the need to keep the families together, in the interest of both children and their parents.