



Office of the Children's Commissioner's response to the Department for Education consultation

Powers to delegate children's social care functions

May 2014

About the Office of the Children's Commissioner

The Office of the Children's Commissioner (OCC) is a national public sector organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. We promote and protect children's rights in accordance with the United Nations Convention on the Rights of the Child and, as appropriate, other human rights legislation and conventions.

We do this by listening to what children and young people say about things that affect them and encouraging adults making decisions to take their views and interests into account.

We publish evidence, including that which we collect directly from children and young people, bringing matters that affect their rights to the attention of Parliament, the media, children and young people themselves, and society at large. We also provide advice on children's rights to policy-makers, practitioners and others.

The post of Children's Commissioner for England was established by the Children Act 2004. The Act makes us responsible for working on behalf of all children in England and in particular, those whose voices are least likely to be heard. It says we must speak for wider groups of children on the issues that are not-devolved to regional Governments. These include immigration, for the whole of the UK, and youth justice, for England and Wales.

The Children and Families Act 2014 changed the Children's Commissioner's remit and role. It provided the legal mandate for the Commissioner and those who work in support of her remit at the OCC to promote and protect children's rights. In particular, we are expected to focus on the rights of children within the new section 8A of the Children Act 2004, or other groups of children whom we consider are at particular risk of having their rights infringed. This includes those who are in or leaving care or living away from home, and those receiving social care services. The Bill also allows us to provide advice and assistance to and to represent these children.

Our vision

A society where children and young people's rights are realised, where their views shape decisions made about their lives and they respect the rights of others.

Our mission

We will promote and protect the rights of children in England. We will do this by involving children and young people in our work and ensuring their voices are heard. We will use our statutory powers to undertake inquiries, and our position to engage, advise and influence those making decisions that affect children and young people.

The United Nations Convention on the Rights of the Child

The UK Government ratified the United Nations Convention on the Rights of the Child (UNCRC) in 1991.¹ This is the most widely ratified international human rights treaty, setting out what all children and young people need to be happy and healthy. While the Convention is not incorporated into national law, it still has the status of a binding international treaty. By agreeing to the UNCRC the Government has committed itself to promoting and protecting children's rights by all means available to it.

The legislation governing the operation of the Office of the Children's Commissioner requires us to have regard to the Convention in all our activities. Following an independent review of our office in 2010 we are working to promote and protect children's rights in the spirit of the recommendations made in the Dunford report and accepted by the Secretary of State.

In relation to the current consultation, the Articles of the Convention which are most relevant to this area of policy are:

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| Article 3 | The best interests of the child must be a top priority in all actions concerning children |
| Article 7 | Every child has the right to a legally registered name and nationality, as well as the right to know and, as far as possible, to be cared for by their parents |
| Article 8 | Governments must respect and protect a child's identity and prevent their name, nationality or family relationships from being changed unlawfully. If a child has been illegally denied part of their identity, governments must act quickly to protect and assist the child to re-establish their identity |
| Article 9 | Children must not be separated from their parents unless it is in the best interests of the child (for example, in cases of abuse or neglect). A child must be given the chance to express their views when decisions about parental responsibilities are being made. Every child has the right to stay in contact with both parents, unless this might harm them |

¹ You can view the full text of the United Nations Convention on the Rights of the Child on the Office of the United Nations High Commissioner for Human Rights website at: <http://www2.ohchr.org/english/law/crc.htm>. A summary version, produced by UNICEF, is available at: http://www.unicef.org/crc/files/Rights_overview.pdf

- Article 12** Every child has the right to say what they think in all matters affecting them, and to have their views taken seriously.
- Article 16** Every child has the right to privacy. The law should protect the child's private, family and home life.
- Article 20** If a child cannot be looked after by their family, governments must make sure that they are looked after properly by people who respect the child's religion, culture and language.
- Article 21** If a child is adopted, the first concern must be what is best for the child. The same protection and standards should apply whether the child is adopted in the country where they were born or in another country.
- Article 30** Every child has the right to learn and use the language, customs and religion of their family whether or not these are shared by the majority of the people in the country where they live.
- Article 39** Children neglected, abused, exploited, tortured or who are victims of war must receive special help to help them recover their health, dignity and self-respect.

OCC response to the consultation 'Powers to delegate children's social care functions'

1. Introductory comment

This response is informed by the detailed comments concerning the rights-based approach to child protection and related services found in the UN Committee on the Rights of the Child's General Comment 13 on UNCRC Article 19 (2011). This demanding framework, within which present UK child protection guidance fits, makes clear the importance of the State's responsibility to the most vulnerable children. Though the Convention is not incorporated in English law, it echoes, and is echoed in, much of what the law already requires. It is also frequently quoted in court cases that set precedents for future practice.

We understand that the legal framework for delegation by local authorities of some of the functions of children's services is already in place, and that this consultation therefore concerns the regulations now under consideration in respect of further delegation. This response provides comments which reflect our overriding concern that any such changes, above all other considerations, should ensure that children's best interests are paramount.

It is not for this Office to defend or promote any particular model of service provision. Sector-wide recognition that the services concerned can be challenging to plan and deliver does not imply that any specific model – whether public-led, private-led or in a mixed economy which features both together with voluntary sector organisations – is intrinsically better for getting the vital work done. High standards should not be the province of any one sector. What matters to this Office is that the service the child receives and the centrality of the child's interests should guide all that is proposed and done, whoever is commissioning, providing, evaluating and regulating those services. In light of the importance of putting children's rights to safety and welfare above all other considerations, as spelled out in the 1989 Children Act supported by UNCRC Article 3, we will focus our comments on the principles which should underpin arrangements for the extension of delegation of social care functions, in particular in respect of child protection.

The main issue concerns the ability of any local authority to continue to exercise the legal responsibility it will continue to hold for ensuring its statutory obligations are met when undertaken by any outsourced provider. Whatever partnership arrangements are made for the delivery of services, it is essential that the local authority is positively enabled (and in cases of any conflict or contractor failure, strongly supported) to exercise this responsibility in the most effective way. This will ensure a high quality of service to the children, young people and families concerned. Quality standards for all providers, and issues of transparency and due accountability, are key issues for further development if these changes come to pass.

2. The child protection system

It remains essential that the agenda for improvement in child protection, (proposed in the review commissioned by the Government and led by Professor Eileen Munro, the findings of which were supported by the Government and those running services) is given the time needed so that all involved can embed, develop, and evidence that improvement. There is a risk that major changes to arrangements for delivery and accountability at this stage could distract from ensuring such improvement takes place. The analysis in and recommendations made by the Munro review team's sequence of reports requires a strong, whole-system approach to the protection of the most vulnerable children in the country, supported by the transparent and rigorous public accountability of those who both commission and provide services.

Professor Munro placed a strong emphasis on early help, and on the need for the development of social work expertise. Pulling together and ensuring a strong, consistent, constantly learning system for all those working in and leading these challenging services, with clarity for lines of accountability as the Munro report recommends, may be more difficult to achieve. Especially in a system marked by the complexity and diversity which could result from widespread external delegation, given local authorities will retain ultimate responsibility.

Such increased complexity may also make the strategic co-ordinating task of Local Safeguarding Children Boards (LSCB) more difficult in any given locality. The lessons being learned from well publicised tragedies involving child deaths include the need for sound inter-agency liaison and communication. This means the role of an effective LSCB is vital to the protection of children through strategic partnership with all concerned. It would be a necessity, in a newly diversifying system, that the contents and subsequent operation of '*Working Together*' Guidance addressed the obligations of delegated providers so that they were bound by it alongside statutory agencies.

To ensure that the complexity alluded to above does not lead to a lack of due accountability, or to a reduction of system-wide multi-agency activity in an area, we consider all delegated social care services should be required to have formal registration by Ofsted, in addition to an expectation that they will be held to account by rigorous and expert inspection, just as local authorities currently are, so that the highest standards can be both tested and maintained for these most vulnerable children.

3. Children's experiences

In addressing the principles which should underpin the child protection system, and in line with Professor Munro's analysis of these, we would point to the body of evidence available from children and young people on what they, as experts in their own and other children's life stories and experiences, consistently say they need from the services concerned. The work we and others have done has shown that children wish to have continuity of relationships and support with those who care for and work with them.² There must, in any new system that develops, be assurance that what could, in the worst case scenario, become short-term commissioning and decommissioning cycles, will not be permitted to prevent the continuity they ask for and deserve.

Children and young people also value – and under the UNCRC in Articles 12 and 19 they are guaranteed – a voice both in plans for meeting their needs, and the shaping and evaluation of services in their area. They are clear in stating that they want to see their entitlements to support fulfilled and consistently applied across all areas of the country. The latter is important given many children and young people move across borders from time to time.

Care leavers in particular have well-recorded and oft-rehearsed issues, including their need for ongoing support and help with accommodation and other needs. All of these needs now underpin the national, cross-governmental Care Leavers' Strategy.

We consider there should be a requirement on any outsourced provider that any planning and decision making put in place as part of services which are delegated by the local authority, ensures the continued active engagement of children and young people in planning for their support and care and is guided by the rights they are accorded under Article 19 of the UN Convention on the Rights of the Child. The involvement of children in planning for and feeding back on progress in their own lives and futures has developed considerably in recent years in some areas, but continues to be inconsistent.

These proposals present an opportunity for the development of very high binding standards on any provider competing for future service contracts, including those who are working in and bidding for in-house teams in a local authority. Such a development would be consistent with best practice models in other local authority services, where competitive markets and a hard-won tendering culture have been commonplace for a long time. As the contract monitor, the local authority should then be free, and should be expected, to be very robust in that monitoring, and to champion the child if a contractor does not deliver what the service specification and subsequent contract require.

² For example OCC publications 'It takes a lot to Build Trust', Recognition and Telling: developing earlier routes to help for children and young people (2013) and OCC consultation responses to the Munro Review of Child Protection.

4. Accountability and quality control

- 4.1 The intended continued accountability of the local authority for ensuring statutory obligations are met will require the very close scrutiny and audit of any services which are outsourced. It will be important that all concerned are clear how the necessary overall planning and strategic direction will be retained if and when service delivery on the ground is delegated. Such close scrutiny will involve considerable resource input from within the local authority and the direction of suitably qualified and experienced staff, skilled in compiling service specifications and in contract law. There would be a clear need for the development of these skills if the local authority is to retain the ultimate statutory responsibility for ensuring services meet needs and measure up to high standards.
- 4.2 We acknowledge that services elsewhere in localities have developed these abilities and that it should be possible to do so in the services under discussion through this consultation. However, the Government is as aware as we and others are that in some cases, contracts awarded to organisations promising a great deal for vulnerable people through outsourced service models, have been woefully both over-sold and under-delivered. Vulnerable people have suffered as a result, sometimes appallingly and to the nation's abiding shame. Any implementation of what is proposed here, must determine from the start that this cannot happen in these services, given how vulnerable the children concerned will remain.
- 4.3 It is not clear from the consultation paper how, and to what level, it would be expected or anticipated that decision making would also be delegated when services are outsourced. It will be imperative that a future system can ensure that local authorities and key partners can, for example, plan for sufficiency of services to meet local needs, which change with time. Local authorities can already make partnership arrangements with a range of organisations for a wide range of service provision. However, decision making on vulnerable children's needs and on the allocation of resources to meet them is not so delegated. If, as appears from the papers issued for this consultation, delegation under the revised Regulations will now include decision making, there are a number of issues to be addressed.
- 4.4 The potential for conflicts of interest must be avoided, e.g. when decision making bodies also provide services. Playing such a dual role can and does provide a perverse incentive. This could lead to purely financially based decision making, rather than that based on children's needs.

The experience and consequences of rapid expansion of the private sector in residential care must be considered. Already there appears to be emerging evidence that financial concerns can and do intrude on planning for children. There have been many unintended consequences of the shift towards majority provision from the private

sector in children's residential care. These have included:

- the concentration of residential provision in some areas – usually where land values and property prices are lowest, rather than resting on considerations of closeness to placing local authorities
- issues regarding areas in which providers have chosen to locate premises, in terms of children's basic safety, exposure to risk of abuse exploitation and harm
- the placement of children in settings which are out of area, when this is not always led by their needs, and related difficulties for local authorities in maintaining contact with children and scrutiny of settings, and also in planning and providing for the changing needs of their children in care population.

Such problems could be addressed by improvements in regional commissioning and planning, but they do indicate the need for careful consideration to be given to partnership and co-ordination of planning when a local authority is considering outsourcing provision. This is in addition to due consideration of the implications of extending the impact of market forces into children's social care provision. A potential consequence, which has occurred with a move to funding private provision, may be charges by providers to local authorities as commissioners, which have increased beyond what it would have cost to continue to run their own provision. Meanwhile the capital costs to restore in house services are no longer available, having been used in funding an outsourced model. Expertise has also left council employment, meaning that rebuilding an in-house offer is impossible because the service building resource is no longer available. Such consequences can lead to local authorities having less flexibility and ability to plan for and carry out their statutory duties responsively over time. Any new system will need to plan for these eventualities, and for alternatives to be brought quickly into place to avoid children being placed at greater risk.

- 4.5 We wish to know how information sharing and the management of information would operate after the engagement of commercial, or other non-statutory organisations in child protection processes and service provision. It will be important to the continuity and robustness of local authority accountability for statutory provision for the local authority, and the LSCB, to have powers to see and require disclosure of the records held by providers, to establish how decisions have been made about a child who remains their concern. It would be impossible for the system to succeed were local authorities holding ultimate statutory responsibilities to be unable to see such records, for example on the grounds of commercial confidentiality. This would be a pertinent matter in particular to the scrutiny required for serious case reviews. This issue reinforces the questions asked above about the extent to which decision making would be delegated, and about the implications

of any errors made in such decision making.

Issues of information sharing also relate to placement moves, and to children's access to services if their care moves between different providers. Obligations to share information must be made clear and unambiguous. They must not be fettered by commercial considerations and must engage the range of statutory services if this approach is to work. The principle of the paramountcy of the child's needs must be upheld. It may however be that there are issues here for other statutory bodies, such as the police, when engaged in highly sensitive operations, which will need further consideration.

5. Innovation

Innovation and flexibility are important to the continued improvement of services for children and their families. Such approaches can, and do, happen within local authorities. The Hackney model of reclaiming social work, for example, has been much praised and other areas are developing services along similar lines, designed to be ever more responsive to local need. Sector-led improvement, including work by ADCS on the needs of adolescents ('What is Care for?') and the concerted approach encouraged by the Children's Improvement Board and since continued by its key partners, has indicated this potential for innovative and joined up thinking. Many regional and sub-regional approaches are taken to social work training, recruitment and continuing professional development, contracting for foster carers and their training, finding adopters and readying and supporting them for becoming a child's family, and much else besides. That all of these things could be supported in a market based or mixed economy model is not at issue: what is, however, is that there may, under these proposals, be a "rush to a private-sector only" way of working in spite of it being clear that local authorities are both creative in and between themselves, and do not have to follow an outsourcing route unless they wish to do so.

6. Evidence

There is a pressing need for more concrete, consistent and properly evaluated evidence, on which all in the system should draw so as to improve it, concerning the effectiveness of different models of services for children. On this basis sensible decisions might be made to enable the planning of high quality, sustainable and stable, service provision.

It is not clear from the consultation materials issued, exactly how services would be proven to be improved by the extended delegation of what are currently key statutory functions in local authorities. In respect of the pilots of social care practices – an anticipated source of such evidence – the evaluation of these indicates limited benefits. Those which were identified, such as the smaller than average scale of teams and lower caseloads, should in fact be available within well planned, resourced, led and managed local authority provision. The successful pilots were, as the evaluative evidence to hand indicates, still heavily reliant on the local authority and there was not

evidence of reduced costs being incurred by the changes brought to models of service provision and delivery.

The additional elements entailed in the delegation of statutory provision from local authorities to outsourced providers will require great care, given the potential conflicts of interest inherent in being both contractor and outsourced holder of powers which were once the province solely of statutory bodies accountable to the electorate and to government. It will be important, in this regard, to see the evidence emerging from Doncaster, for example, as to the benefits and either the evidenced or envisaged drawbacks to children of a range of different models of intervention, all of which are designed to address both real and perceived failures and problems in both service delivery, and the tangible and proven protection of children.

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