



FIGHTING FOR  
CHILDREN'S RIGHTS  
IN INSTITUTIONAL SETTINGS

## CHILDREN AND SOCIAL WORK BILL

Second Reading, House of Commons – 5 December 2016

### 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 many 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>

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<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.

## 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>4</sup>

The DfE's 'Putting Children First' document, published in July, made it clear that Ministers intended to use exemptions as a means of testing 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>5</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".

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<sup>4</sup> Department for Education (May 2016) Children and Social Work Bill. Impact assessments, para' 30.

<sup>5</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".

**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, 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. There has been no commitment to consultation through Green and White Papers. 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 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.

MPs 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>6</sup> and other children's homes abuse scandals of the 1980s and '90s; 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>7</sup>

The Government has stated children's social care exemptions have been "modelled in large part" on education law.<sup>8</sup> 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.

A report which may help to explain the genesis of children's social care exemptions remains

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<sup>6</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>7</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>8</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".

secret. In February 2014, the Government published a report into the future of Birmingham children's services written by Professor Julian Le Grand, Alan Wood and Isabelle Trowler (the Chief Social Worker for Children and Families).<sup>9</sup> They argued that improvement in children's services at Birmingham was, "...hampered by the current lack of available improvement capacity, whether in the private, not-for-profit or local authority sectors...This is particularly the case for a large authority like Birmingham where both the scale and persistent nature of the problem **indicate the need for a radical, long-term solution**" [our emphasis]. Le Grand, Wood and Trowler recommended the DfE commission a study on developing different options for the delivery of children's services which could be triggered by the Secretary of State.

LaingBuisson was subsequently commissioned to carry out the work.

In April 2015, a Birmingham social worker submitted a freedom of information (FOI) request to the DfE for a copy of the LaingBuisson report. He was told in June 2015, "The Department intends to publish the external study of improvement capacity in summer 2015."<sup>10</sup> The same social worker asked for the report again in December 2015. He received an answer in April 2016, which stated the DfE intended "to publish the external study of improvement capacity in summer 2016".<sup>11</sup>

In May 2016, the Children's Minister, Edward Timpson MP, told the Education Select Committee that the study would "be published, as indicated, as soon as [the EU Referendum] purdah is over. So I am not at liberty to start divulging its contents until then, but the reason it is being published is because it is a helpful paper. **It is trying to flesh out some of the ways that we can deliver children's services that are more innovative**" [our emphasis].<sup>12</sup>

A written question from Lord Watson in September elicited the following answer: "The Department intends to publish the report in due course".<sup>13</sup> Our own FOI request for a copy of the report was refused and we are now awaiting investigation by the Information Commissioner.

If Ministers intend to continue with exemptions, we urge Green and White Paper consultation and the publication of all relevant research undertaken by and for the Government.

## About us

Article 39 is a new charity established to promote and protect the rights of children living in institutional settings in England.

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<sup>9</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>10</sup> [https://www.whatdotheyknow.com/request/improvement\\_capacity\\_for\\_childre#incoming-659881](https://www.whatdotheyknow.com/request/improvement_capacity_for_childre#incoming-659881)

<sup>11</sup> [https://www.whatdotheyknow.com/request/improvement\\_capacity\\_for\\_childre\\_2#incoming-797655](https://www.whatdotheyknow.com/request/improvement_capacity_for_childre_2#incoming-797655)

<sup>12</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/education-committee/social-work-reform/oral/33032.html>

<sup>13</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-09-14/HL1943/>