



**CHILDREN AND SOCIAL WORK BILL**  
**Second Reading, House of Commons – 5 December 2016**  
**(Updated briefing)**

**Exemption Clauses**

Article 39 is one of 43 organisations that pressed for the removal of the exemption clauses (“power to test different ways of working”) from the Bill, during its passage through the House of Lords. We did this because we want children’s social care duties to remain for all children. Former chief inspector of prisons, Lord Ramsbotham, led the division on Clause 29 (which was the main provision) on 8 November and Peers voted to remove it by 245 to 213. He said the clauses “amount to nothing less than the subversion of Parliament’s constitutional position”.

**We fear Ministers may attempt to reinstate the clauses in the Commons. Should this happen, we urge Members of Parliament to protect universal children’s social care statutory duties.**

Organisations which oppose exemptions from statutory duties in children’s social care:

- Article 39
- ASD Helping Hands
- Association of Lawyers for Children
- Association of Professors of Social Work
- Association of Youth Offending Team Managers
- Bringing Us Together
- British Association of Social Workers
- British Institute of Human Rights
- The Care Leavers’ Association
- Children’s Rights Alliance for England
- Child Rights International Network
- CoramBAAF
- Coram Children’s Legal Centre
- Depaul UK
- Dyspraxia Kids
- The Fostering Network
- Full of Life
- Howard League for Penal Reform
- INQUEST
- Institute of Recovery from Childhood Trauma
- Legal Action Group
- Legal Action for Women
- Liberty
- Low Farm Therapy Centre
- Nagalro

- Napo
- National Association of Independent Reviewing Officers
- National Association for People Abused in Childhood
- National Association for Youth Justice
- The National Autistic Society
- The National Deaf Children's Society
- NYAS
- Parents of Traumatized Adopted Teens Organisation
- Peer Power
- Prison Reform Trust
- Refugee Council
- Single Mothers Self Defence
- Standing Committee for Youth Justice
- St. Michael's Fellowship
- Surviving Safeguarding
- UNISON
- Women's Aid
- Youth Access.

Around 150 experts, including many of the country's leading social work academics, England's first two Children's Commissioners and parents and carers of disabled children also pressed for the removal of the clauses.

A dedicated campaign was established, called Together for Children<sup>1</sup>, and 106,500+ members of the public have signed a 38 Degrees petition asking for individual councils not to be excused from their statutory duties.<sup>2</sup>

Last month, UNISON published the results of its survey of 2,858 social workers. They were asked "Should councils be able to exempt themselves from children's social care legislation in order to try and achieve better outcomes for service users?" More than two-thirds (69%) of social workers said no, councils should not be able to exempt themselves; just 10% said yes; and 22% didn't know. **69% of social workers said they believe exemptions will lead to more children being placed at risk (only 8% said exemptions would not lead to more risk).**<sup>3</sup>

**BASW's survey of over 1,000 social workers found 76% oppose exemptions from statutory duties and 55% of Principal Social Workers for Children and Families do not support them.**<sup>4</sup> One of the functions of the Chief Social Worker for Children and Families, Isabelle Trowler, is to "provide leadership to the network of principal social workers".<sup>5</sup> That she has been unable to persuade more than half of the network that exemptions from statutory duties will be in the interests of children shows the depth of concern among those who work with children.

<sup>1</sup> The campaign site can be viewed here: <https://togetherforchildren.wordpress.com>

<sup>2</sup> <https://you.38degrees.org.uk/petitions/protect-the-rights-of-vulnerable-children-and-care-leavers>

<sup>3</sup> UNISON (November 2016) UNISON (November 2016) What about the children? A UNISON report on social work reform in England, pp 3-4.

<sup>4</sup> This survey was undertaken by the Children and Families Principal Social Work Network and the results published 2 December 2016:

<http://www.communitycare.co.uk/2016/12/02/childrens-principal-social-workers-feel-government-innovation-proposals/>

<sup>5</sup> <https://www.gov.uk/government/people/isabelle-trowler>

## What the clauses allowed

Clause 29 (as it was) would have allowed local authorities to request exemptions from their statutory duties in children's social care. The then Clause 32 allowed the Secretary of State to impose exemptions on a local authority whose children's services are subject to intervention. Six years was the maximum duration of exemptions. The extraordinarily wide scope of the statutory obligations that could be exempted was set out in Clause 33 – every Act of Parliament and subordinate legislation concerned with children's social care from 1933 onwards. The proposed mechanism for making exemption orders was via statutory instrument, which would have handed over enormous power to the Secretary of State. The Department for Education (DfE) acknowledged that this part of the Bill directly concerned children's fundamental rights.<sup>6</sup>

The DfE's 'Putting Children First' document, published in July, made it clear that exemptions would be used to test whether statutory obligations could be removed across the whole country:

*"[Exemptions to statutory obligations] would create a controlled environment in which we could enable local authorities to test deregulatory approaches that are not currently possible, before taking a decision to make **substantial changes to existing legislation that would apply across the board** [emphasis added]."*<sup>7</sup>

## Peers concerns – Report Stage

**Parliamentary sovereignty** – Lord Ramsbotham said Clause 29 "amounts to nothing less than the usurpation of the proper parliamentary process" and Lord Warner referred to the "draconian powers that the Secretary of State has sought". Baroness Lister noted, "We all know that we have no power when it comes to regulations...It is not fair to say that Parliament will be at the heart of this process".

**Rule of law and postcode lottery** – Lord Ramsbotham asked, "how the courts are expected to respond when a young person or child in a particular local authority area is clearly disadvantaged by the arbitrary disapplication or modification of law as it is applied in all other parts of the country" and Baroness Pinnock argued, "there is a need to retain the hard-won safeguards for very vulnerable children that are currently enshrined in primary legislation".

**Dismantling of the state** – Lord Low explained, "It is perfectly possible to test different ways of working ... within the existing legislative framework. If it is sought to test out different ways of fulfilling a duty, it makes no sense to get rid of the duty. The only circumstances in which it would make sense would be if it were intended to give the duty to someone else—in other words, privatisation, or dismantling of the state ...That is what this is all about".

**Privatisation** – Lord Watson argued, "We believe that the Government's ultimate intention is to open up the field of social work services completely, either to the private sector or to the third sector, with local authorities having their role reduced to a bare minimum. Initially, the most attractive services would be outsourced, but in time the only services not outsourced will be the less attractive and the more problematic ones. At that point, the only means of taking them out of local authority control will be by allowing them to be run for profit and, at that stage if not before,

---

<sup>6</sup> Department for Education (May 2016) Children and Social Work Bill. Impact assessments, para' 30.

<sup>7</sup> Department for Education (July 2016) Putting children first, para' 72. The Department for Education's memorandum to the Delegated Powers and Regulatory Reform Committee, in May 2016, was more circumspect, stating that "the trialling and evaluation of deregulatory measures ... could then lead to future changes in legislation".

this section of the Bill would be amended...”

**Lack of evidence** – Lord Warner said, “We simply do not have the evidence base to show that there are a lot of hungry people out there wanting to innovate who are frustrated by primary legislation. In any case, if the Government thought that the changes they have cited were necessary and needed primary legislation, they could, and should, have used this Bill to make them, and subjected their ideas to parliamentary scrutiny. There was nothing to stop them including those proposals in the Bill and explaining why they needed to introduce changes and why children’s services would be improved. However, the Government have chosen not to do so. Instead, they have chosen an extremely large sledgehammer to crack quite small nuts, which has only caused many people to wonder what the Government are really up to”.

**Opposition** – Lord Warner summed up, “the Government have singularly failed to convince all the major children’s charities, Liberty and the majority of social workers that what they are proposing in Clauses 29 to 33, even with the proposed safeguards, will benefit outcomes for vulnerable children. The charities, along with the professional interests, simply do not consider that the Government have made the case for Parliament to open the door to remove long-standing protective rights granted by Parliament to safeguard highly vulnerable children”.

**Lack of consultation** – the Earl of Listowel explained, “I have not found one social worker or child psychotherapist or one provider of children’s services in the several organisations that I am associated with who supports this. It would be helpful if there could be a proper consultation. To achieve the Government’s vision of social care reform, surely they must bring at least a critical mass of social workers and social care professionals with them. I implore the Minister to take this clause back to the sector, to consult and collaborate with it, and to produce something that we can all get behind”.

The DfE has not issued any response to Peers’ concerns since the removal of the exemption clauses last month. Should the Government try to reinstate the clauses, we have two overarching concerns:

### **1) Unequal legal protection for vulnerable children and young people**

Children and young people who depend on children’s social care services are extremely vulnerable. Acts of Parliament have been passed to protect all of them. Successive governments have issued regulations to protect all of them. We fear the arbitrary removal of legal protection on the basis of where a child lives, rather than their needs and circumstances. This is likely to breach children’s rights<sup>8</sup> and expose local authorities to extensive litigation, though we do not believe it should be for vulnerable children and care leavers to initiate legal action to try and reinstate protection that continues to be available in neighbouring authorities (and the reduction in advice services and legal aid would make this difficult anyhow).

There is debate over whether exemptions should be allowed to apply only to regulations, with Acts of Parliament taken completely out of scope. This would provide welcome reassurance that legislation scrutinised, improved and passed by Parliamentarians for all children and young people in need of care, protection and support will be safe. However, it would not deal with the fundamental problem of legal protection being removed on the basis of geography.

---

<sup>8</sup> Both the European Convention on Human Rights and the United Nations Convention on the Rights of the Child include protection from discrimination in the enjoyment of rights.

Members of Parliament will be aware that key legal protections exist in the form of regulations, including: the ban on corporal punishment in foster care and children's homes; the ban on various forms of cruel treatment in children's homes, introduced in the aftermath of 'Pindown'<sup>9</sup> and other children's homes abuse scandals; protections for disabled children placed away from home; care planning requirements for looked after children; standards and requirements relating to the staffing and running of children's homes; adoption and fostering requirements; the use of secure accommodation; leaving care entitlements; and complaints procedures.

The Government's protest that, without exemptions, it can only change regulations for all children and young people or none is deeply problematic. To accept this argument, we would have to believe that successive Ministers' lack of power to choose which local authorities follow which children's social care regulations has hampered the care and protection of children. We would also have to imagine that the unavailability of legal opt outs in the rest of the UK, and across Europe, impedes innovation in those countries.

## **2) Lack of consultation**

This would be the first time in the history of children's welfare that legislation made for all vulnerable children and young people can be disapplied in a particular area. This is a very radical proposal that warrants Green and White Paper consultation. We have not been able to find any other country with a comparable legal system that allows legal opt outs in children's social care. David Lammy MP has asked the Minister what research the Government has undertaken itself, which is obviously critical information for Parliamentarians.<sup>10</sup>

The Government has stated children's social care exemptions have been "modelled in large part" on education law.<sup>11</sup> However, it has not explained how it sees the organisation of schools as being comparable to local authorities' legal obligations to protect, care for and support individual children and young people.

We had been pressing for publication of the LaingBuisson report into children's services, and were awaiting investigation of our freedom of information complaint by the Information Commissioner when the DfE published the research on 1 December. This confirms our fears that exemption clauses are likely to be part of a longer-term strategy to move all of children's social care services from councils. Our work around the care and protection of vulnerable children in secure training centres, run exclusively by the private sector until 2016, has demonstrated the considerable safeguarding risks in institutional settings when contractors are large, powerful companies and not subject to the same degree of public scrutiny and accountability as statutory agencies.

The LaingBuisson research is focused exclusively on developing children's social care markets outside of local authorities. The work was commissioned on the recommendation of Professor Julian Le Grand, Alan Wood and Isabelle Trowler (the Chief Social Worker for Children and

---

<sup>9</sup> Pindown was the term given to the abusive regime in four Staffordshire children's homes in the 1980s. The inquiry was undertaken by Allan Levy QC and Barbara Kahan: <https://www.staffordshire.gov.uk/yourcouncil/dataprotectionandfreedomofinformation/publicationsscheme/The-Pindown-Experience-and-the-Protection-of-Children.pdf>

<sup>10</sup> The written question is dated 22 November and can be found here: <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-11-22/54288/>

<sup>11</sup> Department for Education (19 May 2016) Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, page 9: "The power is modelled in large part on existing powers under Part 1 of the Education Act 2002".

Families).<sup>12</sup> These three individuals served on the DfE Advisory Panel, which met four times during the four months' duration of the research. The Panel's "remit was to provide insight, guidance and advice around the findings and options for consideration as they developed".<sup>13</sup>

LaingBuisson admits in its report that it never questioned the efficacy of outsourcing children's social care services:

*"We did not discuss the merits of outsourcing and competition as a means of driving desirable change, since it is hard to envisage how additional capacity and diversity could be created without more services being exposed to market forces."*<sup>14</sup>

The report charts the transition of adult social care services from local authority control and observes the links with children's social care:

*"the scene is now potentially set for capitulated, outcome-based 'whole system' contracts in which external lead contractors, or an alliance of external contractors, could for the first time bid to provide the full pathway of social care services for older people or younger adults, including home care and residential care, as well as assessments and other functions now almost exclusively provided in-house ... **There are clear parallels with the possible direction of travel for children's social care services as well.** [our emphasis]"*<sup>15</sup>

Although the report does not explicitly refer to exemptions from statutory duties, the ways in which deregulation could facilitate "market entry" are obvious. The report points to a current lack of experience in assessment and care planning services among external companies, which impedes "whole system" outsourcing.<sup>16</sup> These are among the areas of statutory children's social work put forward for exemptions.<sup>17</sup> Positive reference is made in the report to NHS policy objectives of "contestability and competition in order to generate efficiencies and improved outcomes".<sup>18</sup> The terminology is the same as that used in the exemption clauses.

LaingBuisson notes that suppliers request "consistent legislation and policy making designed to support market development" and "Though the suppliers recognised that this shift may take time to be realised, providers were willing to play the long game if consistent government support and requisite provisions were in place".<sup>19</sup>

The Government tabled an amendment in the Lords that would have prevented exemption orders being used to usurp the 2014 ban on wholesale profit-making in children's social care services.<sup>20</sup> This was a concern we raised at Second Reading of the Bill in the Lords.

The 2014 prohibition emerged from a Government consultation which proposed to give local

---

<sup>12</sup> The report can be found here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/297748/Birmingham\\_report\\_25.03.14.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/297748/Birmingham_report_25.03.14.pdf)

<sup>13</sup> LaingBuisson (1 December 2016) The potential for developing the capacity and diversity of children's social care services in England Independent research report December 2016. Department for Education, page 27.

<sup>14</sup> Ibid, page 26.

<sup>15</sup> Ibid, page 64.

<sup>16</sup> Ibid, page 12.

<sup>17</sup> See Department for Education (19 May 2016) Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee, pp 11-12; and Power to test different ways of working – policy statement, issued by the Office of Chief Social Worker for Children and Families, Department for Education, on 11 October 2016.

<sup>18</sup> Ibid, page 58.

<sup>19</sup> Ibid, page 85.

<sup>20</sup> The amendment read: "Regulations under this section may not be used so as to remove any prohibition on a local authority in England arranging for functions to be carried out by a body whose activities are carried on for profit".

authorities the power to discharge virtually all of their children’s social services functions through independent contractors. It proposed a major extension of the provisions in Part 1 of the Children and Young Persons Act 2008, which already enabled local authorities to delegate their social services functions in respect of children looked after and care leavers. As a consequence of overwhelming opposition – 94% of respondents (n=1315) opposed the regulations<sup>21</sup> – contracting out these additional functions to profit-making organisations was prohibited.<sup>22</sup>

The Children’s Commissioning Trust model proposed by LaingBuisson would allow “for all services to be tendered on the open market and outsourced”.<sup>23</sup> LaingBuisson advises that “the [ban on profit] regulations will not create an insuperable difficulty” so long as the Trust is clear during contracting that “it retains the statutory function”. An example is given for how this may operate:

*“For example, the Commissioning Trust could sub-contract out support assessments for children, retain the decision-making function (as it must) as to what support to provide to a child, and then engage a third party support provider to actually deliver the service”.*

The Government’s response to the report states that it will not compel local authorities to outsource all of their children’s social care services or allow profit-making organisations to deliver them.<sup>24</sup> This does not explain:

- where exemptions from statutory duties fit in the Government’s strategy to stimulate the market in children’s social care;
- why, if Ministers had rejected wholesale privatisation of children’s social care services in June 2014, that same month LaingBuisson was commissioned to research ways of developing the capacity of private companies and the voluntary sector to deliver these services?
- how the Chief Social Worker for Children and Families, a senior civil servant, could be so intricately involved in research that makes radical proposals (mandatory outsourcing and privatisation) which Ministers reject?
- why there was a two-year delay in publishing the report.

If Ministers intend to pursue the exemptions policy, we urge Green and White Paper consultation so that the rationale (and any evidence) for them can be widely shared, including with children and young people; answers can be given to the many questions and concerns expressed since the Bill was published; and Ministers can explain how fragmentation of children’s law fits (or doesn’t fit) with stimulating the market in children’s social care.

### **About us**

Article 39 is a new charity established to promote and protect the rights of children living in institutional settings in England. Contact: Carolyne Willow, Director, [carolyne.willow@article39.org.uk](mailto:carolyne.willow@article39.org.uk), Mobile 07531 837260.

<sup>21</sup> Department for Education (June 2014) Consultation on powers to delegate social care functions. Government response, page 5.

<sup>22</sup> Regulation 5, The Children and Young Persons Act 2008 (Relevant Care Functions) (England) Regulations 2014.

<sup>23</sup> Ibid, page 76.

<sup>24</sup> This was also published on 1 December 2016: <https://www.gov.uk/government/publications/childrens-social-care-increasing-capacity-and-diversity>