



Department
for Education

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

Explanatory Document

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Chapter 1: Introduction

1.1 This explanatory document is laid before Parliament in accordance with section 14 of the Legislative and Regulatory Reform Act 2006 (“the 2006 Act”) together with the draft of the Legislative Reform (Regulation of Providers of Social Work Services) (England and Wales) Order 2013 (“the draft Order”) which we propose to make under section 1 of that Act.

1.2 The purpose of the draft Order is to avoid the imposition of new burdens on Her Majesty’s Inspector of Education, Children’s Services and Skills (HMCI), providers of social work services, and local authorities in the event of the commencement of Part 1 of the Children and Young Persons Act 2008. This is achieved by removing the provision for separate regulation and inspection of providers of social work services in England in favour of including inspection of arrangements involving such providers as part of local authority inspection by HMCI.

1.3 Section 4 of the 2008 Act amends the Care Standards Act 2000 to provide for the regulation of providers of social work services; it provides for providers of social work services to be registered with HMCI and in respect of those services to be subject to regular inspection. The draft Order will remove this provision so that providers of social work services are instead inspected by HMCI as part of their local authority inspection arrangements, but not also through a separate regime.

1.4 The Government is satisfied that Ministerial duties have been met under the relevant sections of the 2006 Act. This includes that the Order serves a purpose under section 1(2) of the 2006 Act, that the pre-conditions under section 3 of the 2006 Act have been met, and that the appropriate consultation has been carried out in accordance with section 13 of the 2006 Act.

Chapter 2: Background to the Order

2.1 Part 1 of the Children and Young Persons Act 2008 makes provision for the delegation by local authorities of certain social service functions to providers of social work services¹. To date this provision has only been used for piloting purposes, with commencement orders relating to individual authorities. Section 4 of the 2008 Act (which has not been brought into force during this piloting period) makes amendments to the Care Standards Act 2000 ("the 2000 Act") requiring providers of social work services to be registered with and regularly inspected by HMCI. Section 4 also enables the Secretary of State to issue national minimum standards for providers of social work services and to make regulations under the 2000 Act in relation to such providers as in relation to other establishments and agencies covered by that Act.

2.2 Evaluation of piloted arrangements for the delegation of social service functions found mixed results across pilot areas, but nevertheless identified evidence of positive change for children, parents/carers and the workforce. For example, carers "were significantly more likely ... to view the support they received from their child's social worker positively. They also felt better supported ... in assisting children and young people in the areas of health, education or leisure activities." Other benefits identified included "increased opportunities for direct work with children and young people; good quality support for carers and small integrated teams offering a personalised service and in some cases creative work with birth parents and/or the use of accessible and user-friendly premises" as well as in some cases a reduction in the rate of placement change². The executive summary of the independent evaluation is included at Annex D and provides details of the specific arrangements tested. The full report is published on the DfE website.

2.3 In light of these benefits, between 15 January and 28 February 2013 Government consulted on two issues: The first issue related to its proposal of full commencement in England of Part 1 of the 2008 Act; the second issue related to the proposal which is the subject of this LRO, to remove the requirement for direct registration and inspection by HMCI of providers of social work services under delegated arrangements.

2.4 The consultation was with a view to giving all LAs in England the flexibility to consider whether delegation arrangements in their areas might help realise similar benefits. Consultation found broad support for the proposal to bring Part 1 of the 2008 Act into force. The Government is therefore minded

¹ The functions which can be delegated under Part 1 are a LA's social services functions in relation to individual children who are looked after by it, and its care leaving functions. A local authority must not enter into such arrangements unless it is satisfied that the functions will be discharged by or under the supervision of registered social workers. Functions which are excluded from such delegation arrangements are the local authority's functions in relation to independent reviewing officers; and its functions as an adoption agency (unless the other party to the arrangement is a registered adoption society).

² <https://www.education.gov.uk/publications/eOrderingDownload/DFE-RR233.pdf>, pages vi and vii

2.5 As the 2008 Act stands full commencement would result in a new requirement for separate registration with and inspection by HMCI. This would introduce significant new burdens for the inspector, providers of services and to a lesser degree local authorities. HMCI's new inspection framework makes explicit provision for consideration of the experiences of children receiving these services under delegated arrangements, and to reach judgements on leadership and governance on the basis of management of these arrangements. To introduce the requirement of section 4 of the CYPA would mean that where LA functions were delegated, they would be inspected through LA inspection and through duplicate arrangements for separate provider inspection. It is Government's view that this is an unnecessary burden.

2.6 The Government therefore simultaneously consulted on a proposal to remove the registration and inspection requirement by way of the draft Order that is the subject of this document. The consultation was carried out on the basis of HMCI's 2012 proposals for the inspection of services for children looked after. These have subsequently been incorporated in a wider framework covering children looked after, care leavers, and those in need of protection [insert link following publication on 15 April 2013], but the provisions concerning delegated arrangements remain unchanged. Obligations to consult have therefore been met. Fuller details of this issue, consideration of consultation responses and how concerns raised are addressed are provided in chapter 4.

2.7 Accordingly, the draft Order makes provision to remove the requirement for direct registration and inspection by HMCI of providers of social work services in England.

2.8 Article 3 of the draft Order confines the application of section 4 of the 2008 Act so that it will only apply to a provider of social work services in Wales. The Wales Government has indicated that it does not wish changes to apply in Wales, and that it is content for the sunset provision to have effect. Accordingly, the draft Order has preserved the current position under Part 1 of the 2008 Act for Wales. .

Chapter 3: The Order

Power to remove burdens under section 1 of the 2006 Act

- 3.1** The purpose of the Order is to remove burdens, as required by section 1(1) of the Act 2006. The Order would remove the requirement in section 4 of the 2008 Act for registration and inspection by her Majesty's Chief Inspector of providers of social work services. This will avoid the introduction of new financial and administrative burdens, on HMCI, existing providers under the piloted arrangements, their application to any new providers to whom LAs might wish to delegate functions following commencement of part 1 of the 2008 Act.

Compliance with conditions in section 3 of the 2006 Act

Non-legislative solutions

- 3.2** The only way to remove the requirement for registration with and inspection by HMCI is to amend the 2008 Act which makes that provision.
- 3.3** The Minister is satisfied that the policy objective in this case could not be secured satisfactorily through non-legislative solutions.

Proportionality

- 3.4** The Minister is satisfied that the proposed change is proportionate to the policy objective, namely to remove the requirement for separate registration and inspection of providers of social work services.
- 3.5** The only effect of the proposed change would be to avoid the introduction of a new requirement for providers of social work services to register with HMCI when part 1 of the 2008 Act is brought fully into force in England. This relieves administrative and financial burdens that would otherwise fall to both parties, without imposing any elsewhere in the system.
- 3.6** New arrangements for the inspection of services for children looked after, care leavers and those in need of protection make explicit provision from September 2013 to examine the experiences of a sample of those receiving services under delegated arrangements and will evaluate the quality of oversight and performance management as part of judgements on leadership and governance. This inspection framework has been developed and is being introduced independently of the draft Order, and while it provides the context in which the effects

Fair balance

- 3.7** The Minister does not consider that the proposed change will adversely affect any individual or organisation. Under pilot arrangements there is no requirement for separate registration and inspection. The proposed change would retain this position as and when Part 1 of the 2008 Act is fully commenced, thereby avoiding the imposition new financial and administrative burdens upon both providers of social work services and HMCI through the development and administration of a new set of registration and inspection processes. There is no need for such additional processes given the context of HMCI's new inspection framework which makes provision for the inspection of services delivered under delegated arrangements, as well as directly under local authority auspices. The Minister is therefore satisfied that the proposal strikes a fair balance between the wider public interest and the interests of those people likely to be adversely affected by it.

Necessary protection

- 3.8** The Minister does not consider that the proposal will remove any necessary protection.
- 3.9** Relevant protection in this instance is located in the security provided by HMCI's inspection arrangements for services for children looked after, care leavers, and those in need of protection, as well as the responsibility that falls to the Local Authority as the corporate parent.
- 3.10** Where functions are delegated the LA would remain the corporate parent and would retain responsibility for the appropriate discharge of those functions.
- 3.11** Under current piloting arrangements there is no registration and inspection requirement for providers of services. The new Ofsted inspection framework which comes into effect from September 2013 will consider the experiences of children looked after, care leavers, and those in need of protection in the same way regardless of under whose auspices services are received. Specific provision is made to consider a sample of those children receiving services through delegated arrangements, as well as to make judgements on leadership and governance that reflect the authorities management of delegated arrangements. Should practices raise concerns Ofsted will inform the Secretary of State.
- 3.12** Moreover, section 136(3) of the Education and Inspections Act 2006 provides that the Secretary of State can specify that an inspection should be conducted in relation to a particular local authority or particular matters. A specific request can therefore be made for

- 3.13** This proposal, therefore, does not remove any existing protections. Whatever the manner in which services are delivered and functions discharged, all children will receive the same level of protection through a consistent framework of inspection. Indeed by virtue of these changes to HMCI inspection arrangements additional protections are afforded that ensure delegated arrangements are expressly considered through inspection – this has not necessarily been the case under pilot arrangements.

Rights and freedoms

- 3.14** The Minister does not believe that the proposal would prevent anyone from exercising an existing right or freedom.

Constitutional significance

- 3.15** The Minister does not consider that the provisions of the draft order are constitutionally significant.

Other Ministerial duties under the 2006 Act

Consultation

- 3.16** The Minister conducted an open consultation exercise on the proposal 15 January and 28 February 2013, and is satisfied that it has carried out its consultation in accordance with section 13 of the 2006 Act.
- 3.17** The details of the consultation and the responses received are covered in more detail in chapter 4.

Parliamentary procedure

- 3.18** The Minister recommends that the draft Order and the Explanatory Document should be laid in Parliament under the affirmative resolution procedure for which provision is made by section 16 of the 2006 Act.
- 3.19** Matters concerning looked after children are sufficiently important to require active scrutiny of the proposal. The draft Order will remove a requirement for direct registration with and inspection by HMCI of providers of social work services under delegated arrangements. The Government's view is that the effect of this proposal will be to avoid the future imposition of burdens, rather than making a material change to existing arrangements. Necessary protections are retained through separate HMCI arrangements for the inspection of services for looked after children within its wider inspection framework for children looked after, care leavers, and those in need of protection. For these reasons we believe the affirmative procedure is appropriate.

Compatibility with the European Convention on Human Rights

- 3.20** The Minister does not believe that the proposed amendment would interfere with any rights or freedoms protected by the European Convention on Human Rights. The Government's view is that providers of social work services would be subject to the Human Rights Act in relation to the exercise of delegated functions.

Compatibility with the legal obligations arising from membership of the European Union

- 3.21** The Minister is satisfied that the proposals are compatible with the legal obligations arising from membership of the European Union.

Territorial extent

- 3.22** Section 4 of the Children and Young Persons Act 2008 applies to England and Wales. The Welsh Government has indicated that they do not wish the proposed changes to apply in Wales. Accordingly the draft Order will confine section 4 so that it only applies to a provider of social work services in Wales, (with a view to the sunset provision coming into effect in Wales in November 2013). .

Binding the Crown

- 3.23** The Minister is satisfied that the proposed change will not bind the Crown.

Chapter 4: Consultation

4.1 An open consultation was conducted between 15 January and 28 February 2013. The consultation document and response form appeared on the dedicated consultation section of the Department for Education website and was advertised on the front page of that website. Electronic notifications were also sent to a range of interested parties comprising:

- All LAs participating in pilot arrangements
- All LAs who had expressed an interest in participating in pilot arrangements
- All providers participating in pilot arrangements.
- All providers who had expressed an interest in participating in pilot arrangements.
- The Association of Directors of Children's Services
- The Local Government Association
- Social Worker Representative organisations
- Provider representative organisations
- Children's representative organisations
- Members of the pilot evaluation team
- Members of the expert group advising on pilot and evaluation arrangements.
- Members of the Social Work Reform Board
- Ofsted

4.2 20 responses to the consultation were received. Six responses were received from local authorities, three from providers/potential providers of social work services with a further two from representative bodies for this group. Two responses were received from social worker representative organisations, and two from members of the expert group. The remaining responses were received from members of the Social Work Practices evaluation team, The Association of School and College Leaders, the Children's Society, the Care Quality Commission and from a social work lecturer. A list of respondents to the consultation is included at annex B.

4.3 The consultation document (included at Annex E) sought views on two related proposals:

- Proposal one was to extend the ability to enter into delegation arrangements for social care functions for looked after children and care leavers to all local authorities in England by fully

- Proposal two to remove the requirement for separate registration and inspection of providers of services to whom functions are delegated – the subject of this draft Order.

4.4 The consultation document (included at Annex E) explained the proposed changes in the context of HMCI’s proposed inspection framework for children looked after and care leavers published in 2012. This framework included explicit provision for consideration of the experiences of children receiving services under delegated arrangements, and for providing a judgement on leadership and governance on the basis of local authority management of those arrangements. Ofsted has since brought these proposals into a wider inspection framework for services for children looked after, care leavers and those in need of protection. The substance of the aspects of the framework relevant to children looked after and care leavers remains unchanged, however, and the same provisions for consideration of delegated arrangements are as they were in the 2012 proposals cited in the consultation document.

4.5 The Minister is satisfied that he has carried out the consultation in accordance with section 13 of the 2006 Act.

Summary of responses to proposal 1

4.6 Of those responding directly to the questions on proposal 1 79% (15 respondents of 19) agreed that proposal one would prevent disruption in areas where delegation arrangements were already in place (16% or 3 respondents disagreed).

4.7 83% (15 of 18 respondents) agreed it would increase flexibility for local authorities in considering how best to discharge their functions (17% or 3 respondents disagreed).

4.8 65% (13 of 20 respondents) agreed with the proposal to commence part 1 of the Children and Young Persons Act 2008. Two respondents (10%) were unsure whether they agreed. Five respondents (25%) disagreed with the proposal.

4.9 In light of these responses the Minister believes it is desirable to pursue this proposal. The second proposal, with which this document and the associated draft Order are concerned, therefore becomes relevant.

Responses to proposal 2

Reducing burdens

4.10 The consultation document asked whether the proposal would avoid introducing burdens.

- 4.11** 19 out of 20 consultation responses answered this question directly. 10 (53%) of these responses agreed that the proposal would avoid introducing burdens. 6 responses (32%) disagreed. The remaining three responses (16%) were not sure.
- 4.12** Of those disagreeing, the narrative text of two suggests the respondent accepts that the proposal avoids burdens but believes separate registration and inspection is nonetheless desirable. In these and two further responses concerns appear in reality to focus on the question of removal of protections rather than disagreement that the proposal will reduce burdens.

Avoiding duplication

- 4.13** The consultation document asked whether the the proposal would avoid duplication of effort in inspection arrangements for LA services and separate arrangements for providers of social work services.
- 4.14** 19 out of 20 consultation responses answered this question directly. Nine (47%) agreed that the proposal would avoid duplication of effort. 5 (26% disagreed, and 5 (26%) were not sure.
- 4.15** As with the question of burdens, the narrative text suggests that three of those disagreeing with the proposition were in reality concerned with the issue of protections rather than commenting on duplication.
- 4.16** Two other negative responses and one unsure response highlight concerns about the possibility of multiple inspections of individual providers under the Ofsted LA inspection framework. While valid, these are not relevant to the proposal at hand which seeks to avoid adding a further layer of inspection to that already planned.
- 4.17** The final negative response appears to have misunderstood the question, discussing the relationship between contract management and regulation/inspection arrangements rather than the duplication that arises from LA and provider inspection regimes both inspecting the same provision.

Non-legislative means of securing the policy objective

- 4.18** The consultation document asked whether there are any non-legislative means of achieving the policy objectives.
- 4.19** 17 of the 20 consultation responses answered this question directly. 9 responses (53%) thought that there were no non-legislative means of securing the policy objective. Four responses (24%) answered “not sure” to this question and four (24%) said they thought there were non-legislative means of securing the objectives.
- 4.20** The narrative text supporting suggestions of alternative means indicate the respondents may have misunderstood the question. Two of them

Proportionality

- 4.21** The consultation document asked whether the proposal is proportionate to the policy objectives objectives.
- 4.22** 18 of the 20 consultation responses answered this question directly. 10 (56%) agreed that the proposals are proportionate to the policy objective. 5 (28%) said the proposal was not proportionate. The remaining three responses answered “not sure”.
- 4.23** No narrative text was provided to explain any of the unsure responses. Only one negative response offered explanatory text, predicting low appetite among local authorities for delegation arrangements.

Fair balance

- 4.24** The consultation document asked whether the proposal strikes a fair balance between the public interest and any person adversely affected by it.
- 4.25** 16 of the 20 consultation responses answered this question directly. Seven responses (44%) felt that the proposals did strike a fair balance between the public interest and any person adversely affected by it. Five responses (31%) did not feel the proposal strikes a fair balance. The remaining four responses (25%) were unsure.
- 4.26** Two respondents stated baldly that they did not believe the proposal was in the public interest. A further two respondents concerns seem to focus on the question of protection.

Necessary protections

- 4.27** The consultation document asked two questions about protection. Firstly whether Ofsted’s new inspection arrangements retained protections and obviated the need for a separate inspection regime for providers of services. Secondly whether the proposal to remove the registration and inspection requirement for providers in itself removed necessary protections.
- 4.28** 19 of 20 respondents answered the first question directly. Eight responses (42%) agreed that new inspection arrangements retained protection, seven (37%) disagreed and 4 (21%) were unsure.

- 4.29** 19 of 20 responses answered the second of these questions directly. Nine (47%) did not believe protections would be removed by the specific proposal with which the draft Order is concerned. Six (32%) answered that the proposal would remove protections, and 4 (21%) were not sure.
- 4.30** In both cases, the narrative explanations revealed that among those concerned with the removal of protection three respondents' concerns were that the local authority inspection framework does not provide sufficient protection. Two other responses indicated a belief that allowing delegation of functions made a separate registration and inspection regime desirable or necessary. In both these instances, then, concerns are not focused directly on the content of the draft Order, but on separate issues relating to wider inspection process and/or proposal one to allow delegation of functions. Concerns raised around the inspection framework have been shared with HMCI to inform the implementation of the new inspection arrangements. For the reasons of burden/duplication set out elsewhere in this document the Minister does not agree that separate registration and inspection arrangements should be seen as desirable.
- 4.31** Given that at present, under piloting arrangements, there are no registration and inspection requirements associated with delegation of relevant care functions under the 2008 Act, we consider that only one respondent identified an existing protection which would be removed by the draft Order – “The protection of the Secretary of State being able to regulate providers in the future”. As we explain at paragraph 3.12, if the draft Order is made the Secretary of State will still be able to request an inspection of a particular local authority's commissioned services/delegated functions where concerns justify such a move. The Secretary of State would still, of course, be able to bring forward legislative proposals at a future date should he wish to introduce regulatory arrangements in the future.
- 4.32** Among those who were not concerned about the removal of protections 5 suggested that the new arrangements would bring greater protection, citing the desirability of a single approach to regulation, the fact that some children would actually receive more attention than currently, and the clarity that would be brought to governance and decision making.

Infringement of rights or freedoms

- 4.33** The consultation document asked whether the proposal prevents any person from continuing to exercise any right or freedom.
- 4.34** 16 out of 20 consultation responses answered this question directly. 12 (75%) did not believe the proposal prevented the exercise of any right or freedom. The remaining four (25%) were unsure.
- 4.35** None of the unsure respondents offered any narrative explanation of their position.

Constitutional significance

- 4.36** The consultation document asked whether consultees considered the proposal to be constitutionally significant.
- 4.37** 16 of 20 consultation responses answered this question directly. 10 responses (63%) did not think the proposal constitutionally significant. 3 (19%) thought it was significant and 3 (19%) were unsure.
- 4.38** Of those answering in the affirmative, the narrative text reveals that one respondent referred to the significance of delegating functions rather than of the changes that are the subject of the draft Order. Another indicated concern that the proposal “removes accountability for the detailed decision making for children looked after from the corporate parent”. Again, this is a comment on the significance of delegation of functions – under which decision making does pass from the corporate parent – rather than the regulation of providers which is the content of the draft Order.
- 4.39** In fact, the draft Order helps ensure that accountability remains with the local authority as the corporate parent, with inspection under HMCI’s new arrangements taking account of children’s experiences under delegated arrangements as part of its inspection of local authorities.
- 4.40** The third simply cited the scope for regulation to fail to identify poor practice in particular cases – this does not meet the test for constitutional significance.

Parliamentary procedure

- 4.41** The consultation document asked whether consultees agreed with the Government’s proposed use of the affirmative resolution parliamentary procedure for the draft Order.
- 4.42** 18 out of 20 consultation responses answered this question directly. 10 (56%) of these responses agreed with the proposed affirmative resolution parliamentary procedure for the LRO. 5 (28%) disagreed. The remaining 3 responses were unsure.
- 4.43** Among those that disagreed two called further consideration or debate of evaluation findings before proceeding with the LRO at all. The evaluation, of course, is silent on regulation arrangements that are the subject of the draft Order given that these did not apply during the pilot period, although as discussed above do offer justification to allow local authorities to consider whether delegation would help realise some of the benefits identified in pilot areas. One respondent appears from their narrative text to have misunderstood the legislation, citing elements of the 2008 Act not relevant to the draft Order. One simply stated their preference for the super affirmative route, and one offered no explanation.

Agreement with the proposal

- 4.44** The consultation document asked whether or not consultees agreed with the proposal to remove the requirement in section 4 of the Children and Young Persons Act 2008 for separate registration and inspection of providers of social work services.
- 4.45** All consultation responses replied to this question. Nine (45%) disagreed, 8 (40%) agreed. Two of the remaining three responses were unsure, with one offering no direct response, but narrative response suggesting they too were unsure.
- 4.46** Where explanatory text was provided by those replying in the negative, the reasons centred either on concerns about the appropriateness of HMCI's LA inspection framework and, either explicitly or by extension, a belief that additional direct inspection would therefore be desirable.

Conclusion

- 4.47** The headline analysis of the consultation responses suggests mixed views on the proposal to remove the registration and inspection requirement in section 4 of the Children and Young Persons Act 2008. It can be seen above that in the main objections fall into two groups:
- Objections to the wider proposal to extend the ability to delegate functions beyond current pilot arrangements – these concerns have been considered in deciding to fully commence Part 1 of the 2008 Act, and were in any case debated in parliament at the time of that Act's passage.
 - Concerns about the administration of Ofsted's LA inspection framework for children looked after and care leavers – these have been raised with Ofsted for consideration as they implement the framework, and will be kept under review.

While it is legitimate to voice both concerns – and they are being taken seriously by the Minister and Her Majesty's Chief Inspector – neither relates directly to the content of the draft Order itself. The Minister concludes, therefore, that these concerns have been or are being addressed separately and it is appropriate to proceed with the proposal to make the draft Order.