

7th April 2020

Reforms to unregulated provision for children in care and care leavers

NYAS written submission to the Department for Education consultation

KEY:

Consultation text: Blue (shortened to relevant sections that contextualise NYAS' response)

NYAS submission: Black

Full consultation: https://consult.education.gov.uk/unregulated-provision/unregulated-provision-children-in-care/supporting_documents/Unregulated%20consultation%20FINAL%20link.pdf

We are therefore proposing legislating to ban the placement of children under the age of 16 in independent and semi-independent settings. This would prohibit the placement of under-16s in any setting that is not a regulated setting, such as a children's home or a placement in foster care.

- 1) Please set out any positive and/or negative impact you think this change would bring about, and the areas we should consider to ensure it is effectively implemented.

The National Youth Advocacy Service (NYAS) welcomes the proposal to ban unregulated accommodation for under 16s, but we strongly urge the Government to extend the ban to protect all care-experienced children up to the age of 18. NYAS is a rights-based charity supporting care-experienced children and young people across England and Wales by empowering their voices to be heard and representing their wishes and feelings.

Under the current proposals, 16 and 17 year-olds in care will continue to be placed into unregulated accommodation, facing many of the same problems that have been highlighted by NYAS and other organisations in recent years. Without regulation, there is little chance of guaranteeing the corporate parenting principle of keeping young people safe and stable in their home lives.¹ It is also at odds with Government policy which encourages a leaving care age of 18, considering care cannot legally be provided in unregulated accommodation.²

Here is the view of a young woman who NYAS has supported, describing her experience of unregulated accommodation at the age of 17: "[Being in] that type of environment was a living nightmare. The number of scary experiences I've faced while living there will probably stay with me forever."

All children are potentially at greater risk in unregulated settings, which is why the Government's response must not be limited to those under 16 years old. The increase in unregulated placements in recent years, as well as the wildly varying rates of using these

placements by different local authorities,³ does not inspire confidence that decisions are being made based on the best interests and wishes and feelings of children in care.

NYAS feel strongly that any homes responsible for children who are in care must be regulated. A crucial part of regulation is inspections by Ofsted and monthly visits by independent Regulation 44 (Reg.44) visitors. Without regulation, there is no official independent safeguard for young people in these homes, and no routine means of measuring quality or suitability.

During a monthly Reg.44 visit, an Independent Person visits a children's residential home to ensure that the rights of the child are being upheld and to monitor their safety and wellbeing. It is the role of the Reg.44 visitor, such as those employed by NYAS, to conclude their visit with a report detailing the way in which the home is operating, listing any concerns and agreeing an action plan with the home manager. The report also details the level of contact between the visitor and the child/young person, their parents/corporate parent, the home manager and staff. Any concerns about the home are red flagged in the report and are the first thing looked at on the next visit. Safeguarding issues are addressed immediately and serious concerns often lead to more frequent visits. Reg.44 visitors check that the rules for children's homes (The Children's Homes Regulations) are being followed. This includes making sure that the wishes and feelings of the children in the home are being listened to and that there are meetings happening in the home for them to have their say. These detailed visits take place in regulated accommodation but should also be taking place in all unregulated accommodation. The safety of the child or young person placed in unregulated accommodation and their rights should not be compromised through a lack of Reg.44 or equivalent visits taking place.

NYAS works with some very good unregulated homes that voluntarily subject themselves to independent Reg.44 visits, but this is not the norm and most remain entirely unregulated. It is however the worst homes that are least likely to encourage independent scrutiny, leading to their failings continuing unchallenged. It is in these homes that the enforcement of Reg.44 or equivalent visits must be most urgently considered.

NYAS is calling for all accommodation for every child in care to be regulated. In 2014, the DfE determined the importance of the Reg.44 role as a result of previous Child Sexual Exploitation cases, in particular in Rochdale, where evidence suggested that young people were more likely to disclose safeguarding issues to people who were independent from their care or homes. The lessons learned from such cases then do not seem to have been evenly applied to protect all children from sexual exploitation, as those placed in unregulated accommodation lack these safeguards. This places a very real and potentially significant risk for children currently living in unregulated accommodation in England and Wales.

As stated above, we have heard that local authorities are making difficult decisions to find the most appropriate placement to meet the needs of the child, and that the ideal placement is not always available, particularly in circumstances where children are first brought into care, or where placements have broken down and new ones have to be sourced quickly. In order to consider how the Department could possibly support local authorities with these issues, it would be helpful if respondents could share any examples they have of good practice in being prepared to deal with emergency placements.

2) Please share your examples of good practice here.

N/A

We propose to introduce a new requirement for local authorities to liaise with the relevant police force when they place children in other local areas. This will ensure that the police can share any information they may have about particular providers or areas, in order for the local authority to make a considered judgement over whether to place that particular young person in that area and provision, including whether any additional support or monitoring should be put in place for the duration of the placement.

3) Do you agree that we should introduce a new requirement for local authorities to consult with relevant local police forces when they place a child out of area in independent and/or semi-independent provision? Yes / No

No.

4) Please explain your answer, including any positive and/or negative impact you think this change would bring about.

Regulations already require local authorities to check the safety and the location of unregulated accommodation before they put a child there. There are already legal duties around visiting children and checking their welfare.

Local police forces must work closely with local authorities and Ofsted in their area to share information. If a local authority is seeking to place a child out of area, then they must consult directly with the local authority where the proposed home is based. Corporate parents need to collaborate better to care for children who they send out of area, and it would be inappropriate to delegate this duty to police forces.

If a new requirement introduces new processes too, this could delay the local authority in finding suitable accommodation for a child, leading to further instability and uncertainty in that child's life. Alongside other forums, Joint Agency Groups already exist for local authorities and police to share information and raise any concerns.

At present, there is no definition of 'care' which would take its ordinary meaning. It is not clear whether what constitutes 'care' might differ by age group, whether the child has special needs, medical conditions or disabilities, or any other factor. Some local authorities have told us this can be unhelpful, particularly for older children, and that they would welcome greater clarity, to prevent the risk of inadvertently placing a child in a setting which would be operating illegally in accommodating and providing 'care' for the child. We propose amending legislation and the associated statutory guidance to make it clearer when a setting is providing 'care' and to bring clarity on what the difference between 'unregulated' provision and 'unregistered' provision is.

- 5) Do you agree that we should amend legislation to define 'care', in order to provide clarity on what amounts to 'other arrangements' i.e. 'unregulated' provision, and what constitutes 'unregistered' provision? Yes / No

No.

- 6) Please explain your answer, including any positive and/or negative impact you think this change would bring about.

There is already a legal definition of care. Regulations require children's homes to follow nine quality standards, including one on 'the purpose and quality of care'.⁴ If the Government chooses the right course of action by regulating all currently unregulated provision, it will remove the need for any new definitions or caveats.

Furthermore, every child in care must have a care plan and regulations set out what must be included.⁵

- 7) Do you have any suggestions for areas where we might go further? In making your suggestions, please provide any supporting evidence or information you have.

At NYAS we champion the right of care-experienced young people to have their voices heard in decisions made about them. We have urged the Department for Education to seek ways to empower the voices of children living in the homes consulted on, and will continue to work with the Government to make sure that care-experienced children and young people are listened to and their views are taken seriously.

One care leaver told us how they had many PTSD and anxiety attacks because of violent behaviour from other residents in their unregulated accommodation, which highlights the failure of some corporate parents to safeguard the mental health and wellbeing of children in their care. For the corporate parent, failing to protect this child from physical and emotional harm or danger could be characterised as neglect under the Government's own definition.⁶

Everyone must be given the opportunity to enjoy their childhood. As a country, we must build resilient networks and strive to enable positive experiences for care-experienced children and young people. Adverse Childhood Experiences and Positive Childhood Experiences are two sides of the same coin - it is not enough just to take a child out of an adverse or traumatic environment and then assume their mental health will improve. Children need love and support in order to flourish.

NYAS' '**Looked After Minds**' campaign is calling upon the DfE to introduce statutory guidance for professionals and carers on Positive Childhood Experiences. As part of that guidance, a 'do no harm' principle for services working with care-experienced children and young people should be introduced that recognises which professional decisions can harm mental health. The guidance we are campaigning for must have an explicit focus on supporting care-experienced children and young people to lead fulfilling lives and reach their potential. This would be an invaluable addition to any framework of regulation and new standards.

There is a further question about the quality and suitability of staff in unregulated accommodation, if there are any staff available at all. In their Interim Report of April 2018, The Independent Inquiry into Child Sexual Abuse recommended that the DfE introduces

arrangements for the registration of staff working in care roles within children's homes. Any changes to professional registration will not affect unregulated accommodation, unless it is brought in line with expectations for other homes for children. This is another reason that children up to the age of 18 must be protected by proper regulation.

The current situation risks a perfect storm. It is not a stretch to say that right now some of the country's most vulnerable children are in unregulated accommodation of unknown quality, supported by unqualified staff or no staff at all. These are children for whom the state has taken on the responsibility of parenting, so the test must be **'would this be good enough for your child?'** Putting this test another way, **'would you be comfortable placing your child in an unregulated home?'**

SEE PG.13-17 FOR NARRATIVE

8) Please set out any positive and/or negative impact the introduction of new national standards would have

These new national standards could have an overwhelmingly positive impact on accommodation for children and young people. The success of the standards will depend on four key elements:

- Care-experienced children and young people must be consulted, to directly shape the standards that will affect their lives. NYAS can facilitate care-experienced advisory groups or forums to address specific questions related to the introduction of the new standards.
- The standards must be enforceable, enshrined in legislation or statutory instruments.
- Accommodation providers must be accountable, subjected to regulation and inspection.
- All children must be protected, so any new standards must include 16 and 17 year-olds in care.

9) Please set out any other areas you think should be covered in the new national standards

NYAS is united with other charities in our sector in calling for any new national standards to also protect 16 and 17 year-olds in care. We would expect to see the nine quality standards that already exist for children's homes, where children can live up to and beyond their 18th birthday, applying to those unregulated homes that successfully transition to a new system of regulation following this consultation.⁷

We fully support our colleagues at Article 39 in their submission on this point: *"Modifications already exist in the children's homes standards for two types of care – short breaks (for disabled children) and secure (where children are detained for their own welfare or following remand or sentencing by a criminal court). Following this precedent, modifications could be made for children's homes specifically looking after teenagers aged 16+ – recognising their need for growing autonomy while still providing care and support. As with short breaks and secure care, there is no reason why this type of children's home couldn't have a more*

appropriate name / description which would be more appealing, and carry less stigma, for teenagers.”

NYAS also welcomes the ‘support standard’ proposal that accommodation providers set out how they will support young people to access advocacy services. However, this should be strengthened with an ‘active offer’ of advocacy, which means that care-experienced children and young people have to opt-out rather than opt-in to having an independent advocate. The active offer already exists in Wales, and should be rolled out across England and embedded into these new national standards prioritising children and young people entering independent or semi-independent accommodation. Any new standards should also include a requirement for Residential Visiting Advocacy (RVA). Through visiting settings on a regular basis our RVAs build relationships with the young people, supporting and enabling them to share their views, wishes and feelings, empowering them to resolve issues and be involved in decisions that affect their lives.

These standards could also be an opportunity to enhance the support available for young people entering independent or semi-independent accommodation as they leave care. Whether in the standards or broader guidance, provision could be made for a young person to keep their Independent Visitor (IV), if they have one for an agreed number of years beyond their 18th birthday (subject to both parties agreeing). This would add to their sense of stability during their transition to independent living. Additionally, offering an IV to all young people entering independent or semi-independent accommodation for a period of 12 months or two years would introduce another level of support as the young person adjusts to new living arrangements. This is the basis of NYAS’ **‘Side By Side’** project, which we are currently in the process of launching on the Wirral. We will be able to share evaluation results with the Government next year, but hope that the project’s principles can inform more immediate action to support young people.

New national standards should also recognise that each child’s situation and assessment is unique to them. That is why universal assessment tools and responding to the child’s wishes and feelings must be central to the tailoring of support and care provided for them. While it can be tailored, support and care must never be completely unavailable or inaccessible to a care-experienced child or young person. For too long, this has been the experience of too many children living in unregulated accommodation.

SEE PG. 17

[Two options are given for putting the new standards into practice – a requirement on local authorities to only place children in care in accommodation which meet the new standards (to be checked when Ofsted inspects councils) **or** a requirement for providers to register with Ofsted, and to be inspected against the standards.]

10) Which option, 1 or 2, do you think would most effectively raise the quality of independent and semi-independent provision?

Option 2.

11) Please explain your answer, including why the options would be particularly effective or ineffective.

While option 1 may be a step forward, it does not go far enough to guarantee high standards. However, option 2 has the most potential to raise standards.

This consultation is taking place because the current arrangements are clearly not working, which is why NYAS have been calling for the independent scrutiny of Ofsted and Reg.44 visits. Only then can we be more certain that children are receiving the care that they need and are entitled to.

Local authorities already have duties to ensure that the accommodation in which they place children is suitable. This is part of their overarching duty to safeguard and promote the welfare of each child in their care.

If a provider takes the step of registering and completes a self assessment, they will know what they need to do in order to be 'approved'. Registering with Ofsted may lead current unregulated providers to realise that they will not be able to meet the standards set, and in that case the local authority is better positioned to ensure that no child or young person is ever placed with them. All providers registering with Ofsted should have to commission monthly independent Reg.44 visits.

12) Please set out the consequences and implementation challenges that should be considered when introducing new standards?

There are children in unregulated accommodation who need safeguarding right now. We cannot delay in taking action. Recognising that Ofsted may need time to build capacity for new inspections and legislation could take months and therefore should not be delayed by process or bureaucracy. As an aid to the work of Ofsted and to assist the providers new to inspection regimes, each new provider should undergo regular Reg.44 (or equivalent) visits. These visits are well known to and highly regarded by Ofsted and often complement the work of Ofsted inspectors without replacing it. There is no need to 'reinvent the wheel', particularly as timing is critical. As the leading provider of Regulation 44 visits, we can be seen as a 'critical friend' by children's home providers. We visit and report on over 400 children's home per month, making recommendations for over 2,000 children during that time period. NYAS can advise on the practicalities of rolling out independent scrutiny of children's homes.

Care-experienced children and young people must be meaningfully consulted to shape any new standards. Recognising that many teenagers may seek more independence, consultation should not mistake that desire for a willingness to live in a home without any care, stability or love. Independence, parenting responsibilities and regulation are not mutually exclusive.

NYAS has previously suggested that a central fund could be set up to assist with any costs facing care home providers to meet new regulation or registration requirements. In the case of private providers, who run over three quarters of relevant independent or semi-independent unregulated accommodation,⁸ this should not come from the Department for Education (DfE) or children's services. In May 2019, the Housing, Communities and Local Government Committee said that Children's Services were at "breaking point" and that

current funding levels were unsustainable.⁹ Instead, we suggest that the Department for Business, Energy and Industrial Strategy (BEIS) might offer a one-off, short-term central fund, and could even recoup some costs with an appropriate registration fee in the future. The fund could operate as a loan or one-off grant. The recent Government response to COVID-19 has demonstrated how quickly and simply businesses can apply for support when needed.

Ofsted must have a role in inspecting. NYAS echo the views of this care leaver: *“It's definitely management that affects how well a place like that runs. I feel like the concept of semi-independent living is a great one but it is not being put into play properly. I really do believe that's because they're not getting checked enough.”*

Whilst there will be many challenges in implementing the standards such as timings, costs, resources, ability and skill levels in reaching the required standards plus many more, they are all resolvable, short term issues that provide necessary protection for children in the long term. Without finding a suitable resolution to regulating currently unregulated care, the consequences are far worse and more expensive than a financial burden to the government. Parents do not put a price on providing a safe and secure home for their child. Corporate parents should see their safety and security as invaluable too.

To ensure that this key check and balance is working effectively we are proposing to make changes to statutory guidance to ensure it is clear that IROs should undertake a visit to a placement to be able to assess whether it is meeting the needs of the child or young person, and that this report must be sent to the local authority to inform their decision making process about next steps for the individual child or young person. This would sit alongside the work we are already undertaking to deliver our commitment in Fostering Better Outcomes to improve IRO effectiveness.

Ofsted already consider IRO effectiveness in local authority inspections. We will therefore work with Ofsted to ensure they are looking at IRO scrutiny of placements as well as local authorities' responses to concerns raised as part of local authority inspection.

- 13) Do you agree that we should clarify statutory guidance, to ensure that IROs undertake visits to a placement to be able to assess whether it is meeting the needs of the child or young person and that they must send a report to the local authority to inform their decision making process about next steps for the individual child or young person? Yes / no

Yes.

14) Please explain your answer

NYAS would welcome in principle an enhanced role for Independent Reviewing Officers (IROs) in scrutinising placements. However, given the potential scale of the role already, it is vital that IROs have the capacity for any new functions. IRO activity should not be seen as an alternative to Ofsted inspections or Reg.44 visits of children's homes, which must be seen as central to regulation and monitoring standards. The Government must clearly define

how IRO visits would add value to existing regulatory activity, particularly once the necessary step of regulating all children's placements is taken.

The language around this proposal needs strengthening to be clear around timescales. When the IRO would be expected to visit must be set out, for example whether it is before a child moves in or during their time living there. Clarity must also be given on how frequently the IRO will visit, whether that be a one-off, monthly, quarterly, annually or something else. The timescales for reporting are very strict for Reg.44 visits, with 72 hours for reports and then five days maximum for them to be signed off and sent to Ofsted. We recommend consulting with the National Association of Independent Reviewing Officers (NAIRO) on how IRO visits and reports would compare to this, and how these reports would add value instead of duplicate effort. Ensuring clear recommendations made by the IRO are followed up between reviews and visits will be vital, but the proposal as it stands is also unclear on how that could be guaranteed.

We propose to increase Ofsted's enforcement powers. We would amend legislation so that Ofsted have a legal step before prosecution to issue enforcement notices, replacing their existing 'cease and desist' letters, so that their action has more bite. This should see illegal providers being either forced to close quickly, register their service, or face some form of penalty, as well as reducing the appeal of setting up such provision. Ofsted would publish details of all providers that have been served with an enforcement notice, and local authorities not to use any providers listed.

Ofsted would retain their power to prosecute providers. In implementing this proposal, we would work with Ofsted to develop a framework for determining under what circumstances Ofsted would proceed immediately with a prosecution or issue an enforcement notice.

15) Do you agree that we should legislate to give Ofsted powers to issue enforcement notices to illegal unregistered providers before proceeding with prosecutions? Yes / no

Yes.

16) Please explain your answer

NYAS supports more enforcement powers for Ofsted to tackle illegal unregistered providers. However, Ofsted should already be working with local authorities and the police to close down any such providers and supporting prosecutions where appropriate. One suggestion in this consultation, that illegal providers might 'face some form of penalty', is too weak and seems unlikely to prevent their ability to continue operating.

We suggest that Ofsted would gain new enforcement powers if all children's homes were regulated under new standards and subject to their inspections. Creating a regulated system for all children in care is vital and urgently needed.

NYAS are proud of our work with Ofsted to consult care leavers on their approach to inspections. We are due to accompany a group of care leavers we work with to an event with Ofsted where unregulated accommodation will be discussed as part of wider inspection work.

We encourage the Government to seek further opportunities to hear directly from care-experienced children and young people so that they can set the agenda. There must be no decisions made about them, without them.

Endnotes

¹ P.8

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683698/Applying_corporate_parenting_principles_to_looked-after_children_and_care_leavers.pdf

² P.12

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683703/Local_offer_guidance_final.pdf

³ P.13-14

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864075/Looked_after_children_in_independent_or_semi-independent_placements_Feb_2020.pdf

⁴ <http://www.legislation.gov.uk/uksi/2015/541/regulation/6/made>

⁵ <http://www.legislation.gov.uk/uksi/2010/959/schedule/1/made>

⁶ <https://publications.parliament.uk/pa/cm201213/cmselect/cmeduc/137/13705.htm>

⁷ <https://www.childrenshomesqualitystandards.org.uk/regulations-quality-standards/quality-standards/>

⁸ P.10

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864075/Looked_after_children_in_independent_or_semi-independent_placements_Feb_2020.pdf

⁹ <https://www.parliament.uk/business/committees/committees-a-z/commons-select/housing-communities-and-local-government-committee/news/funding-local-childrens-authorities-report-published-17-19/>