

LIBERTY

PROTECTING CIVIL LIBERTIES
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Liberty’s briefing on clauses 29-33 of the Children and Social Work Bill: “different ways of working” in children’s social care

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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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Summary

1. Liberty is extremely concerned that the regime proposed by clauses 29-33 of the Children and Social Work Bill would undermine 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 risk removing vital protections from vulnerable young people who rely on the law to keep them safe and guarantee the provision of essential services.
2. The Human Rights Act 1998 requires the state to protect the right to life, freedom from torture and inhuman and degrading treatment, and the right to respect for family and private lives of children. The Act places positive obligations on the State to take measures, including legislative measures, to protect the rights of those in our jurisdiction, in particular those at risk or otherwise vulnerable.
3. With no consultation, the Bill provides for an overly broad power which could be used to exempt or modify almost any duty imposed by children's care legislation passed in the past fifty years. This includes all of the social care services children receive from local authorities, including child protection, family support, the care system and support to care leavers, children and young people in custody, and services for disabled children. Many of these obligations have been placed in legislation to enshrine essential protections on the basis of decades of learning, following public consultation, or to implement recommendations made by inquiries into tragic failings in the state's obligation to protect the rights – including the right to life – of children and young people.
4. The exemptions can apply for a three year period, renewable by a further three years, with the bare minimum of consultation required, for very broad purposes, and within a mechanism which sets out no procedural or substantive safeguards for monitoring or for protecting children from harm.
5. This approach would also expose children, young people and their families, to a postcode lottery of protection. Children and young people who live within local authorities seeking exemptions risk being treated as guinea pigs while the majority of children and young people will remain subject to provisions which the Secretary of State presumably thinks are at best dispensable or at worst no longer adequate to the task.
6. Liberty supports the development of better and innovative ways of working to support and protect children and young people. However, new measures must be taken

within a lawful, coherent and controlled manner that respects the various and distinct roles of practitioners, experts, Government and Parliament, requiring thorough consultation and robust safeguards to protect young people.

7. **Against the backdrop of reduced funding for local authorities, significant public concern about recent and historical failures of the state to protect young people, and threats to repeal the Human Rights Act, Liberty urges Parliamentarians to remove this provision from the Bill.**

Proposed legal framework

8. The Bill would permit 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 social care law or to modify the way in which such a provision applies to the local authority. The powers may be used 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”*.¹
9. Exemptions or modifications must be granted for a defined period of up to three years, which can 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.²
10. In circumstances where the Secretary of State has exercised her powers to intervene in the functions of a local authority, the Secretary of State may in effect make regulations exempting herself from acting in accordance with legislative requirements. These regulations will stay in place even when the direction ceases to exist.³
11. A local authority would be 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 must consult the Children’s Commissioner, Her Majesty’s Chief Inspector of Education,

¹ Clause 29(1).

² Clause 30.

³ Clause 32.

Children's Services and Skills, and any other person that the Secretary of State considers appropriate prior to making regulations.⁴

Analysis

The rule of law and role of parliament

12. The mechanism for innovation set out in the Bill 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 it 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"*.⁵
13. 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 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"*.⁶ 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. 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 is absolutely no limitation within the clause to ensure that the power is only 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

⁴ Clause 31.

⁵ Select Committee on the Constitution, Report on Children and Social Work Bill, 13 June 2016.

⁶ <https://www.theguardian.com/social-care-network/2016/jul/18/children-and-social-work-bill-workforce-services> .

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

14. The rule of law also requires that legislation is applied equally to all. However, where changes are made under this scheme to either primary or secondary legislation, these will only apply in the area of the applicant local authority. In the event that a change to current duties is genuinely required, this *ad hoc* approach will not deliver necessary change in a timely manner to the majority of children and young people.

The importance of enforceable rights

15. 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 will not be able to enforce the rights of the young person or family concerned. How will 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?
16. 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.⁷ 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 is "*achieving the same outcomes more efficiently*". The breadth of the legislation from which exemptions can be granted, which includes all obligations towards young people in care and young people with disabilities, means that there is a significant risk that local authorities will 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

⁷ LGA, Under Pressure: How Councils are planning for future cuts, page 3.

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.

17. 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

18. 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 and 2004.⁸ The Government has adduced a number of anecdotal examples of areas where it anticipates the power may be used to trial new ways of working. These examples have themselves come 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 will be able to provide robust scrutiny for requests from local authorities for exemptions and modifications of their legal duties.⁹ 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.
19. However, the power to exempt applies not just to these examples, but to huge swathes of legislation drafted over the past fifty years. As noted by the Delegated Powers and Regulatory Reform Committee: *"the power will allow, in a very wide*

⁸ Clause 33.

⁹ <http://www.article39.org.uk/news/2016/06/15/government-names-first-three-safeguards-to-be-exempt/> .

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."¹⁰

20. It is deeply inappropriate and disproportionate for such a wide power to be granted. It offers 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. There is also a prohibition on profit-making companies running child protection and other key services. None of these are protected from the proposed power.
21. 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 is seeking 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.

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 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.

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¹⁰ Delegated Powers and Regulatory Reform Committee, 1st Report of Session 2016-17 - published 17 June 2016, paragraph 47.