

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

## **Liberty's briefing on the Children and Social Work Bill for Committee Stage in the House of Commons**

**January 2017**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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## Introduction

1. Liberty welcomes the changes made to the Children and Social Work Bill during its passage through the House of Lords. Along with almost 50 other expert organisations<sup>1</sup> and over 100,000 members of the public<sup>2</sup> we were extremely concerned by proposals contained in then clauses 29-33 of the Bill. By allowing local authorities to opt out of eighty years' worth of duties under children's social care law these proposals would have undermined a rights-based approach to children's social care along with the principles of the rule of law and separation of powers. It risked removing vital protections from vulnerable young people who rely on the law to keep them safe and guarantee the provision of essential services. 69% of social workers questioned believed that letting local authorities exempt themselves from children's social care legislation in this manner would lead to more children being placed at risk and just one in ten supported the Government's proposals.<sup>3</sup>
2. Following this considerable concern and debate, the clauses were deleted at Report Stage of the Bill. Lord Ramsbotham, in whose name the amendments to delete the clauses were tabled, warned "*I submit that clauses 29-33 amount to nothing less than the subversion of Parliament's constitutional position. It is not only wrong but totally unnecessary, in view of existing arrangements, to process proposed innovation because new ways of working can already be tested.*"<sup>4</sup>
3. It is therefore deeply regrettable that the Government now seeks to reintroduce the power for local authorities to opt out under proposed **new clauses 2-9**. The Government had indicated that it has listened to concerns and has introduced new "safeguards". However while the new clauses do contain some differences to the initial powers, the fundamental concerns with the clauses remain entirely unaddressed and the risk to vulnerable children and young people is stark.
4. **Liberty strongly encourages Committee members to vote against the inclusion of new clauses 2-9 in the Bill.**

## The proposals

5. The proposals would permit a local authority to apply to the Secretary of State to exempt that local authority from complying with a provision of children's social care

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<sup>1</sup> <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> <https://www.liberty-human-rights.org.uk/news/blog/social-workers-overwhelmingly-opposed-government-plans-strip-vulnerable-children-their>

<sup>4</sup> Hansard, House of Lords, Children and Social Work Bill Report Stage, 8 November 2016.

law or to modify the way in which such a provision applies to the local authority by making regulations. This power would apply to both primary and secondary legislation.

6. When the powers were first proposed in the Lords an opt-out could be granted for the exceptionally broad purposes of permitting a local authority in England *“to test different ways of working with a view to achieving better outcomes under children’s social care legislation or achieving the same outcomes more efficiently”*.<sup>5</sup> This has been replaced by reference to the seven corporate parenting principles which are established in clause 1 of the Bill. These principles contain no objective means of measurement nor legal threshold for establishing whether or not the purpose is met, and provide no practical limit on the use of the power. Exemptions or modifications would be granted for a defined period of up to three years, which could then be extended by Regulations for a further three year period.
7. The Bill contains no requirement for broad and thorough public consultation prior to the application for or granting of an exception. A local authority would be required to consult only those who it considers appropriate prior to making an application to the Secretary of State. The Secretary of State would be required to establish a “panel” comprising the Children’s Commissioner, Her Majesty’s Chief Inspector of Education, Children’s Services and Skills, and one more person that the Secretary of State considers appropriate. It is not required to consult with the public, children, or families.

## **Analysis**

### *The rule of law and role of Parliament*

8. The mechanism would allow the subversion of the rule of law and proper parliamentary process. It is entirely inappropriate for primary legislation to be amended by regulations made by the Secretary of State at the request of a local authority. In constitutional terms this usurps the proper function of Parliament in making primary legislation. In its scrutiny of the Bill, the Select Committee on the Constitution noted that *“we regret that despite the concerns expressed in the past by this and other committees, the Government continues to introduce legislation that depends so heavily on an array of broad delegated powers”*.<sup>6</sup>

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<sup>6</sup> Select Committee on the Constitution, Report on Children and Social Work Bill, 13 June 2016.

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9. It is also entirely wrong-headed for the Government to propose as a “concession” six duties in primary legislation which will not be subject to the power.<sup>7</sup> The proper process of legislation making requires that Government sets out to Parliament areas in which it wishes to make changes and its case for doing so. Instead, the Government has listed six areas to be protected but asks for a blank cheque to grant exemptions on all other aspects of eighty years’ worth of primary legislation with absolutely no evidence as to the need for change or the likely impact on children and young people. This approach creates an entirely arbitrary and unjustified distinction between certain requirements in primary legislation which can be undone via secondary legislation and other requirements in primary legislation which cannot.
10. In practical terms, bypassing the processes of primary legislation would significantly reduce the extent and intensity of scrutiny that will be applied to the changes. This means that amendments to statutory obligations concerning the treatment of vulnerable children and young people can be enacted in the absence of the highest possible level of diverse and informed debate about the merits and risks of the proposed approach. Education Minister Edward Timpson MP has sought to explain the proposed changes on the grounds that they would “*allow great social workers to try out new approaches and be freed from limiting bureaucracy*”.<sup>8</sup> However what Mr Timpson terms “bureaucracy” is in fact a body of law which has been put in place, on the basis of evidence and with the specific objective of protecting young people.
11. Decisions to remove such a provision, even temporarily, risk reducing the rights, protections or other benefits that young people are entitled to receive, and will have real life consequences for the individuals involved. Further, there was absolutely no limitation within the clause to ensure that the power only be used by “great” social workers, or even to ensure that it is used only at the request of social workers rather than accounting departments. Decisions to remove statutory protections should be made on a case-by-case basis by Parliament so that they can be subject to the most rigorous level of consideration and open to wide scrutiny.

*Application to a subset of young people and children*

12. The rule of law also requires that legislation is applied equally to all. However, where changes are made under the proposed scheme to either primary or secondary

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<sup>7</sup> As presented initially, these clauses did not have any exceptions.

<sup>8</sup> <https://www.theguardian.com/social-care-network/2016/jul/18/children-and-social-work-bill-workforce-services> .

legislation, these would only apply in the area of the applicant local authority creating a postcode lottery of legal protection for children's rights.

### *The importance of enforceable rights*

13. Legal duties and obligations placed on local authorities by children's social care law are ultimately enforceable by the courts. This provides certainty and means that in the event that a local authority fails to meet its statutory obligations, the young person or family concerned are able to take legal action to ensure that the protections laid out by Parliament are put in place. But where a local authority has received an exemption from acting in accordance with law, the courts would not be able to enforce the rights of the young person or family concerned. How would the courts respond in circumstances where a young person or child in a particular area is clearly disadvantaged by the arbitrary disapplication or modification of law that is applicable to young people in other parts of the country?
14. Enforceable, statutory rights also help to ensure that duties towards children and young people are not cast aside in attempts to find savings. The cuts of an average of 40% to local authority funding have been well documented and it is reported that some local authorities do not have sufficient funding to support all their statutory obligations, let alone to fund services that are not ring fenced.<sup>9</sup> The prospect of local authorities seeking exemptions from their array of duties towards children and young people in order to save money is far from remote. The breadth of the legislation from which exemptions could be granted, which includes all obligations towards young people in care and young people with disabilities, would create a significant risk that local authorities would seek exemptions from providing necessary and effective support services to children and young people in order to save money. Providing care and service to vulnerable children and their families can of course be inconvenient, expensive, and difficult for local authorities. But it should be driven by entitlements set by Parliament and careful assessment of their needs rather than competing with refuse disposal and pothole repairs for funding.
15. Underpinning these specific obligations and entitlements is the Human Rights Act. In the context of child protection, social care, and children with disabilities, the rights protected by the HRA include the right to life, the right to be free from torture and inhuman or degrading treatment, and the right to respect for private and family life. The HRA requires the State to take positive steps to protect these rights, and any

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<sup>9</sup> LGA, Under Pressure: How Councils are planning for future cuts, page 3.

exemptions issued by the Secretary of State which undermine these obligations risk violating the rights of vulnerable children and putting the Government in breach of the Act and the European Convention on Human Rights. Government's continued threat to repeal the HRA and recent announcement that it wishes to leave the European Convention on Human Rights<sup>10</sup> raises the spectre that children will be left without both human rights and other legislative protections that are domestically enforceable through the courts. This jeopardises centuries of progress to ensure that children have their needs protected by the state in a consistent and rights-based manner rather than leaving them dependent on the good will or otherwise of local authorities or others.

### *Unjustified scope of the power*

16. In addition to the very loosely defined purposes for which the power can be used, the scope of the power is extremely broad and would permit derogation from or modification of a significant volume of legislation, including huge parts of the Children Acts of 1989 and 2004.<sup>11</sup> The Government has adduced a number of anecdotal examples of areas where it anticipated the power would have been used to trial new ways of working. These examples themselves came in for considerable criticism, causing concern as to the extent to which the Department for Education understands the current legal framework and raising doubts as to the extent to which it would have been able to provide robust scrutiny for requests from local authorities for exemptions and modifications of their legal duties.<sup>12</sup> Notably, all of the examples given have involved reducing the level of service provided to children and young people rather than increasing it and giving them more protection.

17. However, the power to exempt would apply not just to these examples, but to huge swathes of legislation drafted over the past eighty years. As noted by the Delegated Powers and Regulatory Reform Committee: *"the power will allow, in a very wide range of circumstances which cannot yet be predicted, the removal of statutory requirements which may themselves have been imposed with a view to ensuring that children are given certain protections, rights or benefits."*<sup>13</sup>

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<sup>10</sup> <http://www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html>

<sup>11</sup> Clause 33.

<sup>12</sup> <http://www.article39.org.uk/news/2016/06/15/government-names-first-three-safeguards-to-be-exempt/> .

<sup>13</sup> Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2016-17 - published 17 June 2016, paragraph 47.

18. The Government's purported concession in listing six duties which will not be subject to the power only serves to highlight the vast number of other duties which will be vulnerable to ad hoc repeal. Article 39 have listed over thirty examples of vital protections which have not made it onto the Government's list of "core" duties. These include providing support to disabled children<sup>14</sup> and having arrangements whereby young people in foster care can remain with their carer until the age of 21.<sup>15</sup>

### **Lack of adequate consultation**

19. The Government has added a further so-called concession in that the Secretary of State will be required to establish a "panel" comprising the Children's Commissioner, Her Majesty's Chief Inspector of Education, Children's Services and Skills (HMCIECSS), and one or more person that the Secretary of State considers has the relevant expertise. The panel would be asked to advise on the likely impact of the regulations on children and the adequacy of any measures that will be in place to monitor their impact on children.

20. However this amendment was little more than a reconfiguration into a "panel" of the requirements in earlier versions of the Bill that the Secretary of State must consult the Children's Commissioner, HMCIECSS and any other person the Secretary of State consider appropriate. If the panel provided written advice, it must be published, but under this new amendment there is absolutely no requirement on the panel to even produce written advice.

21. In addition, it is deeply concerning that this model of consultation requires statutory oversight organisations effectively to indicate their approval of an opt-out before the impact of the scheme on children and young people is known. In institutional terms, an office which acquiesces to an exemption cannot then offer the public a truly independent assessment or critique of the opt-out in practice. This fundamentally compromises the ability of the three consultees to fulfil their statutory roles and to protect children and young people.

### **Privatisation concerns**

22. The Government also introduced an amendment stating that the power could not be used to opt out of restrictions set out in regulations on profit making in children's services. However, in reality legislation does allow local authorities to outsource the provision of children's social care. Private companies can and do provide some of

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<sup>14</sup> Chronically Sick and Disabled Persons Act 1970, s 2.

these services, and large for profit organisations are able to tender for contracts so long as they do so via a not for profit subsidiary.

23. The amendment therefore does not assuage concerns that the opt-out mechanism will facilitate the extension of the hugely damaging and costly experiment in allowing large companies such as G4S to deliver public services relating to children – such in the detention estate - to further groups of vulnerable young people. There is significant concern that opt-outs will be used to shape legal requirements that suit the requirements of service providers rather than respond to the needs of children and young people.

### **Improvement of protection for all within a proper framework**

24. The rights of children and young people should sit at the front and centre of legislation, policy, guidance, and practice. As part of this, both national and local government should be proactive in identifying practices enshrined in law that do not promote the best interests of young people. Where a process or requirement is no longer considered to be in the best interests of the child, changes should be made for all children and young people via the proper parliamentary processes. If evidence as to the effectiveness of an alternative approach is required, specific legislation should be put forth providing for a pilot process within a framework of basic rights protection and setting in place a mechanism for evaluation that meets accepted research standards, preparing for a full roll out if the independently evaluated evidence shows it is appropriate. The running of pilots in favoured local authorities will not provide sufficiently robust testing of the potential advantages and risks of a scheme – what works for a high performing local authority cannot be assumed to work just as well elsewhere. As a result, this scheme would not only have failed children and young people, but would have also failed in attempts to identify and test different ways of working that can simply then be rolled out nationally.

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