Briefing on Clauses 29-31 of the Children and Social Work Bill 2016

by Family Rights Group

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Family Rights Group

Family Rights Group, which has drafted this briefing, is the charity in England and Wales that works with parents whose children are in need, at risk or are in the care system and with members of the wider family who are raising children who are unable to remain at home. Our expert advisers, who are child welfare lawyers, social workers, or advocates with equivalent experience, provide advice to over 6000 families a year via our free and confidential telephone and digital advice service. We advise callers about their rights and options when social workers or the courts make decisions about their children's welfare. We also campaign for families to have their voice heard, be treated fairly and get help early to prevent problems escalating. We lead the policy work of the Kinship Care Alliance and Your Family, Your Voice and champion Family Group Conferences and other policies and practices that keep children safe in their family network.

Clauses 29-31 of the Children & Social Work Bill

The Children and Social Work Bill is an important opportunity to improve outcomes for vulnerable children, including those who cannot live with their parents. The Bill has many different components including, in clauses 29-31, an attempt to give greater freedoms and flexibilities to individual local authorities to innovate and to trial new ways of working. Whilst we understand the motivation for these clauses, we are extremely concerned about the extensive powers that these clauses give to the Secretary of State, at the request of a local authority, to exempt individual authorities from their duties under primary child welfare legislation and/or regulations. In this briefing, we set out:

- Our concerns in detail; and
- Proposals for a way forward, by describing what, in our view, are the minimum safeguards that need to be in place to allow some flexibility in the application of current regulations and guidance, whilst maintaining

the integrity of the child welfare system and the rights and protections enshrined in statute.

We call on the Government to put forward alternative provisions that meet the safeguards set out in this briefing, if it wishes to continue to utilise the Bill to enable authorities to pursue such freedoms.

Purpose of the clauses – better outcomes for whom?

The essence of clause 29 is that it allows the Secretary of State to exempt local authorities from their statutory duties under either primary legislation, or regulation across a whole raft of children's social care legislation including the Children Act 1989 and the Adoption and Children Act 2002.

At Committee stage, Lord Nash said the purpose of these clauses is to trial new ways of working, the intention being "*to improve the provision of services to children*" and "*to achieve better outcomes for children and young people*[1]" (our emphasis).

However, the drafting of the clauses is much wider than this, and lacks any reference to improving the welfare of children and families. What is said on the face of the Bill is that:

"*the purpose of this section is to enable 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*"[2].

The Bill neither states the words 'for children' nor 'for children and families' nor is it explicit that the purpose is to improve service provision for children or children's welfare. As currently drafted, the term "better outcomes" could mean

[1] Lord Nash in House of Lords debate at Grand Committee 11th July 2016 (Hansard column 49)
[2] Clause 29 para 1

for the child, but could apply equally to other players within the children's social care system, such as prospective adopters, local authority managers, or practitioners. What is a good outcome for one group could potentially be at the expense of others within the system including the individual child or the wider family. For example, section 22C of the Children Act 1989 currently prioritises placement of children in care with wider friends and family. A local authority could, by seeking an exemption from parts of that section, instead prioritise prospective adopters who were also foster carers over potential family and friends carers. Arguably, this is a 'better outcome' for prospective adopters, a more cost efficient way of achieving the outcome of adoption and could speed up the adoption process. In our view, it would not however be a better outcome for potentially suitable wider family members who might have been able to permanently care for the child nor, arguably, for the child in terms of their long term identity and their right to family life. Moreover, it would be a significant extension of the power of the state without the corresponding normal level of parliamentary oversight.

If the clause stated that its purpose was to 'improve services to children and families with a view to achieving better outcomes for them' this would give confidence in the purpose of this section of the Bill.

Lack of evidence for need to exempt authorities from primary legislation

It is of concern that at this late stage, the Government has still not produced a briefing to explain why it feels these clauses are necessary, including a series of examples of freedoms and flexibilities that local authorities are requesting which could only be obtained using these proposed clauses. At the time of writing this briefing, we are still awaiting a meeting with heads of local authority Partners in Practice to hear their views on why these clauses are necessary.

There currently exists in section 2 of the Local Government Act 2000 a power for local authorities to take any steps which they consider are likely to promote or improve the economic, social or environmental well-being of their local

community. The only restriction on these powers is that set out in section 3, that the action must not be taken if it is subject to statutory prohibitions, restrictions or limitations specifically set out in legislation. These proposed clauses in the Children and Social Work Bill go that step further, and permit local authority to take action even if it is prohibited by primary legislation, by allowing them to ask the Secretary of State to exempt them from that statute, or part of it.

The breadth of legislation that may be affected by these clauses

Whilst the intention appears to be to trial new ways of working, primarily in the areas of child protection and permanence for children unable to live with their parents (the examples hither to given all relate to ways of improving practice for children in care – Children Act 1989 or Adoption and Children Act 2002), there is no such limitation within the clauses themselves. On the contrary, the clauses are drafted so widely that they can apply to the majority of legislation passed in the last 50 years that impacts on children's social care, including Part 1 of the Children and Young Persons Act 2008, which limits the extent to which local authorities can delegate their functions in relations to children's services, and s.2 of the Chronically Sick and Disabled Persons Act 1970, which places a duty on local authorities to meet the needs of disabled children. Yet no examples have been given by Ministers during the debate in Committee as to why exemptions are needed from these Acts of Parliament.

There are serious constitutional questions that must arise in giving such broad, far reaching powers to the Secretary of State.

The power to exempt individual local authorities from their duties as laid down in primary legislation

As stated in the House of Commons information sheets “Public acts are legislation of universal application and change the general law.” Primary legislation sets out the framework which must be applied in all localities within the nation regardless of local circumstance and thus in doing so regulates state interference in family life, sets out the rights of individuals including children to secure services and support and makes the state, and ‘organs of the state’ accountable. The children’s social care legislation that would be affected by these clauses has been incrementally introduced over a long period of time, each change taking place after a process of proposal, consultation, parliamentary scrutiny and debate. Family Rights Group maintains the position that if a change is to be made to primary legislation then it should have national application. If legislation is inadequate, outdated, or ineffective, then amendments should be made to such legislation through the normal legislative and consultation process, rather than through a piecemeal approach allowing one or two authorities to get dispensation.

Family Rights Group is therefore extremely concerned about the provision to allow individual authorities to be exempt from primary legislation. We do not believe that a case has been made for such a drastic step and are extremely concerned that children and families in one locality could be deprived of their fundamental rights and entitlements that are still afforded to other children and families across the country.

Our anxiety is further increased by other legislative protections of the rights of children and families being in jeopardy. This includes proposals from the Government to abolish the Human Rights Act and talk in some circles of Britain leaving the European Convention of Human Rights.

The justification that the Government has given for including primary legislation is that some regulations are so linked to the primary enabling power that in order to be able to meaningfully exempt the local authority from the regulation, then the primary legislation would also need to be exempted. The only example given is in relation to the role of Independent Reviewing Officers

(IROs).[3] However, if the purpose of the local flexibility in relation to IROs is, as set out by the Minister in Grand Committee[4], to reduce the number of reviews for children who are settled in long term care, this could be achieved without exemption from primary legislation. Section 25B(b) Children Act 1989 states that the IRO must "participate, in accordance with regulations made by the appropriate national authority, in any review of the child's case". It does not stipulate the frequency of reviews. Rather the frequency of reviews are set out in the Care Planning, Placement and Case Review Regulations 2010. It is not the case that an authority has to seek an exemption from the obligation to appoint an IRO, contained in primary legislation, in order to achieve the outcome of reducing the frequency of reviews for children in long term care.

Power to exempt local authorities from their duties under secondary legislation

We understand, to a degree, the drive that there is amongst senior managers within high performing local authorities who can see ways that they could deliver services more effectively for children and families, if they weren't required to conform to all existing Children Act 1989 and Adoption and Children Act 2002 regulations. However, there are insufficient safeguards in the current draft of these clauses to ensure that if this were done, the rights of children and families would be protected **and** there would sufficient clarity of purpose to ensure that any positive innovation was rolled out nationally within a defined period.

Safeguards and consultation process

If there is to be local exemption from regulations and statutory guidance, then there should be involvement and consultation of stakeholders locally, including children and families and organisations representing them, in order that the

[3] Every child who is looked after must have an Independent Reviewing Officer (IRO) whose responsibility it is to monitor whether children's services are meeting the child's needs and are carrying out the care plan and chair looked after child review meetings.

[4] Lord Nash in House of Lords debate at Grand Committee 11th July 2016 (Hansard column 52)

proposals are being done with, rather than to, the local community. In addition there needs to be an opportunity for scrutiny by organisations such as Family Rights Group, at a national level, so that unintended consequences are avoided and the potential ramifications of roll out of such measures are considered.

As a minimum we would like to see:

1. A requirement that the local authority has to set out in a public document the purpose for which they are seeking the exemption. This should include:
    - Which paragraph(s) of which regulation from which exemption is sought
    - What impact assessment they have done (including equality/ human rights and the family test)
    - What alternative measures/ provisions if any are being put in place
    - How they intend to measure/ assess the impact of the exemption and at what frequency
    - How the views of interested groups (i.e. children and families) will be incorporated into this process
    - What changes this will necessitate to statutory guidance, and what alternative guidance will be put in its place.

2. Local authorities must be required to consult locally with public interest groups, and publish the consultation documents.

3. Once the request is with the Secretary of State there must be some sort of public scrutiny process. One powerful suggestion is a standing committee of Parliament alongside a consultation process that provides opportunity for interest groups (e.g. Family Right Group) to contribute, raise concerns, and consider any unintended consequences of such measures.

4. A clear process by which an exemption can be revoked – currently there appears to be no specific procedure for this, i.e. how can it be triggered and by whom? [5]

Clarity of purpose

We believe that any exemption should be restricted to high performing local authorities who have the management capacity, strategic drive and systems of accountability to introduce significant innovation and monitor the impact of such, rectifying where delivery is not consistent with intent. In addition, we suggest that:

1. It should be a requirement that any proposal from a local authority to the Secretary of State to exempt them from secondary legislation must set out clearly the purpose of such an exemption and how progress will be monitored.

2. The Clauses should set how 'innovations' are to be tested, and to be taken forward for national application, if successful. The Clauses need to set out what will be in place to measure the impact of the local innovation and if focused upon high performing authorities, what evaluation would need to be in place to determine whether such roll out would work in lower performing authorities.

3. The 3 year extension period should only apply as a lead-in period for national roll out. Otherwise there is a real danger that a permanent difference of standards will exist between authorities.

4. The Secretary of State should issue an annual report setting out the flexibilities/exemptions granted and evaluation of impact of such measures and any plans for roll out.

[5] Lord Nash said in the House of Lords debate "…if regulations made under the power are not found to have had the desired effect, they can be revoked swiftly using the negative resolution procedure" Lord Nash in House of Lords debate at Grand Committee 11th July 2016 (Hansard column 54)

Exemptions from statutory guidance

When local authorities apply for an exemption from regulations, it is inevitable that innovations in practice will impact on their ability to comply with existing statutory guidance, and it is likely that they will need to dis-apply existing guidance and put alternative provision in its place. Whilst this is already happening in some Partner in Practice authorities, it is imperative that families and those advising them have easy access to information about what guidance is or is not in use, and what alternative guidance is in its place. We propose that as part of the public document that a local authority must provide (see above) it should set out within that whether as a result of the exemption it is seeking, it is intending to deviate from statutory guidance, and if so, what alternative guidance will be put in its place.