



Department  
for Business  
Innovation & Skills

**FOCUS ON ENFORCEMENT  
REGULATORY REVIEWS**

**Review of Enforcement in the  
Childcare Sector**

MAY 2014

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## Executive Summary

- **The need for regulation of the sector is widely recognised**, and generally welcomed, and evidence exists of some very good childcare provider relationships with Ofsted inspectors (or those inspecting on their behalf). The larger providers appear to enjoy constructive senior engagement with Ofsted.
- **Local authority advice and their role as a “critical friend” is particularly valued** although in some cases concerns were expressed about examples of local authority advice provided (eg a small rural day nursery being given a form in order to register as a food business for the purposes of food safety regulation). Some providers expressed concerns that the local authority advice role may be withdrawn; these concerns were exacerbated by the fact that whilst Ofsted has a duty to bring about improvement through inspection, its role is not to give individual advice to providers.
- Confusion exists over **demarcation limits between the various regulatory authorities and their statutory remits**. Very few providers to whom the review team spoke were able to explain the differences between Ofsted’s general role in ensuring child well-being and those of other regulatory authorities, such as environmental health (creating a clear overlap in for example food hygiene enforcement). Examples were also provided of contradictions: e.g. an Ofsted inspector suggesting fire doors were impeding “free flow” of children.
- **Generic advice on a provider’s responsibilities under the various regimes is hard to find**. Providers complain that there is no single, consistent guide to basic compliance (i.e. Ofsted’s regulatory work plus areas covered by other regulators, including local authorities).
- Concerns – particularly by smaller providers – were expressed over the **quality, volume and coherence of Ofsted guidance**, and in particular about the co-existence within the same Early Years Foundation Stage requirements and therefore inspection of Ofsted’s dual objectives of ensuring child safety and improving educational standards. There are more than 1000 pages of Ofsted guidance, fact-sheets and forms in respect of early-years provision (whether aimed specifically for providers, or provided for parents or others and published in the interests of transparency); small providers in particular complained that the burden of familiarisation or finding the answer to specific questions was considerable.
- Many providers are concerned that there is not a level playing field, as they consider parents’ ability to compare providers’ performance like-for-like across England is being undermined by **inconsistent inspection and rating, and concerns over the accuracy of some written reports**. Larger providers to whom we spoke pointed to discrepancies in inspection outcomes in different parts of the country despite the comparable facts (such as set-up, methods of operations etc) being the same. In addition, childminders to whom we spoke provided evidence of “cut and paste” report writing, where outdated and incorrect facts were included (ie not relating to their actual business, or to the current situation).
- Providers and advisers point to the absence of **inspector-accountability or the ability to challenge a finding** that is perceived to be unfair, and this is linked with confusion over the impact and nature of recent changes to inspections which are triggered by a concern.

For example, appeals against ratings are dealt with via the standard complaints mechanism (which some of the providers to whom we spoke suggested are better suited to dealing with grievances over an inspector or the way an inspection was conducted). Childcare providers have also expressed concerns about the way these inspections are triggered, lack of awareness of evidence that Ofsted may make use of in assessing the provider during such an inspection, and the potential for the resulting report – even if the original concern is found to be without merit – to give parents the false impression that concerns exist about the setting.

- The smallest providers to whom we spoke complain of a **lack of proportionality in the inspection system**. For example, while the inspection of a large day nursery with 200 plus children of all ages might typically take a day, the inspection of a childminder looking after three children can, the review was told, last a similar length of time.
- **Several providers thought Ofsted could do more to provide encouragement for the sector to comply, and recognise good practice in its inspection regime**. Several childcare providers argued that if Ofsted were more prepared to help them understand how to meet their obligations ahead of inspections, rather than rely on inspections to identify shortcomings, overall compliance would be improved and the sector feel more supported. Some providers felt that Ofsted did not give sufficient credit - for example through “earned autonomy” from inspections – for those settings that were independently accredited as having met certain standards.
- **Concerns over the wider package of childcare reforms** on which the Government was consulting at the time (the creation of childminder agencies, relaxation of staff-children ratios, and changes to Ofsted’s inspection and rating system) were also expressed by childcare providers and some parents.

## Introduction and Context

1. This paper summarises the findings of the Focus on Enforcement review of the Early Years Childcare sector. Focuses on Enforcement reviews examine the impact of regulatory delivery by national and local regulators in particular sectors of the economy. Each review is a short, sharp investigation of the experiences of stakeholders. They are conducted by a small team and typically include around eight weeks of fieldwork.
2. This review looked at evidence in respect of delivery and enforcement of regulation in relation to childminders, nurseries and pre-schools for children in the early years age group (birth to five years of age). This paper summarises the evidence made available to the review team, presenting it as a series of findings. In common with all Focus on Enforcement reviews the paper does not make recommendations for reform but rather seeks to identify the impact and consequences of current enforcement practice based on the review's fieldwork. Relevant regulators and departments are separately invited to respond to these findings.

### *Input to the evidence gathering*

3. The review team took evidence through visits and face-to-face discussions and teleconference meetings with 18 separate organisations, including self-employed childminders, nurseries, and intermediaries such as solicitors, and through the Focus on Enforcement website where 24 comments were posted. (See Annex A for list of contributors)

### *Scope and sector coverage of the review*

4. This review considered compliance and enforcement activity in England by national regulators and local authorities in respect of the regulation of childcare providers, nurseries and pre-schools for children in the early years age group. The intention was to identify any aspects of that compliance and enforcement activity that appeared to be unreasonably holding back those operating (or potentially operating) in the sector. The review also considered the impact on business of non-statutory third-parties who can also impose a compliance burden, as well as seeking examples of good practice.
5. The review looked in particular at, but was not limited to, the extent to which compliance and enforcement activity in childcare and pre-school education is proportionate to the risks it seeks to mitigate; targeted; consistent; transparent; and accountable. The review also invited views on the existence of any overlaps, gaps or lack of coordination between different regulatory regimes as seen from the perspective of the business or self-employed provider. The full scope of the review, including the working definition of “compliance and enforcement activity” adopted by Focus on Enforcement reviews, and listing other areas out of scope, is provided at Annex B.

## The “Childcare Sector” and Regulatory Regime

### *Early years childcare: characteristics, regulatory scope and purpose of the regime*

6. The childcare sector is a varied market, covering a diverse range of providers. These range from childminders, nannies, small private nurseries, nurseries, crèches, and pre-schools. Some nurseries are run by charities, voluntary organisations and social enterprises and many are run by large nationwide chains, including international companies.
7. Under the Childcare Act 2006<sup>1</sup>, most providers in England caring for children under the age of five must register on the Early Years Register (EYR), which is regulated by the **Office for Standards in Education (Ofsted)**. This review focuses on providers registered on the EYR and does not cover childcare provision that is not required to register with Ofsted such as provision for children aged three and over run by a school, or providers registered only on the Childcare Register such as run by the public sector, or nannies caring for children in the child's own home.
8. The review team was mindful of the fact that this is a regulated sector focusing on the well being of children. Regulation in this context includes the Early Years Foundation Stage statutory framework which contains requirements relating to both safeguarding and welfare and learning and development. Legal compliance with child protection and children at particularly vulnerable ages. Ofsted is required to assess legal compliance as well as qualitative progress of children in Early Years.
9. At the end of August 2012 there were just under 82,000 childcare providers registered on the EYR<sup>2</sup> providing over 1.3 million childcare places for children under five. There are three main categories of provider registered on the EYR<sup>3,4</sup>:
  - **Childminders** - who work with no more than two other adults, such as other childminders or childminder assistants. They care for children on domestic premises, most often in the childminder's home. There are 56,085 childminders on the EYR, including registered childminders who are currently inactive. Childminders account for around 68% of early years provision and childcare providers overall and offer around 283,300 childcare places.
  - **Childcare providers on non-domestic premises** include **nurseries, playgroups, preschool provision, crèches (although most are exempt from registration), out of school clubs and holiday play schemes**. There are 25,695 providers in this group on the EYR. Childcare providers in this category account for around 31% of early years and childcare providers and offer around 1,028,100 places.

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<sup>1</sup> Department for Education website

<http://www.education.gov.uk/childrenandyoungpeople/earlylearningandchildcare/delivery/a0071032/childcare-act-2006>

<sup>2</sup> This is the total number of providers registered with Ofsted. As not all providers inform Ofsted that they have ceased provision, this number is likely to be higher than the actual number of providers currently operating in the market.

<sup>3</sup> Ofsted Annual Report 2010-11 (description of provider category)

<http://www.ofsted.gov.uk/sites/default/files/documents/annual-reports/o/Ofsted%20Annual%20Report%2010-11%20-%20full.pdf>

<sup>4</sup> The report of Her Majesty's Chief Inspector of Education, Children's Services and Skills: Early years 2011-12 (provider registration figures from end of August 2012).

- **Childcare on domestic premises** – a much smaller category - is provided where four or more adults work together on domestic premises to care for children. Most often these providers are groups of childminders and assistants that choose to work together in the home of one of them. There are 140 such providers on the EYR. This very small proportion of providers offers around 2,300 childcare places.

### *Regulatory Regime*

10. The childcare sector in England is covered by the following regulatory framework:

11. **The Early Years Foundation Stage (EYFS)<sup>5</sup>**: The EYFS is the statutory framework introduced in 2008 that sets the standards that all early years providers must meet to ensure that children learn and develop well and are kept healthy and safe. The EYFS covers children from birth up to five years of age and applies to anyone looking after children for more than 2 hours a day, unless exempt. The EYFS covers learning and development requirements such as communication and language, physical development and assessment and reporting of a child's progress. It also covers safeguarding and welfare requirements, staff/child ratios, staff qualifications and criminal record checks. The Department for Education has policy responsibility for the EYFS.

12. Ofsted inspect early years providers registered on the EYR, against the criteria set out in the EYFS. It carries out around 17,000 inspections<sup>6</sup> per year, and gives providers one of four grades:

- Outstanding (12% of providers in August 2012);
- Good (62%);
- Satisfactory (25%); and
- Inadequate (1%).

13. Since introduction of the EYFS a higher proportion of providers have been judged to be good or outstanding suggesting an improvement in the quality of childcare provision. Ofsted inspects providers who are awarded an outstanding, good or satisfactory rating at least once in the inspection cycle, currently set at four years. This cycle is set out by the Secretary of State for Education. However, providers judged as inadequate will receive a series of monitoring visits and will be re-inspected within 12 months. Providers judged as satisfactory or better may be inspected more frequently than four years, for example if a parent raises a concern.

14. Local authorities have a set of duties under the Childcare Act 2006. Funding for up to 15 hours per week of free childcare for children aged three and four is also distributed by local authorities. This can only be provided by providers registered on Ofsted's EYR. As well as providing advice and support, local authorities carry out

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<sup>5</sup> Early Years Foundation Stage (EYFS)

<http://media.education.gov.uk/assets/files/pdf/e/eyfs%20statutory%20framework%20march%202012.pdf>

<sup>6</sup> The report of Her Majesty's Chief Inspector of Education, Children's Services and Skills: Early years 2011-12

<http://www.ofsted.gov.uk/sites/default/files/documents/ar201112/The%20report%20of%20Her%20Majesty%207s%20Chief%20Inspector%20of%20Education%20C%20Children%27s%20Services%20and%20Skills%20Early%20years.pdf>

their own inspections and quality checks of early years providers to determine which providers qualify for free funding. The inspection cycle varies, but some local authorities aim to inspect a provision annually.

15. Other examples of regulatory activity experienced by childcare providers include (this list is not intended to be exhaustive – see Annex C for more detail, including a brief summary of childcare regulation in other parts of the UK).
- The Health and Safety at Work Act 1974 (enforced by local authorities and the HSE);
  - Food safety: food hygiene laws apply to the preparation, handling and provision of food by childcare providers. This is enforced by local authority environmental health officers. See Annex C for further detail;
  - Fire Safety: legislation requires those responsible for commercial buildings to carry out a mandatory fire risk assessment identifying the risks and hazards in the premises. This is enforced by Fire Authorities;
  - Data protection: childcare providers in England are expected to keep detailed records about individual children's development.

#### *Economic contribution of the sector*

16. The overall value of the UK childcare market, including nannies and public provision is estimated to have increased by 16% over the past 6 years, rising from £4.48bn in 2007 to £5.2bn in 2012<sup>7</sup>. In 2012, nurseries accounted for 55% of the total value of the childcare market, childminders 28%, with nannies making up the remainder. The increase in value of the childcare market has largely been driven by an expansion of the Nanny sector, which grew in value by 28% between 2007 and 2012. In comparison the nurseries sector observed growth in value of 15% while the childminders sector rose by 12% over the same period. It is estimated that market value of the sector will increase by 21% over the next five years, from £5.39bn in 2013 to £6.53bn in 2017.

#### *Employment and Qualifications*

17. Although between 2006 and 2011 the total number of staff working in the childcare sector increased by 23% (from 347,300 to 426,500), in 2011 the estimated total number of paid and unpaid staff in the childcare sector in England stood at 426,500<sup>8</sup>, a decrease of 2% on the previous year.
18. Staff qualification levels in the childcare sector have been steadily increasing over recent years although this varies across the different types of provision. In 2011 across all paid staff within all types of provider over three-quarters of staff (78%) were qualified to at least NVQ level 3 and 15% were qualified to at least NVQ level 6. Staff in full day care settings were the most likely to hold a level three qualification with 84%<sup>9</sup> of staff qualified to this level compared with 59% of childminders. This is in line with the

<sup>7</sup> Source: Keynote Market Update 7th Edition Nov 2012

<sup>8</sup> DfE: Childcare and Early Years Providers Survey 2011  
<https://www.gov.uk/government/publications/childcare-and-early-years-providers-survey-2011> the employment figures from this report should be noted with caution as they are likely to contain some level of double counting due to the survey methodology.

<sup>9</sup> See 16



requirements in the Early Years Foundation Stage, which do not set any minimum qualification requirements for childminders.

19. Increasing qualification levels for staff have also led to average wage increases of around 5% since 2009. However, the average hourly wage for those working in full day care in 2011 was £7.80 well below the national average hourly wage in the UK of £14.76 and more recently, wages in the childcare sector have remained relatively static, most likely due to the challenging economic climate.

#### *Recent history of the regulatory regime*

20. The Early Years Foundation Stage (EYFS) was first introduced in September 2008. The revised, simpler framework for the EYFS was published in March 2012 and implemented in September 2012 as feedback suggested that some aspects of the 2008 framework had proved over-bureaucratic and burdensome.
21. In January 2013 DfE published the report 'More Great Childcare'<sup>10</sup>, incorporating the Government's response to Professor Cathy Nutbrown's independent review 'Foundations for Quality'<sup>11</sup>. The DfE report laid out proposals for raising the status and quality of the workforce, freeing high quality providers to offer more places, improving the regulatory regime and giving more choice to parents. The report also set out proposals to create childminder agencies with the aim of relieving childminders of some of the burdens of setting up their own business, provide training, and matching childminders with parents. The Government has not yet consulted on proposals for childminder agencies.
22. Since 'More Great Childcare' was published, the Government has launched consultations on the proposals in the report including proposals on: relaxation staff / child ratios, staff qualifications and the role of local authorities in early years education and childcare, in particular proposing to make Ofsted the sole arbiter of quality, removing the duty from local authorities to provide advice and training for providers.
23. Ofsted has also recently consulted on certain changes to the way it inspects providers: in particular changing the rating of "satisfactory" to "requires improvement" for all providers non-domestic settings, and a proposal that for childcare on non-domestic settings. Two such ratings in a row would be likely to result in a rating of "inadequate" triggering further enforcement action and possible removal from the EYR.

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<sup>10</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/170552/More\\_Great\\_Childcare\\_20v2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/170552/More_Great_Childcare_20v2.pdf)

<sup>11</sup> <http://www.education.gov.uk/nutbrownreview>

## What we Heard

24. This section summarises the key evidence gathered during the review. It reflects the views expressed by childcare providers and brings together detailed input from written submissions (including those made to the Focus on Enforcement website), and discussions with a wide range of interested parties.
25. Given the pace of reform in this sector, and the range of Government proposals for policy reform, inevitably the team heard - and received comments on the website reflecting views on matters that went beyond the strict focus of the review such as those relating to then current Government consultations.
26. These key points are explained in more detail below.
27. **The need for regulation of the sector is widely recognised, and generally welcomed.** No childcare provider to whom the review team spoke questioned the need for effective regulation of the sector, with strong and effective sanctions available to the regulator for dealing with serious non-compliance. Many providers recognise that standards have improved as a result of the introduction of the Government statutory framework, and in particular the EYFS.
28. Evidence exists of some very good relationships between inspectors and childcare providers and larger providers appear to enjoy constructive senior engagement with Ofsted. The review team heard evidence of inspectors – from Ofsted and the two private sector contractors operating on their behalf, Tribal and Prospect – who worked well with providers, and took a common-sense approach to inspections, focusing on real-world impacts on children, rather than “ticking boxes”. These included imaginative approaches in recognising positive indicators (eg recognising the value of the way one provider was observed to use a large bed of nettles in the garden for learning and development activities, observing the life-cycle of butterflies whilst teaching the children that nettles sting, rather than seeing it solely as a safety hazard). Some providers gave examples of what they saw as poor inspection practice by drawing attention to excellent examples that they had also experienced. For example, an inspector taking a common-sense approach would not necessarily insist on posters being hung in the childminders’ home to see evidence of “print in the environment” – that is, the written word within sight of children as they play, etc – but would instead recognise that the childminder provided it in other ways such as via cereal packets.
29. Local authority advice and their role as a “critical friend” is particularly valued. Many of the providers we spoke to - particularly childminders and smaller nurseries – described turning to their local authority safeguarding teams as a first port of call for ad-hoc advice and training. This is consistent with the local authority statutory duties to provide information, advice and training, and to approve training undertaken. There was a

general perception that while Ofsted was unable to give advice to individual settings (on compliance with the law, or preparation for inspections) that went beyond the very general, local authorities in contrast were generally helpful and eager to see those providers within their areas succeed, both economically and within the terms of the EYFS.

Some of the providers that we spoke to did, however, complain about the quality of advice received from local authorities. This appears to be the case particularly where one local officer acts as a conduit for advice from other parts of local Government. One example given was of a small rural day nursery being given a form in order to register as a food business for the purposes of food safety regulation. The provider in question reported that the children are given nothing more than cheese and crackers, with fruit, as a mid-morning snack; but not having had the resource to investigate or challenge the requirement they had felt there was no alternative but to register as a food business.

Settings such as childminders and smaller day nurseries reported replying heavily on their local authorities for advice and help in preparing for inspections. The review picked up significant concerns from many that with downward pressure on Local Government budgets this much valued local authority resource was being withdrawn. In some cases personal help and coaching was being replaced by locally-provided training, but in others there was evidence of the service being significantly reduced. Current DfE proposals to remove the statutory duty on local authorities to inspect quality have fuelled concerns that this reduction will only become more acute. Given that Ofsted does not have a statutory role in providing such advice and help, providers expressed genuine concerns that a gap will open up leading standards to fall given the four year cycle of inspection.

30. Confusion exists over the demarcations between the various regulators and their statutory remits; and generic advice on a provider's responsibilities under the various regimes is hard to find. Very few providers to whom the review team spoke were able to explain the differences between, and the respective roles of, the various national and local regulators with whom they dealt. In large part this is likely to be because the very wide spectrum of activity in which Ofsted could potentially find child safety and welfare concerns: for example health and safety risks to children in stairwells; or concerns over the quality of nutrition.
31. While no provider argued that ensuring child safety should not be of paramount concern to Ofsted, the potential clearly exists for more than one regulatory authority to intervene on the same issue. For example, if on the day of the (Ofsted) inspection concerns are raised about the cleanliness of food preparation areas and this is written into the report, but on the following day the local authority environmental health inspector awards the kitchen five stars under the Food Hygiene Rating System, parents could at the very least be confused. The review team has not seen a clear explanation of how such regulatory overlaps are either avoided or their effects mitigated.
32. Sometimes there is genuine inconsistency between the requirements of different regimes. For example, a large childcare provider complained of having to choose between the advice of fire authority officers to keep fire doors closed at all times and an Ofsted inspector noting a report that keeping these doors closed impeded the "free

flow” of children within the setting. It should be noted that “free flow” is not a legal requirement and, of course, fire safety regulations are statutory requirements.

33. The above is reflected by the absence of clear, comprehensive “single point of entry” guidance for providers that runs through the full range of regulatory requirements they are likely to face. One newly appointed head of a day nursery told the review team that she had spent much of one night trawling the internet to pull together the various pieces of guidance provided by her local authority, Ofsted, the Information Commissioner’s Office, and so on. Ultimately she concluded that her trade association was the only body that provided any form of simple, basic and signposted guidance.
34. Concerns – particularly by smaller providers – were voiced over the quality, volume and coherence of Ofsted guidance, and in particular of the co-existence within the same inspection Early Years Foundation Stage requirements and therefore inspection of ensuring child safety and improving educational standards. Despite the absence of basic, comprehensive advice on all aspects of compliance in childcare settings, providers all agreed that Ofsted produces a significant amount of guidance for providers in respect of compliance with EYFS (including making available all its guidance to inspectors).
35. Typically, larger settings did not complain about the quality of this guidance. However, several smaller providers were highly critical, citing its sheer volume (the review team counted in excess of 1000 pages including fact-sheets and guidance for providers, parents and inspectors, accounting for 95 separate pieces of guidance) and impenetrability. It was suggested by several that the guidance would benefit from streamlining and easier navigation. This is particularly significant for small businesses who are unable to devote dedicated resource to understanding compliance requirements.
36. Because Ofsted has more than one statutory role - regulating a setting’s compliance with the law in respect of child safety and well-being reporting on the quality of provision for children’s learning and development, and making a positive difference to the quality of settings it inspects - and because these are covered in a single inspection, inevitably the guidance reflects this double purpose also. As a result some providers report that they are unsure whether they are being assessed against an absolute standard, common to all providers, or against the benchmark that was set in their own particular case at the last inspection. It was suggested that the guidance is not clear enough on this point in particular. The oft-repeated line that “satisfactory is not good enough” is clearly a difficult concept to express in guidance that aims to set out – at least in part – what minimum standards to comply with the law should look like. Satisfactory could for example be assumed to mean all legal requirements have been met.
37. Providers to whom we spoke are concerned that there is not a level playing field, as they consider parents’ ability to compare providers’ performance, like-for-like across England, is being undermined by inconsistent inspection and rating. Providers of all sizes whom we spoke to reported concerns about inconsistent inspection practice. While in some cases these were trivial, there were also worries that ratings could still be adversely affected by them. For example, one childminder contrasted her own case with that of a childminder colleague in the same town. In both cases the inspections

had been conducted during particularly wet weather that had prevented the children playing outside, and therefore the providers were unable to demonstrate their arrangements and protocols for outdoor play. In her case the inspector had asked her to talk through what she would have been able to demonstrate had the weather allowed it, allowing the inspector to give her the appropriate credit in the report; but reportedly in the case of her colleague the inspector had said they were unable to do so, and needed to see things with their own eyes, so no credit was given.

38. Larger “chain” providers with very similar settings in all parts of the country were able to point to discrepancies in inspection outcomes in different parts of the country. They reported having gone to some effort to compare the evidence contained in different written reports with the final ratings provided, and they were confident that evidence was being used inconsistently with damaging business consequences for the provider receiving the lower rating. While they acknowledged that given their size and resource they were well equipped to challenge Ofsted, clearly to do so would be a more significant challenge for a smaller provider.
39. Other concerns included some self-evidently absurd examples of “tick-box” inspection, such as one report that noted the absence of signage informing two-year-olds not to climb on a dangerous object. Some childminders provided evidence of inspection reports that contained fundamental errors of fact (such as references to a non-existent class goldfish) or to the age of the childminders’ children living at home. These texts had clearly been cut and pasted from earlier reports – the age of the childminders’ children was wrong by several years).
40. Providers and advisers point to the absence of real accountability or ability to challenge. A number of providers, as well as intermediaries specialising in the childcare sector raised the issue of the Ofsted complaints procedures with the review team. Concerns expressed by those to whom the review spoke centre around two broad areas:
- appeals against the outcomes of inspections are dealt with by Ofsted’s complaints procedure, rather than a bespoke appeals system. Providers reported little or no opportunity to query the inclusion of evidence in a report before it influences the final rating and
  - confusion exists over recent changes to inspections prompted by a concern and how they differ from the normal inspection cycle.
41. To appeal against the conclusion of an inspection rating, providers have to use Ofsted’s complaints process which is also used to complain about the conduct of an individual inspector. Most national regulators distinguish between, and have separate systems for managing, complaints about conduct on the one hand and decisions taken on the other. Some businesses and intermediaries suggested that this was counter-intuitive: confusing if nothing else. In the interests of fairness (and given the potential impact on businesses) there were questions about why there should not be a single review system that enables challenge of Ofsted inspections, particularly given the possible commercial consequences on a provider. It was suggested that a complaint system designed for personnel is not a substitute for challenge of an outcome, the impact of which can last for four years.



42. Other concerns were raised over the ability that relatively trivial shortcomings can be picked up and reported on, without the provider having the opportunity to challenge, informally, their inclusion before the report is finalised and published. Even if, as the result of a complaint by the provider, a rating is changed, the fact of the dispute remains on the record, potentially influencing prospective parents' views about the provider. One such example was given by a major provider, where an inspection report referred to books having been stacked in such a way that children were unable to access them, and the rating was, the review was told, affected as a result. The provider queried why they had not had the opportunity either to take action to give the inspector reassurance that this comparatively minor shortcoming would never happen again (thus focusing on the outcome on the children), or even better been told on the day, before the report was written so that the inspector could see corrective action taken.
43. Several providers referred to the rapid increase in inspections prompted by concerns this year, following a Channel 4 Dispatches programme concerning a child safety incident, and resulting criticisms of Ofsted. Whilst there was no criticism of Ofsted's increased focus on ensuring that the risk serious breaches of child safety was reduced, several providers and one inspector referred to considerable confusion about the way the concerns triggered inspections, and how the new risk assessment was being conducted. One example was given of a provider who had just been awarded an "Outstanding" rating, and then, as a result of a concern triggered by a complaint, had been re-inspected almost immediately, without any prior explanation. In part because of the lack of clarity provided to explain the way these inspections operate, providers appear unsure how they come about. For example, more than one provider told the review team that numbers of complaints, rather than their substance, can affect a rating. This is based on a misunderstanding and is not in line with Ofsted's guidance, but is illustrative of confusion that exists in the sector.
44. A further concern expressed by providers is that such inspections now take – it is asserted – a different approach to the use of evidence. Whereas routine inspections are assumed to be "snapshots" of what the inspector sees on the day, inspections driven by concerns include what the inspector knows about the setting as well as what he or she sees on the day. The complaint of the providers who expressed concerns is less that inspectors should not do this, but that there is very little visibility, and therefore understanding of the new process. Providers are legally required to notify Ofsted of significant events in their setting and following a full risk assessment of the provider's history, this will sometimes prompt a full inspection. The review was told that Ofsted will not now give a provider any "credit" for self-reporting of significant breaches, leading to the risk that there is a reluctance on the part of the provider to do so. The review team was given the example of a day nursery that had referred itself to Ofsted for a safety breach concerning a child being left outside alone for a few minutes. This would clearly constitute a significant risk to any child's safety. In addition to reporting themselves to Ofsted, the provider put in place new procedures to significantly reduce the risk of such an event taking place again. However, despite this assurance, the breach led to a "Complaint Driven Inspection" (CDI) and the incident being noted in the report, and given the fact that it was a serious (albeit one-off) breach, an "Outstanding" rating was automatically ruled out. Obviously, child welfare has to be of paramount importance, but the risk is that any self-reporting is perceived as having a detrimental consequence.

45. Even if the concern that triggered the inspection in the first place is found to be without merit, the fact if the re-inspection remains on the public record as the rationale for the inspection (the reinspection report is published). Although the report would not allude to the concern itself, the fact that a rapid reinspection took place could, providers suggested, have a stigmatising effect in the eyes of parents.
46. The smallest providers complain of a lack of proportionality in the inspection and compliance system. A particular concern of childminders, and of smaller nurseries, was a feeling that Ofsted had a single inspection template that was better suited to larger providers, but was imposed on all, regardless of size.
47. While there is some limited flexibility in responding to the size of provider, childminders felt that they were disproportionately burdened, and that the smallest always suffer first. For example, while the inspection of a large day nursery with 200 plus children of all ages might typically take a day, the inspection of a childminder looking after three children can last a similar length of time. While this appears not to be in line with Ofsted's guidance, it was reported as practice by childminders to whom we spoke.
48. Some providers felt that inspectors simply failed to distinguish between the very different circumstances of a day nursery and domestic childcare, and were capable of "importing" the approach they would take in one and applying it to the second. In addition, many providers complained that record-keeping requirements were identical regardless of the size of the operation.

Several providers thought Ofsted could do more to encourage the sector to comply, and recognise good practice in its inspection regime

49. The review team was told that – in contrast with many other regulatory regimes - Ofsted operates a very clear line that as an inspector it would not be appropriate for it to provide individually tailored advice on compliance with the legislation. In practice, providers report that this means that if during an inspection a minor shortcoming is observed that could be swiftly put right, it cannot be pointed out at the time and corrected.
50. Some childcare providers to whom we spoke – particularly domestic settings such as childminders – told the review team that the regulator was not seen as a "critical friend" but just a critic. Some providers spoke of the "culture of fear" of inspections, and of a feeling that as a provider you were "unsatisfactory unless you could prove otherwise", where the burden of proof was on the provider to impress the inspector. One large provider described the sector as one that was almost completely united in its desire to comply with the law, but that felt it received no active help from the regulator in doing so.
51. Some providers expressed a hope that the Government would, in time, be able to operate more of an earned recognition model, where evidence that the provider met demanding private sector standards that went beyond the legal minimum, would lead to reduced inspection. Earned recognition models that allow for reduced inspection, and free up the regulator's resource for higher priority work, operate in many other regulated sectors of the economy, via third party accreditation or adherence to industry codes of practice.

52. Concerns about the wider package of reforms, were also raised with the review team. Some providers suggested that the sector was becoming an increasingly unattractive place in which to pursue a career. The views offered to the review are summarised below. They relate to proposals to create “childminder agencies”; to relax staff / child ratios and to change the Ofsted inspection regime for early years providers.
53. Proposals to introduce childminder agencies were raised by several childminders. The review heard concerns that agencies, rather than individual childminders, would be inspected and rated by Ofsted, removing the ability of parents to see a rating on an individual setting. Childminders told the review that they wanted more clarity about the qualifications for setting up an agency, and guaranteeing the quality of advice and provision an agency would provide. Some childminders highlighted the potential for agencies to charge a fee, and doing little to support them. One childminder reported that she would not wish to work for a childminder agency (if in time, although voluntary, they became the norm, and therefore independent childminders became seen as niche) but would rather leave the sector, as she wanted to work independently. She also told us that among her extensive contacts in the profession she had not yet found a single childminder who wanted to join an agency.
54. Proposals to relax staff / child ratios were a source of significant concern during the review. Much of the fieldwork for the review was completed before recent Government announcements on the future of this policy. Several nurseries and childminders expressed in strong terms their concerns about the safeguarding of children being compromised, if ratios were relaxed. There were concerns over quality being jeopardised and children not being given enough attention by staff, no matter how qualified they were. Some providers expressed doubts that costs for parents would be lower, as providers would need to pay for more resources to cater for extra children, such as transport. Many queried the evidence and assumptions on which the policy appeared to be based. One childminder told the review team that there were currently not enough children requiring care, so relaxing ratios could threaten the commercial viability of childminders in rural areas in particular. One large provider told the review team that they would be able to manage the proposed changes by employing lower paid, less skilled staff to undertake tasks such as nappy changing and bottle filling, allowing them to pay higher qualified staff to carry out more highly skilled tasks. They acknowledged that this approach would not be practical for smaller settings.
55. Concerns, particularly by small providers and some parents were heard about Ofsted's proposed change to the ratings regime for EYFS, where a “satisfactory” rating would become an “requires improvement” rating, and two “requires improvement” ratings in a row, could lead to the provider being judged as inadequate. Smaller providers expressed the fear that settings which are currently legally compliant – but not improving - could be forced out of the market.
56. The review team heard from several individual parents with children in EYFS settings, whose principal concerns were that their child was looked after in a safe and appropriate environment. One father said that *'most parents don't care about the educational aspects of childcare as long as their child is safe and happy'*. Additionally the Pre-School Learning Alliance expressed the view that parents primarily make



choices over childcare provider according to locality and referrals from other parents, and were less interested in Ofsted ratings.

57. While providers spoken to recognised that the proposed change to the Ofsted ratings would bring the EYFS sector in line with the rest of the bodies inspected by Ofsted, including schools some pointed out that the sectors are not directly comparable.
58. At the time of the review, the review team had seen no cost / benefit analysis of the likely impact of the policy, or modelling of the range of possible outcomes (on employment, cost, or availability) of such a change.

## Annex A: Organisations consulted (including national and local government and regulators) and web postings received

Busy Bees Nurseries  
 Daycare Trust  
 Department for Education  
 Independent Schools Inspectorate (ISI)  
 Local Government Association and
 

- Hertfordshire County Council
- Leicestershire County Council
- Southampton City Council
- Blackpool Council
- Suffolk County Council
- Nottinghamshire County Council
- Essex County Council
- CFBT (on behalf of Lincolnshire County Council)

 London Early Years Foundation  
 Morgan LaRoche  
 My Family Care  
 National Day Nurseries Association  
 NSPCC  
 Office for Standards in Education, Children's Services and Skills (Ofsted)  
 Pre-School Learning Alliance  
 Professional Association for Childcare and Early Years (PACEY)  
 Prospects Services Ltd  
 Semley Montessori Nursery  
 Two individual childminders  
 Tribal Inspections

### Summary of individual postings

The following is a summary of the postings made on the Focus on Enforcement website.

#### Posting 1

- **Complaints and proportionality:** Any complaint received by Ofsted and not assessed as minor, results in an unannounced investigative visit to the childcare provider. Can there not be provision for some common sense to be applied, for example where a check with the local authority might provide an assessment of the safeguarding history of any provider. The facts of the complaints in our case could have been checked simply by a telephone call.

#### Posting 2

- **Inconsistency of inspections:** Three childminders were inspected recently who all continued to be registered, although none of them had current first aid or child protection training. They were not asked when their last training was or to produce an "in date" certificate.

#### Posting 3

- **Pressure of inspections:** Lot of the staff feel anxious about being assessed by Ofsted. The managers particularly feel this pressure and then this is passed onto the front-line staff.
- **Focus of inspections:** The focus on getting evidence of the impact of our services seems to be too emphasized, when staff should primarily concentrate on delivery a quality service. Would like to see the pressure placed on Children's Centre to demonstrate their effectiveness during an inspection reduced.

#### Posting 4

- **Good inspector:** The Ofsted inspector was very chatty and reassuring.
- **Inconsistency of inspections:** Feel the criteria for grades needs to be more specific so we know what to work for and it's not just the inspector's opinion. Our planning for learning was excellent and we were rated 'good', yet a setting nearby had not got the link between plans and journeys and did have to make an action plan, but still got 'outstanding'.

#### Posting 5

- **Administrative issue:** Upon registering with Ofsted initially I ticked 'do not contact' on one of my two referees. Ofsted contacted them and it caused friction, disappointment and embarrassment on my part.
- **Quality of inspection:** Upon being inspected for the first time I had my grading dropped from 'Good' to 'Satisfactory'. Overall I am dissatisfied with my experience with Ofsted.

#### Posting 6

- **Length of inspections:** Inspections are way too long at over 2 hours when they can be done within 30 minutes.
- **Quality of inspectors:** OFSTED inspectors should have had childminding experience so they can relate to us.
- **Changes in regime:** Too many changes in a short time i.e EYFS
- **ICO fees:** ICO fees are wrong when they want us to take photographic proof. Why should we be made to pay £35 annually because we have to take photos, and when we have policies in place for this.
- **Whistleblowing:** Whistleblowing is a waste of time – have done this and nothing happened.
- **Local Authority issues:** Local authorities childcare services are a joke when trying to do training, as they take forever to reply and we get penalised for this.

#### Posting 7

- **Good registration process:** Process for registering childminders seems good, as childminders have to pass their CYPOP5, and have paediatric first aid. This stops people doing it for 'easy money' who are not committed to childcare.
- **Registration scope:** Ofsted need more authority to deal with people who care for children beyond legal allowances, such as paid for care under 2 hrs. **Good enforcement:** Ofsted manage enforcement well, understanding that some complaints are malicious.
- **Good inspection process:** Ofsted manages inspections well. Notice of inspection is given and within a couple of weeks a written report is provided. The childminder is given a verbal report at the time of inspection.

- **Inconsistency in inspections:** Inspectors all have the same guide/handbook, although some do not follow it as closely as others.
- **Provision of advice:** I get advice from Ofsted and my LA.
- **Good Local Authority support:** My LA is very supportive and does not require me to do anything or use anything other than the paperwork that is already put in place by Ofsted. They are always at the end of the phone, email or as a 'real person' to visit and advise.
- **Good LA practice:** My LA offers a variety of training courses, both weekday and Saturdays. Leading (accredited) childminders have a training session each term to meet up and network. The children's centres host childminder drop in groups each month, which offer information events for people considering childminding, and the childcare sufficiency support officers are also there to support anyone wanting to become a childminder.
- **Proportionate regulation:** Don't think Ofsted and local authority requirements are excessive as we need to have first aid and safeguarding training for the safety of the children. I am registered with environmental health, but they do not make any demands on childminders, wishing purely to know that we deal with food.
- **Future proposal for Ofsted role:** Do not want a situation where Ofsted are the only people I can call on for support, as they are not local, do not know the local situation and are not 'on the ground'.
- **Childcare indoor space requirements:** Changing the floor space requirements so they can fit more 2 year olds into small rooms, is ridiculous as children need room to move and play.
- **Childcare ratios:** Being qualified does not give you more arms or eyes to look after the children. Children need lots of individual attention and care as that is how they develop to the best they can.
- **Childcare agencies:** Concerned that agencies will either increase the paperwork and 'hoops' that childminders have to do. It maybe that agencies will take a fee and do very little to support childminders, looking to place children within their own settings and 'downgrading' childminders to just doing the 'difficult' hours that they don't offer. Suggestion that newly registering childminders might only be able to register through agencies. Concerned as this could mean that LAs do not support new childminders.
- **LA role:** LAs are aware of the sustainability and childcare needs in their areas. Risk that agencies will flood the market with childminders, offering a lower quality of care, due to less training and support, with less experience.

### Posting 8

- **Proportionate enforcement:** Extent to which compliance and enforcement activity in childcare and pre-school education is proportionate to the risks it seeks to mitigate. Regulatory compliance is necessary in order to safeguard children, it is right that any perceived lack of adhering to these warrants investigation.
- **Not enough scrutiny:** Concerns about Ofsted 'moving away' from regulating variations to ratios and giving this responsibility to childminders. The system is open to "overminding" and not subject to enough scrutiny.
- **Lack of advice:** Advice from Ofsted and my early years team have been crucial. However, I have had to seek further clarification from support forums and colleagues. This is due to cuts to the early years teams.
- **LA role:** There are no overlaps, gaps and coordination between multiple regulatory regimes. The LA pick up the "on the ground" informal monitoring of childminders

between Ofsted inspections. Ofsted, nor agencies, wouldn't [sic] have the over-arching local knowledge to do this.

- **Revised EYFS and requirements:** Only unnecessary regulation is the onerous amount of paperwork which has been somewhat redressed by the revised EYFS. Regulatory compliance is necessary in order to safeguard children, it is right that any perceived lack of adhering to these warrants investigation.
- **Childcare ratios:** Concerns about the new ratio proposals which add more to a limit of 6 under 8's – potentially which could be 6 children under 5 or 3! This has huge safeguarding implications
- **Childminder agencies:** Seems anyone can set up as an agency – that does not guarantee quality of advice, quality of monitoring local practice and quality. Ofsted already only do inspections every couple of years. This cannot be replaced by an agency – unless the agency is run by the equivalent of the early years qualified staff the local authorities have or they are qualified early years inspectors.

### Posting 9

- **Local Authority issues:** There are members of staff within the LA who are amazing but the budget constraints mean they no longer have the sufficient time for network monitoring visits. The support scheme and start up grant for new minders have ceased. Training brochures have been replaced with CPD online and it is hard to find courses. First aid is mandatory, yet we have to find it now ourselves.
- **ICO fees:** We have to pay the ICO £35 a year because we have to take photos for LJs and development – surely something can be done with this revenue as we have to pay this on top of an Ofsted fee each year?
- **Local Authority funding:** Accredited childminders should get paid the same amount as they get in other areas. My LA gets the same revenue from the government as other LAs yet it doesn't pass it onto providers, but in a neighbouring LA they do.
- **Scope of regime:** Ofsted are good regulators and should regulate all day care for consistency.
- **Inconsistency of inspections:** Need to have specific guidelines so all inspectors mark the same way. That way a grading is a consistent grading throughout the country and there are no 'soft' grades for childcare.
- **Childcare ratios:** Suggestions for childminders to increase their ratios, which will lower costs for parents. There are not enough children now requiring care so it will simply put minders in rural areas out of business as well as some within the towns.
- **Childminder agencies:** Not found a single childminder who wants to join a childminders agency. We don't want to be employed, we want to run our own business in our own way, we want to dictate our own fees and hours, we don't want to pay any % of our already small income to an agency

### Posting 10

- **Ofsted as sole regulator:** Ofsted are the only regulatory and enforcement body for the childcare sector. There is a perception that local authorities have a role in this, but they do not.
- **Local Authority role:** LA function is one of advice, guidance and training provision. This is equally if not more important because Ofsted see a childcare provider once every 4 years and do not have a continuing role in the quality of care.
- **Local Authority funding:** At the moment local authorities decide which providers can access nursery education funding. They base their decision on the quality of care and

education. They are best placed to do this as Ofsted do not know the settings well enough.

- **Ofsted and LA role:** It is likely that access to nursery education funding will be determined by Ofsted, rather than by the LA. Does this mean that Ofsted will also take on the advisory role, and therefore inspect their own advice? Isn't that what we did ten years ago and we decided it wasn't a good idea, so we split the functions?

#### Posting 11

- **Enforcement requirements:** Fully support the enforcement of the legal requirements which are in place to drive up the standards of early years provision and ensure that children are protected.
- **Unnecessary Bureaucracy:** I work with two other childminders. Sometimes in the school holidays, we need an extra childminder to care for an older child with special needs, which takes us up to four adults. After consulting Ofsted, because childminders are restricted to three adults working together at once, we have had to register to be childcare on domestic premises and have dual registration. It seems silly when these are exceptional circumstances.

#### Posting 12

- **Inconsistency of inspections:** Childminders often find themselves frustrated by the continual inconsistencies in the inspection process. There needs to be a definitive list of obligations/legal requirements that childminders need to adhere to. Currently there doesn't appear to be. Many inspectors tell different childminders different things.
- **Lack of advice:** Very often we are not told what the legislation actually says, and are pretty much left to our own devices. Most of the information regarding childminder's legal obligations has been gleaned from the internet.

#### Posting 13

- **Poor handling of complaint:** In 2006, Ofsted received a malicious complaint against me and my childcare business. Although Social Services and the Police found 'no case to answer' Ofsted took this further and I was suspended and then cancelled my registration. The first dealings we had on day one started off with intimidation and continued throughout. One person eventually managed to help me, which led to my being given a waiver and I was re-registered – all too late of course after losing my very successful business.
- **Helpful council staff:** Members of council staff were very helpful to me during my case. I was contacted by council employees approx. two years ago, when another childminder had a similar situation as we had, and was asked to talk to them as it appeared they felt I could help them.

#### Posting 14

- **Childcare ratios:** Professional opinion that this would only lead to disaster, and would not, as has been suggested reduce childcare costs, more children means more resources and more space and a larger car.

#### Posting 15

- **Inconsistent treatment of provisions:** Do not feel it is fair that schools can just set an after school provision without first having to register separately with Ofsted. This provision is only inspected when the school has its next Ofsted inspection – also there is no requirement for them to do EYFS observations. They are always given notice of



their Ofsted inspection. As a private provider who used to be in a school I had to be registered with Ofsted, had unannounced inspections and had to do EYFS observations.

- **Compliance burdens:** Take away the need for us to do observations on EYFS children and sharing information with schools – it takes staff away from working with the children. Also the schools are NOT interested in any information/observations that we as playworkers provide unless it is of a child protection nature. Most times anything we provide ends up being discarded and not being used in any way in promoting the child's development.
- **Quality of inspectors:** Feel there is a need for Ofsted to employ inspectors who have experience in Play and Playwork.

### Posting 16

- **Quality of inspections:** In my personal inspections of my childminding setting, I have always been happy with the inspectors' judgement.
- **Length of inspections:** My only issue has been with the time the inspector has been in my setting – each time between 4 and 5 hours. This I feel is too long and puts a strain on the day when as a childminder I work alone.
- **Inconsistency of inspections:** My main concern is inconsistencies and inspectors own personal viewpoints being expressed. Must stress however that in my opinion Ofsted are continuing to make improvements in being consistent.
- **Use of non-statutory documents:** Concerned about the continued use of statements from the non statutory document – Developments Matters as recommendations or actions.
- **Quality of inspectors:** Must stress however that in my opinion Ofsted are continuing to make improvements in being consistent, and that if more early years trained inspectors were employed that consistency would improve further.
- **Regulatory regime:** I think that to remove direct Ofsted inspection as a compulsory part of the statutory framework would be a major mistake and would create a 2 tier system that would be difficult to maintain quality control over.

### Posting 17

- **Childcare ratios:** Understand that changes will allow a level 3 qualified member of staff to care for 4 children under 2. As an early years provider I consider the changes could have a negative impact on the health and safety of individual children and staff.

### Posting 18

- **Poor inspection:** At our latest Ofsted inspection, we felt that the inspector (from a third-party company) was extremely negative in their approach, and gave a misleading report with comments that had no argument to back them up.
- **Poor investigation process:** I placed a formal complaint and the third-party company carried out an investigation where my complaint was not upheld. However, I felt they could not be truly objective as they were investigating a member of their staff. I have since gone to second stage appeal with Ofsted.
- **Inconsistency of inspections:** Feel Ofsted need to re-evaluate the third party company they use and make sure all the inspectors are working to the same guidelines.

### Posting 19

- **Good registration process:** Had a very good experience of registering with Ofsted. This was in part due to the support I was given by my LA, therefore when Ofsted came out I was well prepared, and the Ofsted inspector was really helpful and supportive and gave lots of advice.
- **Good pre-inspection process:** Ofsted were efficient in their communication with me prior to attending and answered some questions I had.
- **Good inspector:** For my first inspection, the inspector was helpful and supportive.
- **Inconsistency of inspections:** Each inspector has their own ideas and there is a lack of understanding of how a childminder works. For example I was marked down due to not having any evidence of sharing with other settings, but this was due to the children in my care not attending another setting. I know from the local pre-schools and nurseries I deal with that they never share information with myself, but their Ofsted reports do say they do.
- **Inconsistent treatment of provisions:** Ofsted inspector claims before the inspection even starts that a childminder setting cannot get 'outstanding', or as it's your first inspection you cannot get more than 'satisfactory'. These comments are not made to larger non-domestic settings.
- **Lack of understanding of childminder settings:** Ofsted seem to feel that we need to have our home turned into a nursery in order to deliver all of the EYFS. Inspection process needs to understand the benefits that a home from home setting can bring to a child.
- **Lack of support:** Support to Childminders is greatly lacking from both Ofsted and the LA. In the case of Ofsted they treat us like the poor second cousin. In the case of the LA, they put most of the resources into courses for nurseries and inspecting nurseries.
- **LA best practice:** My LA hope to introduce a tiered system, giving different levels of support depending on who needs it, better training with some targeted at childminders, and help us join up with other childminders to create support networks.
- **Onerous food hygiene regime:** As a childminder, I have to register as a food business and complete a temperature log every day, fill in a file about which foods I am throwing out etc. If I find food out of date in the fridge I automatically throw it away, and don't see how filling this in on a log form proves anything.
- **Funding issues:** DfE does not make it easy for childminders to offer Free Early Years Education Funding. Nurseries can simply offer this to all three and four year olds, whereas as a childminder it is not clear cut. Therefore LAs have to create additional paperwork in order to comply with DfE, which means lots of childminders are unable to offer this funding.
- **Revised EYFS and requirements:** Do not think that Ofsted requirements are excessive, and in fact I have cut down a lot of my paperwork since the EYFS 2012 was introduced.
- **Ofsted as enforcers:** Do not feel that Ofsted is the right enforcement officer for any EY setting. It should all be done on a much more local level, where local people know the settings and business, and can do lots of unannounced visits as I believe this is the only way risks will be better managed.

## Posting 20

- **LA quality role:** Ofsted recommends that providers undertake work in addition to EYFS to demonstrate high quality. The LA monitors trends and is duty bound to support providers to meet these additional expectations in order to secure the best



possible outcome at inspection. LAs are being led by Ofsted's advice to providers and are not creating its own additional expectations.

### Posting 21

- **Satisfying Ofsted requirements:** Even though I personally disagree with too many 'group and structured activities' I will now be pressurised into providing them in order to satisfy Ofsted. What if parents do not want their two year old to be directed towards repeated adult-led activities?
- **Lack of understanding of pre-school settings:** Within the Pre-School sector we are expected to achieve the same standards as foundation units within schools or nursery units, however we do not operate within the same parameters; voluntary organisations, operating often in shared community buildings, trying to juggle staffing costs etc.

### Posting 22

- **Lack of advice and support from LA:** Is there moderation of the competencies of LA EY employees, as many of them do not have the expertise or the knowledge to advise or support. Have found their responses or lack of knowledge to be either critical, non-supportive or misleading. Sector needs a more centralised, professional and highly knowledgeable body which does not give out contradictory and confusing messages or advice.
- **Lack of advice and support from training providers:** Would like to know how training providers are moderated properly, and if there is a general code of conduct/practice for EY Training providers and their assessors. I only get hypothesis, not professional advice, from my EYCA and we cannot work legally and professionally on hypothetical guidance. We need clarity, knowledgeable support and competency in the advisory sector.

### Posting 23

- **Length of inspections:** My first Ofsted inspection lasted only one day. Ofsted inspections are far too short for EY settings, as the dynamics changes day to day. To be able to go through paperwork, documents, interview, observe, speak to parents, staff, committee and children and observe practice cannot possibly happen all in one day. Ofsted should consider extending inspections to at least 2 days instead of 1.

### Posting 24

- **Inconsistency in planning issues:** Inconsistencies relating to the Enforcement of Planning legislation and its interpretation. There are often variations of classification of building use, when our occupation should be consistently the same as a childcare provider. Signage is almost entirely a local issue, and tends to be variable across the UK. No clear set of rules which apply nationally when presenting signage submissions of a standard nature.

### Posting 25

- **Proportionality in enforcement:** Fearful of being criminalised when children suffer injuries that occur during normal play. These potentially could be interpreted as contravention of our duties under section 3 of the Health and Safety at Work Act. There is an expectation from some enforcing authorities that even injuries of a minor nature should not occur.
- **Dual enforcement in H&S:** Dual enforcement is commonplace in respect of H&S related issues and although the enforcing authorities for our premises are

Environmental Health Departments, we have to report accidents to both the enforcing authority and Ofsted.

## Annex B: Review of compliance and enforcement in relation to Childcare: Scope

### In Scope

Focus on Enforcement regulatory reviews examine the way national and local regulators ensure compliance with the law, and where necessary enforce it. They are concerned only with the way regulation is delivered, and not with the underlying legislation, which is taken as a given although any known intended changes will be taken into account.

The review will cover compliance and enforcement activity in England by national regulators and local authorities, which affects childcare to focus enforcement resources where they are needed most to protect children. It will consider, amongst other things, the interaction between different regulatory regimes.

This review will consider compliance and enforcement activity in respect of the regulation of childcare providers, nurseries and pre-schools for children in the early years age group from birth to five years old, with a view to identifying any aspects of that compliance and enforcement activity that appear to be unreasonably holding back those operating (or potentially operating) in the sector. The review will also consider the impact on business of non-statutory actors who may also impose a compliance burden.

The review will look in particular at, but is not limited to:

- the extent to which compliance and enforcement activity in childcare and pre-school education is: proportionate to the risks it seeks to mitigate; targeted; consistent; transparent; and accountable;
- overlaps, gaps and coordination between multiple regulatory regimes from the perspective of the business or self-employed provider or parent;
- perceptions of the law that may drive unnecessary behavior;
- whether there is unreasonable or unnecessary pressure brought to bear on providers by third-parties.

### Compliance and Enforcement Activity

In this context compliance and enforcement activity means action taken by national regulators or officers of local authorities, including:

- provision of advice on compliance with the law in order to operate as a childcare or pre-school education provide;
- inspections of locations or equipment in order to satisfy regulatory authorities of compliance with the law;
- requirements to make formal applications, or provide information;
- requirements to attend courses / obtain particular qualifications in order to practice as a childminder, or operate a nursery or pre-school;
- enforcement proceedings taken against individuals or organisations in the event of perceived or actual failure to comply with regulations (NB we cannot consider comments on specific cases unless all proceedings have finished – but we can consider general evidence in relation to enforcement proceedings).

The review is also be interested to learn about:

- examples of effective, tailored and easy to understand guidance and advice for businesses, and good regulatory delivery that is risk-based, focused on achieving compliance and supporting business growth.
- any issues encountered where third parties are encouraging companies to undertake unnecessary compliance activity eg. where regulation does not actually require something to be done, but companies are led to believe it does.

## **Out of Scope**

We will not be looking at:

- Issues related to Nannies, Au-Pairs, children looked after in their family home, or homes for Looked-after Children;
- Issues relating to childcare for children who are not in the early years age group;
- CRB checks;
- Other regulatory activity which is not unique to childcare such as employment law, company law or taxation common to most businesses, or health and safety at work rules not particular to the business of childcare, would not be in scope; and

The review will avoid duplication of effort with other recent or current reviews of similar subject matter.

## Annex C

### Summary of Legislative Framework Affecting Childcare Sector

*(This is a fuller version of the summary in the main report)*

The childcare sector in England is covered by the following regulatory framework:

**The Early Years Foundation Stage (EYFS)**<sup>12</sup>: The EYFS is the statutory framework that sets the standards that all early years providers must meet to ensure that children learn and develop well and are kept healthy and safe. The EYFS covers children from birth up to five years of age, and applies to anyone looking after children for more than 2 hours a day. The EYFS covers learning and development requirements, such as communication and language, physical development, and assessment and reporting of a child's progress. It also covers safeguarding and welfare requirements, staff/child ratios, staff qualifications, and CRB checks. Providers must also carry public liability insurance. The **Department for Education** has policy responsibility for the EYFS.

**Ofsted** inspects early years providers registered on the EYR, against the criteria set out in the EYFS. It carries out around 17,000 inspections<sup>13</sup> per year, and gives providers one of four grades:

- Outstanding (12% of providers in August 2012);
- Good (62%);
- Satisfactory (25%); and
- Inadequate (1%).

Since introduction of the EYFS a higher proportion of providers have been judged to be good or outstanding, suggesting an improvement in the quality of childcare provision. Ofsted inspects providers which are awarded an outstanding, good or satisfactory rating once in a four-year cycle. However, providers judged as inadequate will receive a series of monitoring visits and will be re-inspected within 12 months.

**Local Authorities** play an important strategic role, through a set of duties under the Childcare Act 2006. These duties require authorities to:

- work with their NHS and Jobcentre Plus partners to improve the outcomes of all children up to five years of age and reduce inequalities between them;
- secure sufficient childcare for working parents;
- provide a parental information service;
- provide information, advice and training for childcare providers.

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<sup>12</sup> Early Years Foundation Stage (EYFS)

<http://media.education.gov.uk/assets/files/pdf/e/eyfs%20statutory%20framework%20march%202012.pdf>

<sup>13</sup> The report of Her Majesty's Chief Inspector of Education, Children's Services and Skills: Early years 2011-12

<http://www.ofsted.gov.uk/sites/default/files/documents/ar201112/The%20report%20of%20Her%20Majesty%207s%20Chief%20Inspector%20of%20Education%20C%20Children%27s%20Services%20and%20Skills%20Early%20years.pdf>

Funding of up to 15 hours per week of free childcare for children aged three and four is also disbursed by local authorities. This can only be provided by providers registered on Ofsted's EYR. Local authorities carry out their own inspections and quality checks of early years providers to determine which providers qualify for free funding. The inspection cycle varies, but local authorities usually aim to inspect a provision annually.

Other examples of regulatory activity experienced by childcare providers include (this list is not intended to be exhaustive):

**Health and Safety<sup>14</sup>:** All businesses and places of work, including childcare settings, are legally bound by the Health and Safety at Work Act etc Act 1974. The Act sets out the general duties which employers have towards employees and members of the public, and employees have to themselves and to each other. The Act is enforced by HSE and Local Authorities.

**Food safety<sup>15</sup>:** Under the Food Safety Act 1990, Food Hygiene (England) Regulations 2006, Regulation (EC) No. 852/2004, food provided by a childcare provider may be classed as a food business, depending on the nature of the food provision, whether it is carried out for profit or not. There is also a requirement in the EYFS to ensure that food provided is safe. Food hygiene is enforced by local authorities environmental health services. The Food Standards Agency has produced a special pack called 'Safer food, better business for childminders'<sup>16</sup>, to assist them in complying with the law.

**Fire safety<sup>17</sup>:** The Regulatory Reform (Fire Safety) Order 2005 applies to all non-domestic premises in England and Wales, including nurseries. The Order places the emphasis on risk reduction and fire prevention and is enforced by Fire and Rescue Authorities and other bodies. Under the Order, people responsible for commercial buildings, are required to carry out a mandatory detailed fire risk assessment identifying the risks and hazards in the premises.

**Data Protection<sup>18</sup>:** As part of the EYFS, childcare providers in England are expected to keep detailed records about individual children's development. The Data Protection Act 1998 requires every organisation processing personal data to register with the Information Commissioner's Office as a data controller, unless they are exempt. There is a two-tiered annual notification fee, based on an organisation's size and turnover. The fee for tier 1 is £35 and the fee for tier 2 is £500.

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<sup>14</sup> Health and safety regulation..... a short guide

<http://www.hse.gov.uk/pubns/hsc13.pdf>

<sup>15</sup> FSA Guidance on the Requirements of Food Hygiene Legislation

<http://www.food.gov.uk/multimedia/pdfs/fsaguidefoodhygleg.pdf>

<sup>16</sup> Safer food, better business for childminders

<http://www.food.gov.uk/business-industry/caterers/sfbb/sfbbchildminders/>

<sup>17</sup> London Fire Brigade website

<http://www.london-fire.gov.uk/RegulatoryReformOrder2005.asp>

<sup>18</sup> Information Commissioner website

[http://www.ico.gov.uk/for\\_organisations/data\\_protection.aspx](http://www.ico.gov.uk/for_organisations/data_protection.aspx)

**Planning permission:** Childcare providers need to seek advice from their local authority regarding planning permission, as the premises they are using could involve a change of use, and also require car parking permissions. Childminders also need to seek advice from their local authority, as setting up a business from a domestic property could require planning permission.

**Public Performance Licence (PPL)**<sup>19</sup>: Childminders and childcare providers are required to obtain a PPL in order to play CDs and DVDs for children in their care, as they are being played in a business setting. Where a business or organisation requires a PPL licence but does not obtain one, they will be infringing copyright and may ultimately face legal proceedings by PPL.

**Transport**<sup>20</sup>: Childcare providers driving a vehicle with more than 8 passenger seats are required to hold a full category D1 driving licence. They also need to have a Restricted Operators Licence and Certificate of Initial Fitness for the vehicle from the Vehicle and Operators Services Agency (VOSA).

### **The independent sector in early years**

The Independent Schools Inspectorate (ISI) is a Government approved inspectorate responsible for the inspection of Association independent schools. It is approved for the purpose of inspection under Section 162A of the Education Act 2002, and reports to the Department for Education on the extent to which schools meet statutory requirements. The EYFS applies to ISI members who offer provision for children aged 0-3, and are therefore obliged to register on Ofsted's EYR to meet the requirements of the Childcare Act 2006. However, the ISI carries out inspections of its members registered on the EYR, using the ISI framework for inspections which takes into account EYFS requirements. The ISI evaluates the extent to which the provision fulfils the requirements of the EYFS, and follows the requirements of the Childcare Act 2006.

The EYFS also applies to ISI members who offer provision for children aged three upwards, and are registered on the EYR. For this age group, provisions can apply for an exemption from some learning and development requirements. To apply for an exemption from DfE, the provision must have an 'outstanding' or 'good' rating from Ofsted, or the equivalent from ISI. Provisions such as Montessori and Steiner settings, can also apply to the DfE for exemptions from some learning and development requirements in the EYFS, to take into account their ethos on education. The Childcare Act 2006 does not allow for any exemptions from the safeguarding and welfare requirements of the EYFS.

### **Devolved Administrations and early years**

This review focuses on the early years regulatory regime in England. Different regimes apply in the devolved administrations, which are as follows:

#### **Scotland**

- In order to operate an early years or childcare service, including nurseries or childminders, the provider must be registered with the Care Inspectorate.

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<sup>19</sup> PPL website

<http://www.ppluk.com/I-Play-Music/Businesses/Why-do-I-need-a-licence/>

<sup>20</sup> <https://www.gov.uk/browse/driving>

- Education Scotland also inspects pre-school centres, nursery schools, primary schools and those with nursery classes, with a particular interest in developing children's skills and understanding in literacy, numeracy, health and wellbeing.

### **Wales**

- The Care and Social Services Inspectorate Wales (CSSIW) is the registration and inspection body for day nurseries and childminders.
- Estyn inspects quality and standards in education and training providers in Wales, including nursery schools and settings that are maintained by, or receive funding from, local authorities.

### **Northern Ireland**

- All pre-school centres and nursery schools are registered and inspected by the Education and Training Inspectorate, for the quality of education.
  - By law, Early Years Teams in local authorities must operate a registration and inspection system for the following types of childcare services; day nurseries, playgroups, out-of-school care, childminders, summer and holiday schemes, and crèches.
- Proposals which would require looking solely at the regulation itself in a particular sector itself rather than the operational delivery and enforcement of it.

BIS retains the discretion to reject an application that it does not consider is in scope for this review or to reject a request for funding where the case for funding has not been made.

If you have any questions relating to scope, please email [focusonenforcement@bis.gsi.gov.uk](mailto:focusonenforcement@bis.gsi.gov.uk) or you can call 0207 215 5000 and ask to speak with a member of the Focus on Enforcement team.



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