

# HOUSE OF LORDS

## Delegated Powers and Regulatory Reform Committee

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7th Report of Session 2013–14

### **Children and Families Bill European Union Approvals Bill**

**Littering from Vehicles Bill [HL]  
Alan Turing (Statutory Pardon) Bill [HL]  
Clean Neighbourhoods and Environment  
(Amendment) Bill [HL]**

**Draft Legislative Reform (Regulation of  
Providers of Social Work Services)  
(England and Wales) Order 2013**

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HL Paper 49

## The Delegated Powers and Regulatory Reform Committee

The Committee is appointed by the House of Lords each session and has the following terms of reference:

- (i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;
- (ii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
  - (b) section 7(2) or section 15 of the Localism Act 2011, or
  - (c) section 5E(2) of the Fire and Rescue Services Act 2004;and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and
- (iii) To report on documents and draft orders laid before Parliament under or by virtue of:
  - (a) section 85 of the Northern Ireland Act 1998,
  - (b) section 17 of the Local Government Act 1999,
  - (c) section 9 of the Local Government Act 2000,
  - (d) section 98 of the Local Government Act 2003, or
  - (e) section 102 of the Local Transport Act 2008.

### *Membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Andrews  
Baroness Gardner of Parkes  
Baroness Farrington of Ribbleton  
Baroness Fookes  
Lord Haskel  
Countess of Mar  
Lord Marks of Henley-on-Thames  
Rt Hon. Lord Mayhew of Twysden QC DL  
Baroness O’Loan  
Baroness Thomas of Winchester (Chairman)

### *Registered Interests*

Committee Members’ registered interests may be examined in the online Register of Lords’ Interests at [www.publications.parliament.uk/pa/ld/lldreg.htm](http://www.publications.parliament.uk/pa/ld/lldreg.htm). The Register may also be inspected in the Parliamentary Archives. Interests related to this Report are in the Appendix.

### *Publications*

The Committee’s reports are published by the Stationery Office by Order of the House in hard copy and on the internet at [www.parliament.uk/hldprcpublications](http://www.parliament.uk/hldprcpublications).

### *General Information*

General information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is on the internet at <http://www.parliament.uk/business/lords/>.

### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee’s email address is [dpr@parliament.uk](mailto:dpr@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that “in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion” (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, “be well suited to the revising function of the House”. As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and other acts specified in the Committee’s terms of reference.

# Seventh Report

## CHILDREN AND FAMILIES BILL

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### Introduction

1. The Bill had its Second Reading on 2 July. It is made up of eight Parts each affecting different areas concerning children and families. Part 1 is concerned with adoption and children looked after by local authorities, and contains provisions intended to speed up the adoption process and enable children to be placed with less delay and disruption. Part 2 is concerned with family justice and makes changes to the conduct of proceedings involving children. Part 3 revises the legislation relating to children with special educational needs. Part 4 makes changes to the system of registration of childminders by allowing them to register under the Childcare Act 2006 with childminder agencies rather than directly with Her Majesty's Chief Inspector of Education, Children's Services and Skills. Part 5 makes changes to the functions of the Children's Commissioner. Parts 6, 7 and 8 all relate to employment. Part 6 provides a new right of shared parental leave and statutory shared parental pay; Part 7 is concerned with time off for ante-natal care; and Part 8 concerns the right to request flexible working.
2. The Department for Education has prepared a memorandum for the Committee explaining the delegated powers in the Bill.<sup>1</sup> We have found that, in a number of instances (of which a few are mentioned below) the memorandum could have explained more fully why a delegation is thought to be necessary, or why a particular level of parliamentary scrutiny is being proposed. This is not the first time the Committee has found reason to raise this issue with Government departments and we expect action to be taken to remedy this failing in the future.

### Clause 3 – Recruitment, Assessment and Approval of Prospective Adopters

3. Clause 3 amends Chapter 2 of Part 1 of the Adoption and Children Act 2002 (“the 2002 Act”) by inserting a new section 3A into the 2002 Act which allows the Secretary of State to give directions. Such directions are able to require local authorities to make arrangements for certain of their functions to be carried out on their behalf by other adoption agencies, which include both other local authorities and adoption societies registered under the Care Standards Act 2000. The functions to which section 3A applies relate to the recruitment of prospective adopters, the assessment of prospective adopters and the approval of prospective adopters. Under section 3A a direction of the Secretary of State may be given to individual local authorities, specific descriptions of authorities, or all local authorities in England.
4. The memorandum recognises that the power to give directions under section 3A is legislative in nature. It states: “As is usual for such powers of direction there is no Parliamentary procedure”. But no examples are given of other

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<sup>1</sup> <http://www.parliament.uk/business/committees/committees-a-z/lords-select/delegated-powers-and-regulatory-reform-committee/bills-considered/>

circumstances where similar powers to direct have been given and we are not persuaded that such an approach is appropriate here. The scope of the power is such that it could be used to direct all local authorities in England to make arrangements for their functions relating to the recruitment and approval of prospective adopters to be exercised by adoption societies registered under the Care Standards Act 2000. **We consider it inappropriate to delegate a power of such scope without the exercise of the powers being subject to parliamentary scrutiny. In our view, the only circumstance in which it is appropriate for the power to be exercised without parliamentary scrutiny is where the direction is aimed at a single named authority and is made because of a failure on the part of the authority to carry out its functions to an adequate standard. In all other cases the powers should be exercisable by statutory instrument subject to the affirmative procedure.**

#### Clause 6 – The Adoption and Children Act Register

5. Clause 6 amends sections 125 to 131 of the 2002 Act. Section 125 establishes the Adoption and Children Act Register (“the Register”) containing information about children who are suitable for adoption and about prospective adopters. Section 125(3) prohibits the Register from being open to public inspection or search. Under section 129, information in the Register may only be disclosed, other than for research purposes, to an adoption agency. Clause 6(4) inserts a new section 128A in the 2002 Act which confers a power on the Secretary of State to make regulations allowing prospective adopters to search and inspect the Register. The regulations can restrict the parts of the Register which prospective adopters would be allowed to search and inspect, and make access subject to prescribed terms and conditions. Regulations under section 128A are subject to the negative procedure.
6. We are surprised that the memorandum does not give any specific indication as to why the Government consider that the negative procedure offers an appropriate level of scrutiny in this case. It states, in the context of the amendments made to sections 125 to 131 as a whole, that the negative procedure “is the appropriate level of scrutiny for regulations providing for this level of operational, administrative and procedural detail”. We do not regard it as appropriate to characterise the provisions made under section 128A as being operational, administrative or procedural. We believe it constitutes an important change to the operation of the Register in that it will allow access to personal and sensitive information which otherwise only adoption agencies have access to. **In our view the negative procedure does not provide a sufficient level of scrutiny, and regulations under section 128A should be subject to the affirmative procedure. The importance of ensuring that the regulations contain appropriate safeguards was made clear in paragraph 185 of the report of the House of Lords Select Committee on Adoption Legislation.<sup>2</sup> We have no doubt that the House will wish to have available to it the draft regulations in advance of the Committee stage of the Bill.**

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<sup>2</sup> *Adoption: Post-Legislative Scrutiny* (2nd Report, Session 2012-13, HL Paper 127)

### Clause 36 – Assessment of Education, Health and Care Needs

7. Clause 36 is concerned with the carrying out of assessments of a child or young person's education, health and care needs (EHC needs assessment). Clause 36(11) allows regulations to make further provision about EHC needs assessments. This includes provision about how assessments are to be conducted, about expressing views and submitting evidence, and about the advice to be obtained in connection with an assessment. The regulations are subject to the negative procedure. The Department's memorandum states this level of procedure is appropriate for the level of procedural detail required and it notes that some of the matters are already dealt with in regulations subject to the negative procedure under the existing legislation (see Schedule 26 to the Education Act 1996 ("the 1996 Act")).
8. There is, however, one matter which is to be dealt with by regulations which is set out on the face of the 1996 Act. Clause 36(11) allows regulations to make provision requiring the attendance of a person of a prescribed description in connection with an assessment. The equivalent requirement is in paragraphs 4 and 5 of Schedule 26 to the 1996 Act. Paragraph 4 allows a local authority to serve notice on the parent of the child being assessed to require the child's attendance for examination. Under paragraph 5 the parent commits a summary offence if he or she fail to comply with the notice. The power conferred by clause 36(11) is much broader than that conferred by the existing legislation: it is not limited to requiring the parent to secure the attendance of the child concerned, but allows a wider range of persons to be required to attend.
9. The memorandum does not explain why it is necessary to have the flexibility offered by regulations. Also, nothing is said in the Bill about the sanction to be imposed. Imposing a requirement to attend is only meaningful if there is a sanction for failing to attend. But nothing is said in the Bill about the sanction which may be imposed under the regulations. **In our view, these matters make this an inappropriate delegation. We consider that who may be required to attend and the sanction for non-compliance should be set out on the face of the Bill as is done under the Education Act 1996.**

### Clause 44 – Reviews and Re-assessments

10. Clause 44 is concerned with reviews and re-assessments. Clause 44(1) requires a review of an EHC plan every 12 months. Clause 44(2) specifies when a local authority must reassess the educational, health and social care needs of a child or young person for whom it maintains an EHC plan. It requires a re-assessment to take place if a request is made by the child's parent or the young person or by the institution which the child or young person attends. Clause 44(7) allows provision to be made in regulations about reviews and re-assessments. It enables the regulations to specify other circumstances when a review or re-assessment must take place. It also allows the regulations to provide for exceptions where otherwise there would be a duty on a local authority under clause 44 to review a plan or make a re-assessment. Regulations under clause 44(7) are subject to the negative procedure.
11. The memorandum notes that regulations made under the existing legislation relating to reviews are subject to the negative resolution procedure, and argues that this procedure is also appropriate for regulations under clause

44(7). There are however differences in the scope of the regulation making powers. The existing powers under the 1996 Act would not allow, as clause 44(7)(b) does, provision to be made about the circumstances in which it is not necessary to carry out a review despite there otherwise being a duty to do so under the primary legislation. In the case of re-assessments, clause 44(7)(b) will replace a provision currently contained in primary legislation. Section 328(2) of the 1996 Act specifies the circumstances in which a local authority is not required to carry out a re-assessment. It is limited to the case where an assessment has been carried out within six months of the date of the request. There is no equivalent provision in clause 44. Instead, as is made clear by the memorandum, the intention is for such provision to be included in regulations made under clause 44(7)(b) in order to allow greater flexibility in setting the period of time. But it is noteworthy that clause 44(7)(b) goes much wider than allowing different periods of time. It provides a general power to disapply the duty to carry out reviews and re-assessments in specified cases. We are surprised that no explanation is given in the memorandum for this wider scope which would allow a significant derogation from the duties to review and re-assess imposed under clause 44(1) and (2). **We invite the House to ask the Minister better to justify the scope of the powers conferred by clause 44(7)(b) which to us, in the absence of an explanation, appears to be inappropriately wide.**

#### **Clauses 49 and 4– Personal Budgets and Direct Payments**

12. Clause 49 requires a local authority, which maintains an EHC plan for a child or young person, to prepare a personal budget if asked to do so by the child's parent or the young person. Clause 49(3) provides for the detailed provision about personal budgets to be contained in regulations. This includes provision about making requests for personal budgets, about the amount of a personal budget, about the source of the funds for personal budgets, for making direct payments out of a personal budget, for the types of provision to which personal budgets and direct payments may relate, about when and on what conditions direct payments may be made and when repayment may be required. Regulations under clause 49 are subject to the negative procedure.
13. Clause 49 in part re-enacts sections 532A to 532C of the 1996 Act which were inserted by the Education Act 2011 which provided for the piloting of schemes for the making of direct payments. When reporting on these provisions in our 20th Report of the 2010-12 Session, we recommended that they be subject to the affirmative procedure. Since we reported, an order has been made under sections 532B and 532C of the 1996 Act setting out detailed provisions with respect to direct payments. The memorandum explains that, with the experience obtained from the pilot schemes, the negative procedure is now suitable, particularly as the issues have been subject to a considerable degree of parliamentary scrutiny. However there are differences between the scope of regulations under clause 49 and the order making powers under sections 532B and 532C of the 1996 Act. Clause 49 is not limited to direct payments but deals more generally with establishing personal budgets for securing the whole range of provision specified in an EHC plan. The regulations will cover matters such as determining the amount of a personal budget and the sources of the funds for a personal budget (which may include bodies other than the local authority). **Whilst it seems reasonable for the detailed provisions**

**relating to personal budgets to be set out in regulations, the effect of clause 49 is that the regulations will set out the entire system for personal budgets. This goes beyond a power to make direct payments, and accordingly we consider the affirmative procedure should apply at least in relation to the first exercise of powers.**

14. We have reached the same view on section 4A of the Adoption and Children Act 2002 inserted by clause 4 which is in near identical terms to clause 49. The memorandum explains the use of the negative procedure because the regulations will be concerned with “procedural and technical detail”. **We take the view that, because these are novel proposals and the whole system of personal budgets will be set out in the regulations, the regulations should be subject to the affirmative procedure at least in relation to their first exercise.**

#### Clause 51 – Appeals

15. Clause 51 provides a right of appeal to the First-tier Tribunal in respect of certain matters concerning EHC needs assessments and EHC plans. The matters to which the right of appeal applies are set out in subsection (2). Subsection (4) provides for regulations to make provision about appeals and includes provision about the powers of the Tribunal on determining an appeal. **Under the Education Act 1996 the powers of the Tribunal on determining appeals are set out on the face of the Act. No explanation is given in the memorandum as to why a different approach has been adopted here or as to how it is envisaged the powers will be exercised. We are not convinced that there is a need for this delegation, but if there is we consider the affirmative procedure should apply.** It strikes us that here, as in a number of other provisions referred to in this report, the approach has been to delegate power to make provision which under the 1996 Act appears on the face of the Bill, without in our view sufficient explanation for the decision to move the provision from primary to subordinate legislation.

#### Clauses 54 and 55 – Appeals and Claims by Children

16. Clauses 54 and 55 allow the Secretary of State by order to provide that children in England may appeal to the First-tier Tribunal under clause 51 of the Bill or make a claim to the Tribunal under Schedule 17 to the Equality Act 2010. Under clauses 54 and 55 all the elements relating to the right of children to appeal or make claims will be contained in subordinate legislation; there is nothing on the face of the Bill other than the order making power itself. Provision is already made in the 1996 Act for appeals to be made by children in Wales: see sections 332ZA to 332ZC. But in that case most of the provisions appear on the face of the primary legislation.
17. Orders under clauses 54 and 55 are subject to the negative procedure subject to one exception: an order under clause 55 is subject to the affirmative procedure where it amends or repeals a provision of primary legislation. In relation to orders under clause 54 the memorandum states that the Government believe it appropriate for “the order setting out the procedural details” to be subject to the negative procedure. In relation to clause 55, it is noted that the order will make provision about the same sort of matters as the order establishing the pilot schemes.

18. We are concerned that in such an important area none of the matters relating to appeals and claims by children is placed on the face of the Bill. In this context, we cannot accept that it is appropriate to describe matters such as the age at which a child can bring an appeal, or the provisions for determining whether a child is capable of bringing an appeal, as procedural details. In our view the negative procedure does not provide a sufficient level of parliamentary scrutiny. These are novel proposals which will have an important impact on the rights of children. **If the substantive provisions governing appeals and claims by children are all to be contained in subordinate legislation, then we consider the order containing them should be subject to the affirmative procedure, irrespective of whether the powers are exercised under clause 54 or 55.**

#### Clause 68 – Making and Approval of Code of Practice

19. Clause 67 requires the Secretary of State to issue a code of practice which gives guidance to local authorities in England and the other bodies listed in clause 67(1) about the exercise of their functions under Part 3 of the Bill. Each of them is required to have regard to the code. Clause 68 requires a copy of the code to be laid before Parliament in draft and provides for it to be subject to the negative procedure. This is different from the position under the 1996 Act under which the code is subject to the draft affirmative procedure.
20. The memorandum explains the use of the draft negative procedure by reference to other statutory codes where the same procedure applies. But the contexts in which those other codes apply are very different, and no specific explanation is given as to why the draft negative procedure is appropriate in this case. The issue of the procedure to be applied to the code of practice was considered by the House of Commons Education Committee during its pre-legislative scrutiny of the special educational needs provisions of the Bill.<sup>3</sup> That Committee emphasised the importance of the code remaining subject to “meaningful parliamentary scrutiny”. It recommended the negative resolution procedure but its recommendation was based on the understanding that the affirmative procedure would delay and make more difficult the process of revising the code. We are not convinced that the draft affirmative procedure would cause greater delay. If anything we consider there may be circumstances in which the draft negative procedure might cause greater delay because of the need to wait for the 40-day period to elapse before the code of practice could be brought into force. **We do not believe that the case has been made out for applying the draft negative procedure and consider the code of practice should remain subject to the draft affirmative procedure.**

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<sup>3</sup> 6th Report, Session 2012-13, (HC 631-I), paragraph 129.

### EUROPEAN UNION APPROVALS BILL

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21. This Government Bill does not delegate legislative power.

### LITTERING FROM VEHICLES BILL [HL]

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22. This Private Member's Bill had its Second Reading on 19 July. It introduces civil penalties in England for the registered keeper of a vehicle from which a person contravenes section 87 of the Environmental Protection Act 1990. That section makes it an offence to deposit and leave litter in any place that is open to the air.
23. Subsections (5) to (8) of clause 1 confer delegated powers. Subsection (5) requires the amount of the civil penalty to be specified in regulations, as must be the procedure for imposing penalties and recovering costs (subsection (6)), and the contents of the notice to be given to those liable to pay a penalty (subsection (7)). Regulations may also make provision about appeals (subsection (8)). The bill does not, however, require any of the regulations to be made by statutory instrument; nor does it specify who is to make them.
24. **We recommend that the Bill should be amended to address both of these points, and that all regulations made under clause 1 should be subject to a Parliamentary procedure. Unless the maximum amount of the civil penalty can be specified in the Bill itself, we would expect regulations under subsection (5) of clause 1 to require the affirmative procedure. We also consider that the affirmative procedure should apply on the first exercise of powers conferred by subsections (6) to (8) of that clause; but thereafter the negative procedure would seem appropriate.**

### ALAN TURING (STATUTORY PARDON) BILL [HL]

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25. This Private Member's Bill does not delegate legislative power.

### CLEAN NEIGHBOURHOODS AND ENVIRONMENT (AMENDMENT) BILL [HL]

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26. This Private Member's Bill does not delegate legislative power.

**DRAFT LEGISLATIVE REFORM (REGULATION OF PROVIDERS OF SOCIAL WORK SERVICES) (ENGLAND AND WALES) ORDER 2013**

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27. The Committee's role in relation to a Legislative Reform Order (LRO) is described in our first Report on such an Order:<sup>1</sup> "When considering an LRO, our role is not to consider in depth the policy in the draft order, but to consider whether it is 'appropriate' to be made under the 2006 Act [Legislative and Regulatory Reform Act 2006]; if so, whether it meets the tests in the 2006 Act; and to consider the matters considered for other instruments by the Joint Committee on Statutory Instruments."
28. The tests in the 2006 Act are as follows:
- "(a) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
  - (b) the effect of the provision is proportionate to the policy objective;
  - (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
  - (d) the provision does not remove any necessary protection;
  - (e) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
  - (f) the provision is not of constitutional significance."
29. In our 3rd Report of the current Session, we recommended that the draft Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013, laid by the Department for Education (DfE) on 13 May 2013, should be subject to the super-affirmative procedure. This meant an extension in the period (to 12 October 2013) during which the draft Order would lie before the House, before the Government could arrange for it to be debated. We considered that, while the LRO met the other tests in the 2006 Act, the Department had not provided an adequate justification of its statement that the LRO would not remove any necessary protection.
30. The purpose of the draft LRO is to avoid the imposition of new burdens on Her Majesty's Inspector of Education, Children's Services and Skills (HMCI), providers of social work services, and local authorities if the Government bring into force Part 1 of the Children and Young Persons Act 2008 Act, allowing local authorities to delegate certain social service functions to providers of social work services. In our 3rd Report, we noted that, while the LRO would remove the requirement for registration and inspection of providers of social work services in England by HMCI, the explanation of future arrangements given in the accompanying Explanatory Document (ED) concentrated mainly on inspection, and made little reference to registration under Part 2 of the Care Standards Act 2000. Registration under Part 2 of that Act would allow the imposition of national minimum standards and requirements as to the fitness of providers, and

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<sup>1</sup> 1st Report, Session 2007-08 (HL Paper 11), paragraph 39.

would also provide a mechanism for removing providers who were failing to meet standards. Nothing was said in the ED about the removal of these protections and why the protections were no longer considered to be necessary.

31. On 2 July 2013, Mr Edward Timpson, MP, Parliamentary Under-Secretary of State, DfE, wrote to the Chairman in response to the Committee's 3rd Report. We are publishing that letter at Appendix 1. Mr Timpson states his belief that the regime proposed by the LRO, which would hold local authorities directly accountable for ensuring that commissioning arrangements maintained appropriate standards, would be at least as effective as a separate regime under which providers were subject to regulation.
32. We are not persuaded that this is the case. In his letter, Mr Timpson says that there is scope within the anticipated arrangements to meet the specific issues raised by the Committee in relation to the removal of protections. However, in our view, the possibilities for doing so which are mentioned in his letter are, hypothetical and contingent, and do not provide a secure basis for ensuring that coherent standards for the delegated provision of social work services are defined, implemented and enforced.
33. **Having considered the letter from Mr Timpson, we remain of the view that the Department has not justified its statement that the LRO will not remove any necessary protection. In the light of this view, we conclude that draft Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013 fails to meet the relevant condition set out in section 3(2)(d) of the Legislative and Regulatory Reform Act 2006. We recommend that the LRO should not proceed.**

## **APPENDIX 1: DRAFT LEGISLATIVE REFORM (REGULATION OF PROVIDERS OF SOCIAL WORK SERVICES) (ENGLAND AND WALES) ORDER 2013: GOVERNMENT RESPONSE**

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I am writing following the publication of the Delegated Powers and Regulatory Reform Committee's report on 6 June 2013.

In it the Committee gives its assessment of the Draft Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013 (the Order).

The Committee has properly given serious thought to the question of necessary protection. Given that the proposal relates to children in care, this too has been my main concern in preparing the Order. Below I consider the issues raised by the Committee and explain further my assessment that the Order will not remove protections.

The Committee's report says

“The explanation of future arrangements given by the Department in the ED bears largely on inspection, and makes little reference to registration under Part 2 of the Care Standards Act 2000. Registration under Part 2 would allow the imposition of national minimum standards and requirements as to the fitness of providers. It would also provide a mechanism for removing providers who are failing to meet standards. Nothing is said in the ED about the removal of these protections and why these protections are no longer considered to be necessary.”

My starting point in considering the question of regulation, registration, standards and inspection, is that the overall objective is to ensure the quality of the services provided to the children in our care system. I consider that the question of whether this should be done under delegated arrangements by placing direct expectations and requirements on the provider or the commissioner to be relevant only insofar as it affects the care that children receive.

The Committee is correct that the effect of the Order would be to move away from direct regulation of providers in the manner described. However, I believe that the regime envisaged under the proposal, which would hold local authorities directly accountable for ensuring that commissioning arrangements maintained appropriate standards, would be at least as effective as a separate regime under which providers are subject to regulation. Indeed it seems to me that the former arrangement is preferable as it sets consistent expectations across the piece, regardless of the mechanism of service provision, and helps avoid any temptation to “pass the buck” between commissioner and provider in the event that services are judged to be inadequate.

Beyond that general principle, I believe there is scope within the anticipated arrangements to meet the specific issues raised by the Committee that protections may be removed through the loss of the Secretary of State's ability to:

- set minimum standards for providers of social work services; and
- prevent those who don't meet those standards from continuing to operate in the market.

Ofsted does not, of course, have a registration scheme for providers of social work services in place at present. We cannot, therefore, compare the specifics of Ofsted's quality assurance of local authorities with a theoretical system for the

regulation of providers. That said, I believe the anticipated regime does allow for expectations very similar to those described by the Committee to bear upon providers if that is considered desirable. For example:

- Under its leadership, management and governance judgement the proposed Ofsted inspection framework sets explicit expectations on local authorities which they must ensure are met by those they delegate their powers to. This will be tested by inspection. As delegated arrangements develop I would, of course, look to and work with Ofsted to ensure that its inspection framework remains appropriate. It might in the future prove desirable to place further expectations on the operation of delegated arrangements, so that satisfactory inspection grading was dependent on these expectations being met. This in effect provides an alternative mechanism for setting minimum standards expected of providers, but does so through Ofsted's relationship with the commissioning authority.
- In addition, should concerns at some point emerge, under section 136(3) and (4) of the Education and Inspections Act 2006 the Secretary of State could request an inspection of particular LAs (those delegating functions in this instance) in respect of particular matters that he specifies. It would, therefore, be possible to frame such a request by reference to standards for the discharge of delegated functions. Ofsted would then be obliged to consider the provision in these terms and could report on them alongside LA inspection reporting on how well or otherwise the authority was discharging its statutory duties.
- Where Ofsted identifies inadequate services the Secretary of State can issue directions on improvement to the LA. In this context, should serious weaknesses be identified within the delegated arrangements of a local authority the Secretary of State could instruct the authority to end these arrangements and withdraw from contracts with a specified provider. I consider this negates the need for deregistration arrangements.

I consider the above provisions allow for at least the same degree of protection as a separate regime of standards and registration for providers. In addition I would draw the Committee's attention to some further protection that could be put in place under the planned regime.

- Under section 7 of the Local Authorities Social Services Act 1970, The Secretary of State can issue statutory guidance which LAs are expected to comply with except in exceptional circumstances. In this instance such guidance might set out expectations in relation to the award and discharge of a contract delegating functions – again effectively describing a set of minimum standards – or might look more widely at arrangements to protect the interests of affected children. For example, the Committee might be interested to know that I have already asked officials to consider whether it would be desirable to issue guidance on managing conflicts of interests in the event that we commence part 1 of the CYPA 2008.

In the event that we do fully commence Part 1 of the Children and Young Persons Act I intend to monitor closely how local authorities put delegation arrangements into effect. I expect to take stock early in 2014, and decide whether to pursue some or all of the possibilities that I describe above for strengthening protections still further.

I would be very happy to correspond further with the Committee on this or any other questions that the draft Order prompts. As you know, sunset provisions in the 2008 Act mean that timescales are very tight if we are to pursue the proposal. I would therefore be very grateful if, should we decide to continue with the Order at the end of the sixty day scrutiny period, the Committee was able to give it swift consideration.

I am copying this letter to the chair of the Regulatory Reform Committee.

I have discussed and agreed the contents of this letter with the Office of the Chief Inspector.

Edward Timpson MP

Parliamentary Under Secretary of State for Children and Families

2 July 2013

## APPENDIX 2: MEMBERS AND DECLARATIONS OF INTERESTS

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

### Children and Families Bill

Lord Marks of Henley on Thames for undertaking family casework in his capacity as a Barrister.

#### Attendance:

The meeting on the 24 July 2013 was attended by Baroness Andrews, Baroness Farrington of Ribbleton, Baroness Fookes, Baroness Gardner of Parkes, Lord Haskel, Countess of Mar, Lord Marks of Henley-on-Thames, Rt Hon. Lord Mayhew of Twysden and Baroness O'Loan and Baroness Thomas of Winchester.