

B E T W E E N:

THE QUEEN
(on the application of ARTICLE 39)

Claimant

-and-

SECRETARY OF STATE FOR EDUCATION

Defendant

WITNESS STATEMENT OF SOPHIE LANGDALE

I, Sophie Langdale, Director of Children's Social Care: Practice and Workforce at the Department for Education, 20 Great Smith St, Westminster, London SW1P 3BT, WILL SAY as follows

1. I am a longstanding senior civil servant and since October 2019 have been employed as Director of Children's Social Care: Practice and Workforce in a job-share arrangement with Frances Oram. I am responsible, together with Ms Oram, for the statutory framework and practice in children's social care in relation to child protection, children in need and children in care, including fostering and residential care and securing permanence for children through adoption and Special Guardianship Orders; and securing improved outcomes for children in need, children in care and care leavers, as well as oversight of the social work profession.
2. I am duly authorised to make this statement on behalf of the Secretary of State for Education ("**the Secretary of State**") in response to this claim. The contents of this statement are within my own knowledge or derived from records held by the Department for Education ("**the Department**") or from discussions with colleagues and are true to the best of my knowledge and belief.
3. The purpose of this statement is to set out for the Court the relevant context and background in relation to the process of making, and the ongoing review of, the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 ("**the 2020 Regulations**").

4. This Witness Statement is structured as follows. I set out the context in which the need for the 2020 Regulations arose at §§5-9; describe the process of making the 2020 Regulations at §§10-22 the review mechanism contained in the 2020 Regulations and ongoing work in relation to it at §§23-35 I deal with parliamentary scrutiny thus far and going forward at §§36-38; and set out a brief conclusion at §§39-41.

Context: the need for the 2020 Regulations

5. The children’s social care system in England is responsible for the protection and welfare of the most vulnerable children. It receives approximately 650,000 new referrals every year, and at any one time has around 400,000 children in need¹ and 78,000 looked after children (i.e. those children in the care of the local authority), who are supported by around 31,000 registered social workers; there are 2,300 children’s homes with 12,000 registered places, and 44,000 foster carers with 55,000 children in foster care. The sector is governed by a complex set of detailed primary and secondary legislation with day-to-day responsibility overseen by Directors of Children’s Services in the 151 top tier local authorities. The Children Act 1989 (“**the 1989 Act**”) is the central piece of legislation governing children’s social care. The 1989 Act provides the framework for managing what local authorities, courts, parents, and other agencies in the UK are doing to ensure that children are safeguarded. This means making sure that their well-being, health care, and human rights are all being looked after to a high standard. The welfare and best interests of children, and the need to act consistently with these including by avoiding undue delay, underpin children’s social care practice and the relevant legal framework.
6. On 30 January 2020, the UK’s four Chief Medical Officers increased the risk level from COVID-19 in the UK from low to moderate, advising that “*government should plan for all eventualities*”. During February of this year the Department, in common with other Government departments, ramped up its planning for a potential COVID-19 pandemic and began to make preparations and ensure that contingency measures would be in place to address the potential national crisis.
7. There was considerable uncertainty about how a pandemic would affect the children’s social care system and those children and families reliant on it for support and protection. The worst-case scenario available to us at that time, informed in particular by the most up-to-date information available from the Scientific Advisory Group for Emergencies (“**SAGE**”), indicated that there was potential for a significant part of the population becoming ill, and significant numbers of excess deaths. I exhibit as **SL1** a document from SAGE, dated 26 February 2020, setting out

¹ As defined in s.17 of the Children Act 1989.

planning assumptions for the COVID-19 pandemic in the UK. The SAGE document set out a reasonable worst-case scenario of infection rates resulting in workforce absences of 17-20% nationally during peak times; just under 10m people requiring assessment by health services; 1.3m people requiring hospital care for an average six-day stay; and some 820,000 excess deaths.

8. The Children's Social Care system was already facing significant pressures prior to COVID-19. Three children in every classroom have needed a social worker to keep them safe from abuse and neglect, with local authorities reporting it as their number one immediate pressure,² and 80% of them overspending their children's social care budget in each of the last five years. At March this year only 50% of local authorities were judged good or outstanding by Ofsted with 21 local authorities judged inadequate and in formal intervention with Department, which compares to 86% of schools judged good or outstanding. Reporting on Pressures in Children's Social Care in 2019 the National Audit Office noted that both it and the Committee of Public Accounts had previously reported that local authorities' finances and services were increasingly under strain. The existing pressure along with consideration of the reasonable worst-case scenario as outlined in SAGE's scientific advice led to two particular considerations for children's social care:
 - (i) The workforce could face a significant rate of staff absence caused both by sickness and self-isolation. A particular issue was that the social work workforce is primarily female and therefore more likely to also have caring responsibilities necessitating additional time absent from work to care for dependent children or other family members. The Department was concerned that there was already a significant vacancy rate in local authority employed children's social workers (16.4% nationally, but with some local authorities facing much higher vacancy rates, at the end of September 2019 based on the Department's annual statistics, which I exhibit as **SL2**), and the children's social care system was already widely reported as being under significant pressure. An absence rate much higher than normal would therefore have the potential to prevent local authorities, particularly those with the highest vacancy rates, from effectively dealing with new referrals received and meeting the needs of those children already receiving support from children's social care. For internal planning we assumed a relatively higher workforce absence level for the children's social work workforce, incorporating evidence on the demographics of this occupation group. Our highest assumption was that the additional social worker absence rate could reach around 35% as a weekly average rising to 41% at the peak. Staff sickness for those working on residential children's homes, including secure children's homes where there are high staff-child ratios, was also a significant concern to the Department. Similarly, we

² <https://lgiu.org/publication/lgiu-mj-state-of-local-government-finance-survey-2020/>

had concerns that foster carers, many of whom are older, could fall sick in high numbers or be required to self-isolate, reducing the availability of foster placements.

- (ii) Significant rates of serious illness could lead to an increase in the number of children requiring emergency care by local authorities should their adult carers not be able to care for them either temporarily or in the event of their death. The existing market for placements is extremely tight. The Department regularly hears from local authorities that they can contact more than 200 children's homes to find a place for an individual young person; statistics for the year ending 31 March 2019 (exhibit **SL3**) show that 41% of children were placed outside their local authority area because there weren't placements available within the local authority's area; and we had already seen a growing list of children needing a secure children's home bed (reaching more than 50 children per day when these regulations were being developed) but no new beds being offered due to concerns about the potential impact of COVID-19, including because of staff absence. Further there has also been a significant increase in the number of young people aged 16 and over being placed in unregulated provision from 3,660 in 2015 to 6,190 in 2019. This increase has been driven by multiple factors, and this was highlighted in our research published in February 2020 (see exhibit **SL4**). These include the fact that more older children are coming into care, and older children are more likely to be dependent on this type of provision, but also that a lack of other available regulated placements, such as in children's homes and secure children's homes, leads to more young people being placed in unregulated accommodation if a secure placement is not immediately available even though their needs could be better met in regulated provision. More than three quarters of looked after children are placed in foster homes and the system relies heavily on those placements remaining stable, but we know from fostering service reports that more than 40% of foster carers are aged over 50 and some have existing health conditions; one Independent Fostering Agency (IFA) reported that 10% of their carers would be shielding during COVID and unable to take new placements. Any significant increase in the number of children entering care could make it significantly more difficult to secure appropriate placements particularly for those for whom unregulated provision is unsuitable, including those under 16, especially if capacity is reduced by foster carers falling sick and children's homes not admitting children due to outbreaks.

- 9. It was against that context that the Department was, in February and March 2020, considering the question of what legislative interventions may be necessary to allow local authorities and providers respond to the COVID-19 pandemic and the specific circumstances faced at a local level. In addition to those in children's social care a range of legislative interventions were made

across government including through the Coronavirus Act 2020 to respond to the pandemic. Within children's social care legislative change formed part of a wider set of responses designed to enable local authorities to focus on what mattered on a day to day basis including stopping routine inspections, putting Ofsted inspectors in to local authorities to provide support, and pausing a number of DfE funded programmes.

Process: How the 2020 Regulations were made

10. In February the Government began to prepare possible emergency legislation in response to the COVID-19 crisis, under the leadership of the Department of Health and Social Care. This would in due course lead to the Coronavirus Act 2020. On 18 February, the Children's Social Care ("CSC") directorate within the Department was first commissioned to consider whether any legislation would be needed. By 27 February, the decision had been made across government to limit the scope of the Coronavirus Bill to exclude any legislative requirements that could be met through secondary legislation and the Secretary of State approved the scope of the bill from a departmental perspective. For CSC, the Coronavirus Bill only included powers to increase the available social work workforce through the emergency, temporary registration of social workers who had recently left the profession; this was in line with similar powers in the bill for the emergency registration of health professionals.
11. I have noted above the significant workforce issues in both local authorities and children's homes and shortages in the availability of foster carers. As to the potential effect of COVID 19, a particular concern within CSC was the risk that these issues, coupled with an increased demand for services, could lead to the most vulnerable children being put at risk if services, struggling to cope with the full range of legislative requirements, found themselves unable to take timely action to address immediate safeguarding concerns. The Department thus took the view that it had to prepare for the risk that local services may be unable to fully comply with their existing duties due to the significant pressures caused by COVID-19. On this basis, the Department began the process of seeking to establish what changes to regulations would best serve the Department's overriding objective of safeguarding the most vulnerable children, including by relieving services which we expected to be placed under significant pressure to enable focus on the core safeguarding duties.
12. The development of the 2020 Regulations was an iterative process. Within CSC, individual policy teams reviewed their respective areas of expertise with a view to identifying possible amendments that should be made in response to the COVID-19 pandemic. A long list of potential

changes and the considerations that were raised in relation to them is exhibited to this statement as **SL5**.

13. As part of the decision-making process, the Department sought views from the sector about potential pressures in the system and whether local authorities and providers could meet current regulatory requirements given the potential for significant staffing shortages at that time and other contextual factors such as reprioritisation of NHS resources impacting upon the ability to obtain timely assessments of potential cares, for example. I exhibit as **SL6** the note of a meeting held on 25 March 2020 with Social Worker Practice Leaders and Principal Social Workers from local authorities, at which I was present, at which attendees highlighted an *“urgent need for national guidance specifically for child and family social workers - which statutory requirements can be relaxed and how?”*. Local authorities were also requesting guidance on approvals for temporary foster carers, and there were concerns about balancing staff and family safety and/or anxiety around social distancing with statutory requirements with some local authorities struggling with workforce capacity.

14. While the urgency with which the 2020 Regulations needed to be drafted meant that a formal consultation was not possible, from mid-March until the finalisation of the draft regulations views were sought from the Department’s key delivery partners (i.e. Ofsted, Association of Directors of Children’s Services (**“ADCS”**), Social Worker Practice Leaders group) and other stakeholders that the relevant policy teams considered, in the time available, should be approached (e.g., Fostering Network,³ Consortium of Voluntary Adoption Agencies, Independent Children’s Homes Association, Coram, the Children and Family Court Advisory and Support Service, the Family Rights Group⁴). I exhibit as **SL9** copies of the relevant correspondence⁵. In approaching partners and stakeholders, the Department made it clear that views were being sought on the substance of what was to be included in the proposed regulations. This is clear both from the emails that were sent out by the Department,⁶ and from the fact that we received significant substantive feedback. Feedback differed across stakeholders as some commented on what changes were required to adapt to COVID-19 more generally and others commented on specific proposed changes.

³ See the correspondence with the Fostering Network at pages 45-37 of exhibit **SL9**.

⁴ See the correspondence at pages 99-102 of exhibit **SL9**.

⁵ I understand that this is already before the Court, but as it was not included in the Claimant’s bundle it was thought convenient to exhibit it to this statement

⁶ See, for example, at pages 11-14 of exhibit **SL9** the email sent on 17 March 2020 at 14:42 to local authorities, which informed recipients that *“We are looking reviewing all relevant children’s social care regulations to identify any areas that we need to amend to allow for flexibility in the coming month”* and asked, following a series of more specific questions, *“Are there other issues we should be considering?”*.

15. The Children’s Commissioner was also informed about the proposed amendments on 17 April 2020, and provided substantive comments on certain specific regulations: see pages 152-207 of **SL9**.
16. As can be seen from the submission to Ministers exhibited at **SL7**, amendments to statutory instruments in the context of COVID-19 were categorised as ‘urgent’ by the Department if they had a direct impact on the rights of individuals or were required to enable the smooth functioning of administrative systems. The 2020 Regulations were considered to fall into both categories: they were required to enable the continued smooth functioning of children’s social care services in circumstances which had already led to the closure of schools to most children and a national “lockdown” at the end of March, and related to services provided to individuals under the regulations that were being amended.
17. The urgent categorisation meant that the 2020 Regulations had to be laid within 4 weeks (by 23 April) as part of the departmental SI timetable. Our view was that these regulations needed to enter force at the earliest opportunity to avoid the potential for a negative impact from the pandemic on the effective functioning of children’s social care including local authorities and providers quickly failing to meet primary safeguarding responsibilities whilst attempting to meet those statutory requirements that the Department had formed the view could safely be relaxed temporarily. Through the period of development of the 2020 Regulations leading up to the day they were laid the Department focused on putting the 2020 Regulations in place quickly as the number of cases of COVID-19 continued to grow. It was also clear by the time that the 2020 Regulations were signed off that continuing with all face to face activity as normal would, in certain instances, risk exposing both staff and children/ families to catching the virus.
18. Some feedback from stakeholders led to specific changes. For example, the requirement for a formal medical report was an issue raised early by stakeholders as a cause of significant delay to approvals of new foster carers, hence our decision to temporarily revise the requirement in Schedule 3 to the Fostering Services (England) Regulations 2011 and allow foster carers to self-report medical information in the initial stage of assessment.⁷ In addition, local authorities advised that due to COVID-19 related staff absences, it would not always be possible to meet the quorum number of adoption panel members, which would lead to delays in the adoption process, which is why the amendments to regulations 4 and 6 of the Adoption Agencies Regulations 2005

⁷ Regulation 9(14) of the 2020 Regulations. See, for example, the email from Southwark Council of 18 March 2020 12:32 exhibited at page 21 of exhibit **SL9**.

were made.⁸ Similar provisions were made to the Fostering Services (England) Regulations 2011 to address the same concerns about fostering panels.⁹ The Department also received feedback from Ofsted and the Independent Children's Homes Association that clarity was required surrounding independent visits to children's homes.¹⁰ The Department decided to amend regulation 44 of the Children's Homes (England) Regulation 2015 in order to provide assurance that the registered person would not be in breach of the law if an independent person could not make a personal visit every month due to lack of availability or an outbreak of COVID-19 at a children's home. We were of the view that the wording of regulation 44 was wide enough to allow virtual or remote visits where appropriate and therefore this was not specifically included in the amendments. The provider also has to be able to demonstrate that reasonable endeavours have been used to facilitate a visit.

19. In ideal circumstances, the Department would have wished to have had full consultation on the 2020 Regulations. However, in the circumstances, this was simply not practicable. A desire to ensure that the Department was adequately informed as to the impact of the 2020 Regulations going forward did, however, inform the decision to include a review mechanism within the 2020 Regulations, about which I say more below. We took into account concerns raised including from children's charities in the course of preparing guidance accompanying the 2020 Regulations which was published on 6 May 2020¹¹.
20. Mindful of the importance of protecting children's rights, the Department carried out a Children's Right Impact Assessment for the regulatory changes: which appears in the Claimant's bundle at p403-406. The assessment concluded that the changes would not have an adverse impact on children because there was no amendment to any primary legislative responsibilities that local authorities have, and noted in particular that no changes were being made to the substance of the services being provided to children. The assessment stated as follows:

“These changes introduce greater operational flexibility for local authorities, but they do not reduce or remove any responsibility that local authorities have towards children. Local authorities are still expected to provide children's services and to identify, support and protect vulnerable children. The changes are intended to give local authorities flexibility to help them deliver these services whilst resources are limited due to the COVID-19 pandemic.”

⁸ Regulation 4 of the 2020 Regulations. See the correspondence with local authorities prompted by the Department's email of 17 March 2020 14:42 exhibited at page 12 of exhibit SL9 in which there is extensive comment on the issue of panels and quoracy requirements.

⁹ Regulation 9(6) of the 2020 Regulations.

¹⁰ In a different context, on 17 March, the Secretary of State announced a suspension of Ofsted inspections during the COVID-19 outbreak. This followed input from Ofsted regarding the need to amend Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) Regulations 2015.

¹¹ Insert hyperlink to guidance

21. The safety and protection of vulnerable children remains paramount for the Department during the COVID-19 outbreak. The very purpose of the changes introduced by the 2020 Regulations was to protect vulnerable children from being put at risk of harm by allowing social workers and care providers to prioritise urgent safeguarding concerns ahead of certain specific procedural duties. Our aim was to make minimal changes to ensure the safe functioning of children’s social care during COVID-19. The amendments do not reduce the responsibility that local authorities have towards protecting children from significant harm and promoting their welfare. No amendments have been made to local authorities’ duties in primary legislation. These include section 22(3)(a) of the 1989 Act, which sets out a local authority’s duty to safeguard and promote the welfare of any child they are looking after, and section 1 of the Adoption and Children Act 2002 which states that the child’s welfare is paramount in all decisions on adoption.
22. I understand that the claimant suggests that previously proposed legislation in the then Children and Social Work Bill in 2016, known as “the power to innovate”, or publication of a subsequent ‘myth buster’ document, somehow bears on the making of the 2020 Regulations. I am aware of those previous initiatives, but I can confirm that neither initiative, nor any of the underlying policy work, was considered or featured in the decision-making process leading to the making of the 2020 Regulations. The 2020 Regulations were developed solely in response to the potential crisis facing children’s social care as a result of the pandemic.

Review

Process

23. The Department started work on the process of monitoring and reviewing the 2020 Regulations almost immediately on their coming in to force. Our approach to monitoring regulations is based on a triangulation of information gathered from a variety of sources. These sources include local authorities, charities and other key partners:
- (i) Local authorities:
 - o Regular discussions with a large sample of the 151 top-tier local authorities in England, led by the Department’s regional teams. The first set of these discussions were held in w/c 18 May and the second set took place in w/c 8 June. The discussions are taking place on a four-weekly basis.

- A fortnightly Vulnerable Children and Young People’s survey is sent to local authorities to help the Department quantify the impact of COVID 19 on children’s social care services and to target its support to those where help is needed the most. Information is captured on: contact with children supported by the local authority; children’s social care; workforce; cost pressures; system pressures; concerns about children and young people with an education and health care plan; and, any general trends, challenges and best practice. The first survey was sent w/c 18 May.
- (ii) Charities:
- We have held two meetings with charities (on 5 May and 20 May) to seek feedback/ understand any concerns about the 2020 Regulations and accompanying guidance. Several children’s charities (Action for Children, Barnardo’s, Become, Children’s Rights Alliance for England, The Children’s Society, Family Rights Group, Just for Kids Law, National Children’s Bureau and NSPCC) and Ofsted have attended the meetings. The Department also offered follow up meetings with the charities on specific areas of the regulatory amendments, which the Family Rights Group, Children’s Society and National Children’s Bureau requested. Specific feedback on the guidance covering the flexibilities has been provided in these meetings; the Department has taken this forward and made amendments to the next iteration/s of the guidance. Separate discussions have also taken place with a group of chief executives of children’s charities which meets weekly under the chairmanship of Indra Morris, the Department for Education’s Director General for Social Care, Mobility and Disadvantage. Feedback from all of these meetings is also being used to inform the Department’s approach to ongoing monitoring and review.
- (iii) Key partners:
- Twice weekly meetings with representatives of the Association of Directors of Children’s Services in which we regularly discuss the management and monitoring of the 2020 Regulations, alongside other issues of interest to local government.
 - We hold weekly meetings with groups of Social Worker Practice Leaders and Principal Social Workers from local authorities. These meetings allow opportunities for questions and concerns to be shared and can feed into policy – this includes feedback on the amendments introduced by the 2020 Regulations. The Department seeks information from participants on which regulatory changes they are using and why.
 - We hold and attend regular meetings with providers of children’s homes and foster care, regional adoption agencies and voluntary adoption agencies. These meetings are held to discuss the impact of COVID 19 on each of the respective areas and to share information and any wider concerns by the providers. We have received examples of how some of the flexibilities, such as reduced quoracy on panels, are being used.

24. The role of Ofsted in the review process should also be noted. Despite regular inspections being suspended Ofsted continues with its broader regulatory work with regard to Children's Homes, Fostering and Adoption Services and continues to interact with local authorities with regard to those matters as well as notifications about children. In all of this work Ofsted will, in its ongoing programme of annual engagement meetings with local authorities, explore how local authorities have been using the temporary changes. The purpose of this engagement will be to get a better understanding of how local authorities are helping children in the current context and making sure they are safe. There are ten such individual local authority meetings which have taken place or are scheduled in June/July. Ofsted will ask specific questions regarding the use of the 2020 Regulations and why they have been used (as per the guidance).
25. Separately, Ofsted retains its powers to inspect as it sees fit under s.31 of the Care Standards Act 2000. This provision allows Ofsted to inspect or monitor settings to respond to safeguarding risks to ensure that expected levels of care in the sector remain. Thus, Ofsted is required to act swiftly to respond to safeguarding risks. It has taken action to suspend a number of children's home and stopped others from taking any more children; and has continued to start proceedings to cancel homes or managers where this is the right thing to do. While, in light of present circumstances, they have prioritised registration of new children's homes, Ofsted have still refused to register people they did not think were suitable.

Feedback from the review mechanism thus far

26. The monitoring information from the above sources (see exhibit xx) demonstrates that a number of local authorities are using specific flexibilities provided in the 2020 Regulations, although not all of them, and that few authorities are using multiple flexibilities. They suggest that the flexibilities introduced by the 2020 Regulations are being used following a process of careful consideration, and only where judged necessary. Currently those flexibilities relating to adoption and fostering are in most frequent use, and, often, these have been used in only one or two instances per local authority. Of the 69 local authorities spoken with in May, 20 had used the flexibilities and 10 were considering using them in the future. In June, of the 88 local authorities spoken with, 49 had used the flexibilities and 2 were considering using them in the future. The main uses of the 2020 Regulations reported to the Department include the use of virtual visits to children in care (under amended Regulation 28 of the Care Planning, Placement and Case Review (Regulations) England 2010); and those in relation to fostering. It is noteworthy that the Department's detailed analysis indicates that any use of the flexibilities introduces has been

infrequent; in some cases, amended requirements have been used only once or twice. We are seeking to secure further detail in future engagement with local authorities. It is however worth noting that, had the Regulations not been made, the local authorities and children's social care providers that have found it necessary to use some of the provisions would otherwise have had to act unlawfully by breaching the unamended regulations or, potentially, sought to meet them by stretching their resources with the consequent risk of their core safeguarding duties being affected.

27. Feedback from Social Worker Practice Leaders and Principal Social Workers has been to similar effect, indicating that the 2020 Regulations are needed but are being used appropriately and proportionally, including in accordance with the Department's stipulation that these temporary flexibilities should only be used where absolutely necessary, with senior manager approval and records kept, as per the guidance. We have also received feedback from Independent Fostering Agencies that have reported using flexibilities in regulations to approve temporary foster carers in order to identify placements for specific children.
28. The Department has carried out three waves of its Children and Young People's Survey, with 147 out of 151 responding to the most recent survey. Whilst not specifically asking about use of the additional flexibilities provided by the 2020 Regulations, survey responses provide useful information about how local authorities are managing services. This demonstrates that local authorities are managing in different ways, reinforcing the limited use of flexibilities – which aligns with feedback from our regional team's conversations with individual local authorities.
29. These regular discussions are allowing the Department to regularly assess how often, and in what circumstances, the regulations are being used.
30. Additionally, Ofsted are helping to ensure that the flexibilities are used appropriately; they have sent communications to all children's homes providers with regards to Regulation 44 (Independent person: visits and reports). They have advised that all children's homes providers should carry out a careful risk assessment of any action taken, keep a clear record of decisions and take pragmatic decisions in the best interests of children. Ofsted have indicated that they expect children's homes providers to think about alternative ways to keep in contact, supervise provision and maintain oversight, such as using telephone or video conferencing, while recognising the limitations of this approach.
31. The Department also continues to review the guidance that supports the 2020 Regulations and has specifically sought feedback from a wide range of children's charities, and has received such

feedback from a wide range of charities.¹² Our regular discussions and engagement with charities, the Office of the Children’s Commissioner and Ofsted have enabled the Department to identify any concerns and take action in response where necessary. For example, in response to these discussions, the Department has updated the next iteration of the guidance accompanying the 2020 Regulations by strengthening the wording in relation to Regulation 44 (Independent person: visits and reports) to make it clear that face-to-face visits remain important. Information from the Department’s monitoring and specific requests to be informed of any specific examples where local authorities or providers may not be acting in the best interests of children, or in keeping with the spirit the regulations are intended, is also being used to inform updates to the guidance.

32. I would highlight two further factors that are likely to bear on the review exercise. The first is the effect of the recent launch of test and trace on children’s social care, about which there is presently some uncertainty. One potential effect is that it could lead to more staff needing to self-isolate. It may also be the case that social workers and other members of the workforce with specific risk factors may not be able to return to work for an extended period, particularly if travel on public transport is required. Understanding how these issues are affecting children’s social care will be important considerations and will inform Departmental thinking going forward. Currently, across 147 local authorities (based on responses to the survey), social worker ‘unavailability’ rates generally remain steady between 0-10% excluding any vacancies. In the latest set of data, there are potential signs of overall improvement compared to the previous two survey returns. Some local authorities used the free text space to advise that their staffing levels remain unproblematic. We cannot, however, yet be sure that the peak of the impact on the children’s social care workforce has been passed, and this will continue to be monitored.

33. A second factor is any change in the need for children’s social care support in particular the effect of the return of more children to school in September, which certainly has the potential to increase the number of referrals to children’s social care – schools normally account for approaching one in five referrals to children’s social care. Referrals to children’s social care are currently approximately 20% lower than the historic average with a particular downturn in those from school. Similarly, we are aware that the number of children entering care is lower than in recent years, although it has increased since earlier stages of the pandemic. Many stakeholders have commented that they expect a sharp rise in demand as children return to school. Separately, we have heard from independent fostering agencies that referrals to their services have increased substantially throughout the COVID crisis, by 40% between 1st March and mid-April, in one example. The same agency has seen a 49% decrease in applications from those interested in

¹² Including charities that have put their name to Article 39’s campaign to revoke the 2020 Regulations, being Become, Children’s Rights Alliance for England and Just for Kids Law.

becoming foster carers during the same period. This points to a fragile market unprepared for an increase in the number of referrals received by local authorities.

34. The Parliamentary Under Secretary of State for Children and Families has committed to reporting to Parliament before summer recess on the outcome of the work the Department has done to monitor the use of amended powers. The timing and form of that report is subject to agreement of Parliamentary authorities; however, it is anticipated that it will take the form of a Written Ministerial Statement.
35. The 2020 Regulations expire on 25 September. The Minister has been clear that the 2020 Regulations should not be in place any longer than needed. Whether or not the full range of amendments remain in force until then, or whether there may still be a need for the regulatory flexibility introduced by the 2020 Regulations thereafter, including in the weeks immediately after 25 September, will all need to be considered as part of the ongoing review process that I have described above. The Department intends that a formal consultation, albeit a truncated one compared to our usual practices, will be held following the Minister's statement to the House before recess, allowing interested parties (including the claimant) to inform any decision about the need for any ongoing regulatory flexibility beyond 25 September.¹³ There is no plan to extend the 2020 Regulations in their current form. If there is a need for further flexibility in any of the underlying regulations, it will be provided for on a case-by-case basis after discussion with stakeholders and subject to ordinary parliamentary process.

Parliamentary scrutiny

36. Due to the exigencies of responding to the COVID-19 pandemic promptly, and in particular concern as to the risk of local authorities providers and services being put under extraordinary pressure to try to meet statutory obligations while continuing to provide care for vulnerable children and young people during the outbreak, the Department was unable to lay the 2020 Regulations for a full 21 days before their coming into force. The Department was concerned that delay could put extraordinary pressure on local authorities, providers and services to try to meet statutory obligations while continuing to provide care for vulnerable children and young people during the outbreak.

¹³ As explained by the Minister in debate in the House of Commons on 10 June, should there be any need to extend the flexibilities provided by the 2020 Regulations beyond 25 September, this will be done on a case-by-case basis, in discussion with stakeholders, and with full parliamentary scrutiny and with a further expiry provision within the SI.

37. I would note that, whilst the 2020 Regulations were not subject to the usual 21-day rule whereby legislation does not come into force until at least 21 days after being laid, this has not prevented parliamentary scrutiny of the 2020 Regulations within the 40 day praying period. Parliamentarians have subsequently examined the legislation closely and held the government to account. Parliamentarians have tabled 21 parliamentary questions, and a private notice question in the House of Lords on 30 April; further, a Secondary Legislation Scrutiny Committee Report on 7 May and a Joint Committee on Statutory Instruments (JCSI) Report have been produced on 20 May. This culminated in an Early Day Motion debate in the House of Commons on Wednesday 10 June, in which a number of arguments made by the claimant in this litigation were ventilated and responded to by the Minister.¹⁴ I exhibit the Hansard record of the debate as SL8. The Government won the vote to prevent the 2020 Regulations being annulled by a majority of 137 (260-123).
38. As noted above, the Parliamentary Under Secretary of State has committed to updating Parliament before summer recess of the work that the Department has done to monitor the use of amended powers and the frequency in which they have been used.

Conclusion

39. Throughout the pandemic, Departmental Ministers have been clear with officials that protection of vulnerable children is a priority. This has been demonstrated through the prioritisation of vulnerable children's attendance at education settings alongside the children of key workers and a large range of initiatives across the Department for Education and more widely across Government focused on supporting children and families; backed up by a wide range of mechanisms in place designed to understand the impact of the pandemic on children.
40. The protection of vulnerable children was our primary objective in all our considerations of legislative change. The Department and children's social care services were under significant pressure and this necessitated an abbreviated policy development process within a still developing situation. All concerned did their best to come up with an appropriate solution to an urgent problem in the time available, that sought to balance the needs of vulnerable children and young people with the potential for real and significant pressures placed on those charged with their safety and welfare.

¹⁴ Including, it should be noted, through reference to a previous rebuttal of concerns raised and inaccuracies in the description of the regulations made by the Children's Commissioner.

41. As outlined above and in departmental communication to external stakeholders since the 2020 Regulations have been laid, we have been clear that wherever possible local authorities and providers should strive to meet the duties as they stood before the 2020 Regulations came into force. As also outlined our ongoing monitoring of local authorities indicates that, in fact, this is the approach being taken. The COVID-19 situation is dynamic and as lockdown restrictions ease we would expect that any use of the flexibilities provided in the regulations would become more limited and expect local authorities and providers to return to business as usual as soon as practical. The Department will continue to monitor the effect of the 2020 Regulations and consider the need for the various amendments with close attention to the developing situation.

Statement of Truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

PD

Signed

22 June 2020

Date