

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

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

**December 2016**

## 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 40 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 clauses 29-33 of the Bill. 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. In doing so, it would have 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. We strongly encourage MPs to ensure that this progress is maintained in the Commons and to resist any attempts to bring these damaging proposals back into the Bill.

## The proposals

4. The proposals would have permitted a local authority to apply to the Secretary of State to create Regulations to exempt that local authority from complying with a provision of children's social care law or to modify the way in which such a provision applies to the local authority. Under the provisions, the powers would have been available 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*

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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.

*under children’s social care legislation or achieving the same outcomes more efficiently”.*<sup>5</sup>

5. Exemptions or modifications would have been granted for a defined period of up to three years, which could then be extended by Regulation for a further three year period subject only to publication by the Secretary of State of a report stating the extent to which the intended purpose has been achieved.
6. In circumstances where the Secretary of State had exercised her powers to intervene in the functions of a local authority, the Secretary of State would have in effect been able to make regulations exempting herself from acting in accordance with legislative requirements.
7. A local authority would have been required to consult “*such of the other safeguarding partners and relevant agencies in relation to its area as it considers appropriate*” prior to making an application to the Secretary of State. The Secretary of State was required only to consult the Children’s Commissioner, Her Majesty’s Chief Inspector of Education, Children’s Services and Skills, and any other person that the Secretary of State considers appropriate.

## **Analysis**

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

8. The mechanism would have allowed 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 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>
9. 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

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<sup>5</sup> Clause 29(1).

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

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>7</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.

10. If practitioners consider that these provisions are no longer useful they should of course have mechanisms for raising this issue and suggesting alternative approaches. But 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*

11. 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 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*

12. 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?

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<sup>7</sup> <https://www.theguardian.com/social-care-network/2016/jul/18/children-and-social-work-bill-workforce-services> .

13. 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>8</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, particularly given that one of the explicit statutory purposes for seeking an exemption was “*achieving the same outcomes more efficiently*”. 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.

14. 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 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 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*

15. 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 the Children Acts of 1989

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<sup>8</sup> LGA, Under Pressure: How Councils are planning for future cuts, page 3.

and 2004.<sup>9</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>10</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.

16. However, the power to exempt would have applied 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>11</sup>
17. It is deeply inappropriate and disproportionate for such a wide power to be granted. It offered no protection to even the most essential and basic of statutory duties and protections offered to some of the most vulnerable and disadvantaged children in society. For example, the Children Act 1989 sets out the duty of local authorities to investigate when a child is suffering significant harm with the purpose of deciding whether action should be taken to safeguard or promote the child’s welfare. The Act also sets out the requirement to provide children in need with day care. None of these were protected from the proposed power.

#### *Targetted and independently tested innovation*

18. If either local or national government have identified areas within legislation for improvement then they can and should make specific proposals to be presented to Parliament for consideration. Instead, the Government sought to legislate for a *carte blanche* allowing the Secretary of State to disregard eighty years’ worth of law with no supporting evidence as to why such a power is necessary. In view of the Government’s statement that *“the Government believe that the legislative framework is the bedrock of children’s social care services... We believe this framework is*

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<sup>9</sup> Clause 33.

<sup>10</sup> <http://www.article39.org.uk/news/2016/06/15/government-names-first-three-safeguards-to-be-exempt/> .

<sup>11</sup> Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2016-17 - published 17 June 2016, paragraph 47.

*essentially correct*<sup>12</sup> it is difficult to understand why a targeted approach to reform is not possible.

### **Purported Government concessions in the Lords**

19. A number of amendments to the clauses were proposed at Committee and Report, with the Government conceding that the proposals as introduced did not contain adequate safeguards. However the amendments failed to remedy the substantive criticisms of the clauses and peers opted for their deletion instead.
20. For example, amendment tabled by Lord Nash would require have required the Secretary of State 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 have been 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. However this amendment was little more than a reconfiguration 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. It did not require standard widespread consultation at either a local or national level such as would be expected for changes to primary legislation.
21. The Government also introduced an amendment stating that the power could not be used to opt out of restrictions on profit making in children’s services. While this clarification was welcome, it did absolutely nothing to address the principled concerns about the role of Parliament in making decisions about legislation nor the practical concerns about the lack of suitably wide consultation as well as the fundamental lack of protection for vulnerable children and young people subject to the power.

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

22. Developments in society’s understanding and experience of how the state ought to act in order to ensure that the best interests of the child are promoted will of course require legislative changes from time to time. 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

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<sup>12</sup> Hansard, House of Lords, Children and Social Work Bill Report Stage, 8 November 2016, per Lord Nash.

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.

**Sara Ogilvie**