Agenda Item 6.1.1

Children and Social Work Bill

Submission to the House of Commons Public Bill Committee

CoramBAAF (formerly the British Association for Adoption and Fostering) is the interdisciplinary, multi professional membership organisation for those working in family placement across the public and voluntary sector.

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This submission focusses entirely on the clauses titled 'Testing new ways of Working as set out by Edward Timpson in the amendments presented to the Committee dated 15th December 2016

Submission

1. We are very concerned with the government's re-introduction of clause 29 and related clauses into the Children and Social Work Bill. We opposed the clause as it was introduced and debated in the House of Lords and were content that the Lords voted to delete the clause. We believe the re-introduced clause and the newly introduced 'safeguards' to be fundamentally flawed and seriously threaten the best interests, safety and welfare of children. We acknowledge that the amendments do exclude sections of the current legislative framework from 'the power to test new ways of working' and attempt to place a scrutiny process in place. But we believe that none of this addresses the fundamental constitutional principle that the law is the law. Over generations, this principle has become embedded in the constitutional framework of the U.K. Our laws are made by Parliament, applicable to every part of the country (in this case England) and not those that have chosen to opt out. The law is upheld through the authority of the courts alone, not the discretionary decisions of managers in local authorities. The clause challenges these fundamental principles and the House of Lords affirmed this in rejecting the clause and its threat to the rights, needs, entitlements and welfare of children. We cannot see that anything of substance has changed since that vote.

The Fundamental Right of Parliament to make and amend the law of the Land

2. We believe in innovation in the best interests of children and families. We are pleased to see the Minister re-affirm the principle drivers for the care system in subsection 1 (NC2). We accept that the law as it comes to be

applied and administered can act against the best interests of children. It is the role of the courts to continually test the proper interpretation and application of the law – in this case the Children Act 1989 and the Adoption and Children Act 2002 and other statutes. But these and other Acts of Parliament have proved to be a powerful child and family centred framework that have stood the test of time. If there are serious questions about the current legal framework, then the government can seek to amend the law through the authorisation of Parliament after extensive scrutiny, consultation and debate, including finally seeking Royal Assent. That new or amended law then applies throughout the land if and until questions are raised again about its effectiveness. It is not for individual local authorities or the Secretary of State to 'tinker' with the bits they think do not work. And currently if they were to do so, then this could be subject to legal challenge and the scrutiny of the courts, including the possibility that the courts would find a breach in the application of the law or its process. We believe the amended clause seeks to circumvent this long established and fundamental set of principles that set out how the country is governed. That the proposed clause(s) challenge this and that it focusses on children and their constitutional rights to be treated equally by the State when exercising its duty to promote their wellbeing and safeguard their welfare.

The evidence for the need to innovate

3. The Department for Education illustrates their argument for the need for the clauses through a series of examples. We believe that these examples demonstrate a poor case for the clause(s) and a serious misunderstanding

of these issues. If these examples represent the strength of the Department for Education's argument for the clauses, then we believe that in exploring them in more detail, then the fundamental weaknesses and risks quickly become apparent.

Department for Education Fact Sheet – Example 1

• *Trialling new approaches to the Independent Reviewing Officer role, to target where it adds most value – at present legislation states that an Independent Reviewing Officer must be present at all reviews for every child. Some children tell local authorities that they want to chair their own reviews, or that they do not like having an IRO present.*

4. The current arrangements for Independent Reviewing Officers is to ensure that the plan for every child or young person in care is child centred, delivers what they need in the short and long term and holds to account the local authority and others who are responsible for the plan. The detail of this role is set out in the IRO Handbook which is statutory guidance and

runs to 72 pages[1]. The guidance states that in drafting the guidance children and young people were consulted and there was very clear message from them about the role of the IRO as the following quote illustrates:

> "When they meet the child they should do this one to one so that the child can talk freely. They must check with both the child, and other people working with the child, on whether the child is OK and happy where they are living and with their care plans. They must regularly ask each child whether they are happy with how things are being done for them, and keep checking what is happening for each child against that child's plans and the decisions made at their reviews." [2]

This section of the Guidance concludes by saying:

> 'We have aimed to keep the voices of children and young people consistently in mind as we have drawn up this guidance.'

5. It is very difficult indeed to identify how the Guidance fails to keep this core issue in mind throughout including for those young people in the most challenging of circumstances such as the youth justice system. In fact, the introduction of Section 25B(1)(c) into the Children Act 1989 was intended to reinforce the local authority's duty under section 22(4) of that Act 'to ascertain and give due consideration to the wishes and feelings of the child when making any decision with respect to the child.' The term 'due consideration' places a significant requirement on the local authority to evidence compliance but it does not restrict the local authority in

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1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/337568/iro_statutory_guidance_iros_and_las_march_2010_tagged.pdf

2 Page 4

working with the IRO to achieve this effectively in a way which respects the wishes and views of the child or young person. The Regulatory framework also addresses this issue under Regulation 36(1)(b) where the IRO is required to speak to the child in private prior to each review so that the IRO personally establishes the child's wishes and feelings about the issues to be covered at the care planning meeting.

6. What is evident in both primary and secondary legislation is that there is the clearest of expectations that the IRO would include taking into account any view the child or young person might have about chairing their own review or not wanting an IRO present. What is particularly concerning is that the DfE has not recognised that it amended the Care Planning Regulations in 2015 to the allow precisely the flexibility that is identified as 'testing new ways of working' – namely that when a child is identified as being in a long term fostering placement then the IRO does not have to directly meet the child. And the advantage of this regulatory change is that applies to every child in every local authority, not a select few as would apply under this amendment.

7. It is therefore extremely difficult to comprehend why the clause is in any way needed to facilitate a solution to the example set out in the Department of Education's fact sheet given the current legal provisions it has already made. We could only plead with the Department of Education or any local authority to read the Regulations and the Guidance and to use the opportunities they provide. The DfE's fact sheet misrepresents or misunderstand the current requirements placed on IROs or the

opportunities they have to address any issues raised by the child or young person in relation to their role.

8. The second issue that is ignored in the fact sheet example are the powers under Section 25B(3) of the Children Act 1989 for the IRO to refer issues of concern about the local authority's services for the child for investigation by CAFCASS. This change was intended to ensure that IRO's understood that their role was to challenge local authorities in the best interests of a child and that this was not seen to be an exceptional act. If an exception to this duty was granted to a local authority by the Secretary of State to enable them not to comply with the requirement that every child's case should by reviewed by an IRO, then this fundamental protection would be removed – a serious infringement to the child's rights to have their needs addressed in their care plan.

9. Our view is that if the DfE wants to innovate and improve services to children, then it is the enhancement and resourcing of the role of the IRO that needs to addressed. The example in the fact sheet would have quite the opposite effect and it is very difficult to understand how it could have been used as an example of innovation.

Department for Education Fact Sheet – Example

• *More agile approaches to adoption and fostering assessments, using technology to gain the contributions of experts rather than always relying on a sitting panel as is currently required by law.*

10. The long-established role of panels to recommend on the suitability of prospective adopter/s or foster carer/s or the suitability of a match between a child and adopter/s draws on two principles. The first arises from the significance of the recommendation on a child's life and those adults who have applied to become adopter/s or foster carer/s. Such life changing decisions demand that they are explored by a range of professionals and those with direct experience of adoption or foster care as well as representing that of the local community – typically an elected member of the local authority. It is also important to note that adopters whose suitability is being addressed will be able to directly address the panel, answer or raise questions as they see fit. The functioning and process of the panel also draws on the advice of a senior professional. Panels represent the best of a professional and community approach to making significant life changing issues for children. Panels also hold professionals to account in quality assuring the work that they do when it has such fundamental life changing consequences. The second issue is the confidence that comes from the sector knowing that there is a uniform set of requirements across England when approving suitability and matches. The placement of a child 'out of area' will draw on the confidence that comes from knowing that the fundamental quality assurance mechanism that operates through panels will have been applied in the area where the child is to be placed – whether for adoption or foster care.

11. It is very difficult to understand what 'agile' means in this example. Does this mean agility in relation to the actual assessment or agility in relation to the functioning of the panel or both? It is certainly the case that in recent years that many panels have utilised electronic forms of communication and draw on a central list of potential members for each panel meeting. But these do not replace the importance of reflection, exploration and evidence that comes through 'face to face' discussions in the panel itself.

12. In an attempt to be 'more agile', the role of panels in making recommendations on whether a child should be placed for adoption was ended in 2012. Since that time, we have seen a 50% drop in the number of children with adoption as the plan. While this change cannot be the sole reason for this drop, it coincided with two challenging judgments from the Supreme Court and the Court of Appeal about the robust nature (or lack) of local authority planning and decision making. There continues to be serious questions asked about the combination of these judgments and the absence of the Panel's scrutiny in reducing the quality and confidence of local authorities when considering the future of these children when it comes to making an application to the court. This 'fall' may have been an unintended consequence of that change but it was argued at that time that this would make planning and decision making 'more agile'. The subsequent consequences for a large group of children

has been hugely problematic impacting on their constitutional right to experience 'family life' and will have lifelong consequences for them.

Department for Education Fact Sheet – Example 2

• Looking at different approaches to assessing friends and family carers. Now legislation, doesn't distinguish between the way we assess foster carers who are joining the fostering workforce and commit to many placements over a considerable period, and friends and family carers who are being approved in the same way to look after one young person who they have a relationship with. Local authorities say that this can at times provide a barrier to friends and family care placements.

13. When families find themselves in difficulty and this raises serious questions about the care of their children – in the short or long term - then other members of the family would typically step in to provide temporary or longer term care for the children. The extent and consequences of this are available from the Buttle Trust[3]. While the family 'stepping in' might be a common response, the analysis undertaken by Bristol University of the 2001 census data[4] connected to the Buttle Trust project demonstrates that the stresses on many of those families – income, housing, health and well-being - are significant despite the commonly reported good outcomes for the children.

[3] http://www.buttleuk.org/areas-of-focus/kinship-care

[4] http://www.bristol.ac.uk/sps/research/projects/completed/2011/rj5314/finalkinship.pdf

14. A small proportion of these children raise a range of concerns from safeguarding and other issues and some because family members are not in a position or able to care for the children. The law identifies that these children may be 'in need' (Section 17, Children Act, 1989), may fall under the requirements that the local authority provide 'voluntary' accommodation for the child (section 20, Children Act 1989) or be subject to a Child Protection Plan and/or where the local authority has applied to the court for an Interim or Full Care Order. The local authority has a responsibility where it is not possible for the child to be placed with their parent or another person with parental responsibility to consider a placement for the child as set out in S22(C)(6) of the Children Act 1989 – namely:

    (a) placement with an individual who is a relative, friend or other person connected with (the child) and who is also a local authority foster parent;

    (b) placement with a local authority foster parent who does not fall within paragraph (a);

15. These statutory requirements are intended to ensure that children who are identified as 'in need and/or at risk are placed in the most appropriate placement with a hierarchy identified in the relevant sub sections of those that are related to or know the child to those who will be 'strangers'. But given the risk to the child, then the local authority must ensure that any placement made meets the standards identified under the fostering regulations. These regulations are not intended to create a bureaucratic

hurdle but are focussed on ensuring that the child is placed with people who are safe, child centred and have the knowledge, skills and understanding to meet the needs of the child for as long as the placement lasts.

16. As the Department for Education's fact sheet sets out there are problems in applying the same standards to 'stranger' foster carers and to family members. What may seem to be a significant risk factor with a stranger foster carer may equally apply to a family member but the advantages of the child being placed with appropriate family member may on balance be strong. This is an acknowledged problem and various attempts have been made to address it but the problem persists and the Department for Education has paid little attention to exploring solutions to this in recent years.

17. Identifying that the issue could be addressed through local initiatives under this clause is however extremely risky and there are a number of cases that expose what this risk is.

17.1 In 2016 Brighton and Hove Safeguarding Children Board[5] published a Serious Case Review in relation to the death of 'Child E'. He was 17-

[5] Trance, S; Rogers, L. (2016) Serious Case Review: Child E, Brighton and Hove Safeguarding Children Board.

years old and died because of serious injuries resulting from hanging. The Coroner returned an open conclusion on whether the death resulted from suicide or an accident. E was 'looked after' by the local authority and had been since he was 3. His carers were family members – his maternal aunt and partner. His mother died from an overdose when he was 8 and his father played almost no role although contact had resumed in the later years of E's life. E had a range of serious emotional and behavioural issues, criminal activity and substance misuse. The SCR identified a complex range of factors that arose from the role of the local authority as corporate parent to E and the role of the aunt and partner as day to day approved carers for him. This resulted in confusion, uncertainty and a poor level of coordinated care, planning and services for E between the local authority, his carers and E.

18. In terms of assessment of relative carers, there are related questions when the legal order is Special Guardianship. This Order, introduced in 2005, has provided significant opportunities for children to be placed with family members with the Order authorising those family members 'to exercise parental responsibility to the exclusion of all others with parental responsibility'. At the same time, very serious questions have been raised about the rush to make an Order without the local authority or the court having or giving sufficient time or resources to exploring with the relative applicant their suitability, understanding, commitment to or having the resources to care for the child throughout their minority. The following two cases identify the risk.

18.1 A serious case review from Devon LCSB in January 2016 identified a child 'Bonnie' who at age 2 was sexually abused. A Special Guardianship Order had been made to the maternal grandmother who was assessed very positively by the local authority. Her former husband was identified as a risk to the child but the grandmother had not lived with him for 12 years. The Order was made and subsequently a referral was made to Devon's safeguarding team and on examination Bonnie was found to have been sexually abused penetratively by the grandfather who had moved into the grandmother's home.

18.2 In Nottingham in July 2014 Shanay Walker aged 7 was found dead while in the care of her aunt Kay-Ann Morris, aged 24 who held a Special Guardianship Order. Shanay had suffered more than 50 injuries. Kay-Ann Morris and the grandmother, Juanila Smikle, aged 53 were subsequently charged in relation to the death of Shanay and the judge, Mr Justice MacDuff said in passing sentence that both were guilty of a "most wicked betrayal of trust".

19. There are other similar cases of child deaths at the hands of relatives where Special Guardianship Orders have been made. While these Orders are not foster care arrangements what is demonstrated is that while placement with family members has huge and undeniable benefits for many if not most children, the responsibility of local authorities and the courts in exploring these benefits as well as the risk factors cannot be underestimated. The Department for Education's fact sheet is naïve and dangerous in proposing that there should be local disapplication of the current framework of assessment in addressing these issues. It must be

recognised that children have suffered the most tragic of consequences from poor assessments and the provision of support and the robustness of a national approach is needed not a local discretion to downgrade these assessments. That national responsibility is the responsibility of the Department for Education and one that it should not avoid by enabling this clause.

Conclusion

20. Clause 29 and its amendments fell in the Lords on the basis of the challenge to the fundamental role of Parliament to make and amend the law as it will apply to the whole of U.K. (in this case). It was also based on a challenge to the role of the courts in upholding the rule of law as it applies to the whole country. And that fundamentally impacted on the rights, welfare and needs of children.

21. The examples the Department for Education uses in illustrating the advantages of the amended clause are poorly argued, poorly understood and fundamentally negate the State's duty to safeguard the welfare and rights of children as we have come to know them. Innovation and 'testing new ways of working' should and must be enabled but these amendments are fundamentally misconceived. The Department should return to explore with local authorities, Universities, the Health Sector and those that innovate and experiment just how they can do this within the law, ethically and responsibly. The fundamental principle of 'do no harm' does not drive this clause(s) as is illustrated in the examples above. The Department for

Education must 'start again' with this principle firmly embedded in any new proposal.