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EVIDENCE REVIEW

Reimagining residential children's homes

A fresh look at regulation



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Contents

A fresh look at regulation

- 3 Introduction
- 4 The regulatory framework
- 8 Regulation in practice: reflecting on and learning from what we do now
- 10 Safeguarding and welfare: regulating for stability and contingency
- 14 'Regulating with love': regulating for the quality of relationships
- 15 Working together: regulating for partnerships that work
- 18 A changing cohort: regulating for high-needs placements
- 20 Regulating for a professional workforce
- 24 Conclusion
- 26 References

1

Introduction

This chapter sets out to take a fresh look at the regulatory framework that governs children's residential social care. Two decades on from the *Care Standards Act 2000*, and as early plans for the long-anticipated review of children's social care emerge, this chapter reflects on where we are now and where conceivably we could be if we were to re-imagine how the regulatory system is framed and operates. In other words, if we were drawing up a regulatory framework today, how might it look? In particular, how should regulation be framed if it were to focus on the conditions that best support relationship-practice and optimal outcomes for children and young people in residential care placements?

In exploring these questions, this paper does not seek to offer definitive answers. Rather, it invites sector leaders to consider how they might play an active role in re-imagining the regulatory landscape and, in particular, what role regulation could play in helping to overcome the most pressing and systemic challenges that the sector faces – because regulation cannot be divorced from issues of cost, sufficiency, and purpose.

Following a brief description of the legislative and regulatory landscape, this paper asks:

- > What can we learn from what we do now – in other words, from the breadth of information potentially available from an already heavily regulated sector within children's social care?
- > How might the regulatory system better protect the voice of the individual child in residential care – in particular, through a supportive approach and contingency planning that aims to avoid the potential trauma and damage of sudden and unplanned placement moves?
- > What can we do to ensure that love and strong relationships, and the conditions that foster those relationships, are at the heart of the system?
- > No children's home can meet all of a child's needs on its own: what steps can be taken to ensure that the system is genuinely supportive of partnership working, and at all levels?
- > What changes might be needed to ensure regulation works in the best interests of children and young people with the most complex needs, who now make up a far larger (and increasing) proportion of the residential care population than 20 years ago?
- > What role could an enhanced regulatory system play in professionalising the workforce, both within children's homes themselves and amongst those charged with regulating them? And what role can professional regulation play in enabling therapeutic care, for example?

The regulatory framework

The regulatory framework for children’s homes has changed significantly over the past 20 years. Before 2002, responsibility for the regulation and inspection of homes rested with local authorities. A desire to improve both the consistency and quality of residential care, and to increase the independence of homes, led to the creation first of the short-lived National Care Standards Commission and then, from 2004, the Commission for Social Care Inspection. In 2007, responsibility for the regulation of children’s homes was subsumed into Ofsted.

External control in the form of regulation is designed to create accountability, monitor compliance, and evaluate service quality. For children’s homes, the focus and direct experience of regulation is the social care common inspection framework (SCCIF); for local authorities, it is the framework for the inspection of local authority children’s services (ILACS). Both frameworks concentrate on three key areas:

- > children’s experience and progress
- > welfare and protection
- > the impact of leadership and management.

Having a regulatory framework (Figure 1) in place brings multiple benefits. A framework helps to guide and support positive practice, and it enables inappropriate actions to be challenged or blocked. Looking beyond children’s homes, having a common approach to evaluation across the various settings for children in care also enables comparisons to be made between different types of care.

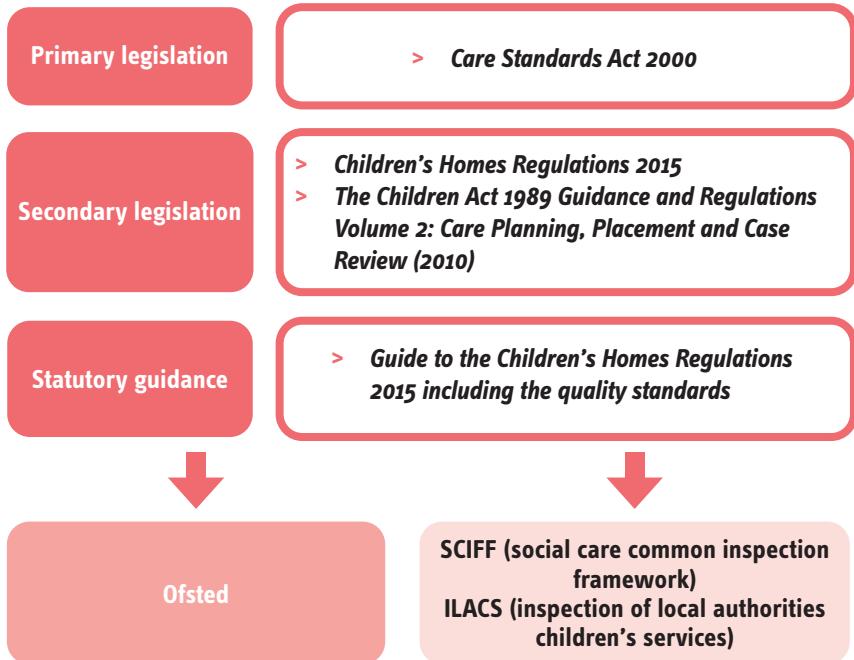


Figure 1: The regulatory framework: how it operates

The regulatory framework for children's homes focuses primarily on the process and legislation outlined in Figure 1:

- > The Department for Education is responsible for drafting legislation and producing statutory guidance. Ofsted draws on both to create the regulatory framework.
- > Ofsted reports directly to Parliament; Ofsted **describes itself** as 'independent and impartial'.
- > Providers must comply with legislation (primary and secondary); this is non-negotiable. The Department for Education (2015b) guidance is a document that home providers should pay regard to when interpreting and meeting the legislation.
- > If a home falls short of what is required by legislation, Ofsted issues requirements referring directly to the specific regulation that has been breached. Ofsted will also give a date by which this should be remedied.
- > Ofsted will also make recommendations if it identifies areas of practice within a home that could be improved. Should Ofsted consider that lack of action on a recommendation has adversely impacted on children, this may appear as a requirement at the next inspection.

The regulatory framework: key legislation

The *Children Act 1989* clarifies the legal status of children living in homes, and the duties and expectations of the local authority towards those placed under various sections of the Act. Children can be provided with care as directed by court order under:

- > **Section 31** (care orders)
- > **Section 44** (emergency protection)
- > **Section 46** (police protection)
- > **Section 21** (remanded into care by criminal courts)
- > **Section 25** (secure accommodation)

Under **Section 20** children may also be provided with care under the terms of a voluntary agreement with those who hold parental responsibility. In the case of young people aged 16 or over, their need for accommodation should be assessed in line with the Southwark Judgment¹ and the young person may consent or refuse to become a looked after child.

Section 17 is used to accommodate a child 'in need'. This is the main category for placing disabled children in homes on regular short breaks. It is also used to provide accommodation to children on the edge of care as a way of supporting families to stay together. If a child receives a short break that lasts longer than 17 days in the same home, or the total number of placement days exceeds 75 in a 12-month period, then the child must be treated as a looked after child. Statutory expectations for looked after children must then be met, including the appointment of an Independent Reviewing Officer, the creation of an education, health and care plan, and regular visits and reviews.

The *Children Act 2004* provides the legislative spine on which the reform of Children's Services was based. It aims to improve and integrate effective local working to safeguard and promote children's wellbeing. The Act takes a child-centred approach and covers universal as well as targeted and specialist services. It introduced into law the **Every Child Matters** outcomes and the role of the Children's Commissioner.

1 The Southwark Judgment, made by the Law Lords in May 2009, is case law that obliges local authority Children's Services to provide accommodation and support to homeless 16 and 17-year-olds. Previously, many Children's Services had taken the view that young people in this age group did not necessarily need 'care', but rather 'help and support' in accessing housing benefits. Since the judgment, councils have had a legal obligation to provide accommodation and often care services also.

The *Children and Social Work Act 2017* enshrines corporate parenting principles into law to drive local authority culture. It seeks to ensure that all members of the local authority workforce, and all departments, consider the impact of their work on all children and young people in the local authority's care, and on those under 25 who were previously in their care (Department for Education, 2018).

The Care Planning, Placement and Case Review (England) Regulations 2010 set out clear expectations for a continuous process of planning and reconsideration of the care plan for each child. Accompanying guidance required local authorities to develop a strategy for how they would ensure sufficient care placements; Section 22g of the *Children Act 1989* places a duty (the 'sufficiency duty') on local authorities to ensure that sufficient placements are available to meet children's needs in the local area 'so far as reasonably practicable'.

The *Care Standards Act 2000* sets out what constitutes a children's home: an establishment that 'provides care and accommodation wholly or mainly for children' (which the Act goes on to distinguish from foster care, hospitals, residential family centres and boarding schools). The *Children Act 1989* stipulates that anyone aged under 18 is a child. Young people over 18 may live in a children's home if it continues to meet their needs, but homes must ensure that most of those placed there are under 18 (in order to avoid coming within the remit of Adults' Services).

The *Children's Homes (England) Regulations 2015* removed the concept of minimum standards and introduced nine Quality Standards that specify how key areas of care must be provided to ensure children's needs are effectively met.

Regulation in practice: reflecting on and learning from what we do now

In practice, the primary focus of the regulatory framework is the inspection. For children's residential care providers, the grade awarded here has the potential to bring validation and financial reward; it also has the potential to discourage referrals and generate financial difficulties. Inspection rests on the assumption that good practice is promoted by overseeing organisations and holding them to account for their performance. A small-scale study by Ofsted of homes that were consistently (i.e. for five years or more) rated good or outstanding appears to bear this out (Stanley, 2020). Most registered managers felt inspections had helped managers and homes to improve by recognising and supporting effective practice.

Ofsted inspections are not the only quality assurance mechanism in place, however. Placing authorities undertake their own quality assurance and contract monitoring visits. Some make use of the Children's Cross Regional Arrangements Group (CCRAG)² to streamline and standardise the number of visits to homes, particularly where children are placed some distance from the placing authority.

Children's homes are also required to regulate themselves:

- > Under **Regulation 45**, children's homes must review the quality of their care once every six months and ensure that their evaluation is informed by feedback from children and families, residential care workers and other professionals, including those in placing authorities.
- > **Regulation 44** requires homes to contract with an independent person to visit the home at least once a month and make a judgment as to whether children are being safeguarded and their wellbeing promoted. That judgment should be informed by consultation with children and others, and the regulation places a duty on the home to assist the independent person to speak to children, relatives and residential home workers.

Under Regulation 45 each home must produce a report about the quality of the care it provides, and the independent person must produce a report in relation to each visit under Regulation 44. Copies of these reports must be sent to Ofsted and each placing authority.

² CCRAG is a partnership of local authorities who are committed to working together to support the sourcing, contracting, monitoring and annual fee negotiations for placements in children's residential care homes. www.ccrag.org.uk

These external and internal regulatory requirements all cover broadly similar ground. Collectively, they make children's homes possibly the most audited sector within social care. Arguably, given the high levels of need among children in residential care and the 24/7 nature of provision, that is as it should be. But it should make us think twice about calls for further tightening of the regulatory regime, such as can sometimes emerge during media coverage of an apparent system failing. Such calls can put pressure on regulators to 'fix' what appears to be broken – and to do so in a visible and assertive way. In his book about the role of auditing and regulation, *The Audit Society: Rituals of Verification* (1997), Professor Michael Power of the London School of Economics called for 'regulatory sensitivity', which he described as an approach that 'involves decisions about how to leave individuals alone to get on with their work as much as about how to monitor them' (p. 145). Ofsted (2018, p. 96) is clear that regulation and inspection should be 'proportionate', yet views about what constitutes 'proportionate' will vary. The reality is that behind any apparent system failing, a range of complex and inter-related issues are at play – and rather than default to tightening up regulatory practice, we need to think about more imaginative and innovative solutions and what we can learn from what we do now.

A review of the audit information that placing authorities gather on children's homes, and how they use it, could inform any revisions to the regulatory approach. The cost of regulation – both internal and external – could be assessed alongside this as a cost-benefit analysis. Cost must be considered: this is vital to ensure that smaller providers, who are seeking to provide care that is both high quality and cost-effective, are not inadvertently excluded from the sector.

Safeguarding and welfare: regulating for stability and contingency

The overriding aim of children's homes legislation is to promote positive practice, which largely translates as ensuring that children are safe and their welfare is being promoted. Since the introduction of the Children's Homes (England) Regulations 2015 ('the 2015 Regulations'), some early blanket regulatory approaches have evolved into a more graduated response. An early conviction that 'only good is good enough', for example, has been replaced by a more nuanced perspective. This recognises that if 'there are no serious or widespread failures' adversely affecting the children's welfare (Ofsted, 2019b, p. 8), then 'requires improvement to be good' can mean that a home is on an improvement journey.

Homes rated inadequate for safeguarding are automatically given an overall rating of inadequate. Around 2% of homes are rated inadequate each year (National Statistics, 2020). For many children, such a judgment will spell the end of their placement. But some local authorities have sought not to remove children immediately.³ Rather, they consider the findings of the report, discuss improvement planning with the home and, informed by the child's wishes, consider the impact on the child of any potential move. This considered approach reflects the placing authority and the home sharing the risk, with each playing their part in driving improvement. Local authorities can implement their own contract monitoring arrangement and increase social worker input to assure themselves that the placement remains safe and suitable.

But when the regulator decides to suspend or cancel a home's registration, there is no room for flexibility: local authority and child must both defer to that decision, whatever their views, and the child has to move placement immediately. Ofsted is clear that such a decision is only ever taken as a last resort and only after robust consideration of all the facts. Yet for the child and placing authority, the potential ramifications are similar to the impact of an emergency protection order, but with no comparable threshold in place. As can be seen from Table 1, the number of homes that had their registration cancelled increased from four to eight between 2015 and 2018, while the number of suspensions increased almost tenfold (although there has since been a slight decline or stabilisation in this previously upward trajectory).⁴

³ Conversations with author.

⁴ In its annual report for 2017-18, Ofsted cited a number of factors that may have contributed to the increase in the number of enforcement actions. These included an increase in inspector capacity, the cancellation of two chains of children's homes, and in response to updated legal advice on safety and standards of care (Ofsted, 2018, p. 103).

Number and types of enforcement action by year ⁵				
Year	2015-16	2016-17	2017-18	2018-19
Total number of homes	2,071	2,090	2,261	2,392
Cancellations	4	2	8	4
Suspensions	3	4	29	26
Restrictions	14	48	73	67

Table 1: Number and types of enforcement action taken against children’s homes, 2015-16 to 2018-19 (Source: Ofsted annual reports)

‘I feel like a parcel getting moved around all the time, getting opened up and sent back and moved on to somewhere else.’ Teenage girl living in a children’s home (Children’s Commissioner, 2019c, p. 16)

‘I never unpack cos I know I’ll be passed on somewhere else in a few weeks.’ Teenage girl living in a children’s home (Children’s Commissioner, 2019c, p. 15)

Instability and placement moves are the concerns most often raised with the Children’s Commissioner (2020c, p. 6), and young people interviewed for the Commissioner’s Stability Index 2019 repeatedly highlighted the severity of the impact of placement moves. Although not necessarily specific to children’s homes, many spoke of their sadness, anger, disappointment or stress (Children’s Commissioner, 2019d, p. 13); others drew attention to the impact on their mental health and wellbeing (Children’s Commissioner, 2019a, p. 2). The 2020 Stability Index (Children’s Commissioner, 2020b, p. 4) found that moves are highest for children whose first placement is a secure/residential placement (25.5%) or a children’s home (16.7%), and 7.5% of this group (349 children) experienced 2+ moves in 2017-18 and 2018-19 (p.5).

Children who have gone through an abrupt placement ending due to regulators’ concerns may experience similar feelings. Of course, children may also be upset to find that they have been living in a home that was deemed to be failing, and some may be relieved that swift action has been taken to find an alternative placement. But when a home’s focus is on closure and the local authority is focused on finding a new placement, it is essential that care is taken to consider how each individual child is experiencing what is happening.

⁵ When a children’s home has its registration cancelled or suspended, children’s placements will end. If the provider is placed under restrictions, it means the home cannot accept any new placements.

Efforts to avoid a breakdown usually focus on the placing authority, home and child seeking to develop strategies to sustain a fragile situation; but if registration is cancelled or suspended, none has a say. So in seeking to re-imagine the regulatory landscape, we need to think hard about the scope for contingency planning and putting systems in place to ensure that the potentially traumatic impact on children of moving in this unplanned and unexpected way is minimised.

- > **Contingency planning for prevention might include:**
 - 1) Registration: better testing of the fitness of new providers to cope with challenges.
 - 2) Support: access to support for struggling homes to help them improve.

- > **Contingency planning for unplanned moves might include:**
 - 1) Amending the children's homes guidance to ensure that trauma-informed discussions take place to inform every placement ending or move; those discussions must take into account significant attachments.
 - 2) Commissioners and regulators could assess: (i) children's homes' plans for dealing with unplanned placement endings, and (ii) their plans for receiving children following an unplanned placement ending.

Contingency planning could be reviewed through the ILACS framework.

Hearing what children are saying: widening our reach

There is a good deal of evidence, both recent and historical, to suggest that children and young people in care do not always feel listened to by social workers and other professionals (e.g. Children's Commissioner, 2019c, p. 11; Children's Commissioner for Wales, 2015, p. 6; Daly et al., 2016, p. 26; Munro, 2011, p. 28).

In the first iteration of the **Children's Homes Regulations in 2001**, the issue of children's wishes was covered in a single sentence: in preparing or reviewing a placement plan, the home was to 'seek and take account' of the child's views. **Regulation 7** of the 2015 Regulations, by contrast, sets out a discrete, page-long quality standard covering children's 'views, wishes and feelings' (Department for Education, 2015b, p. 20). This is one of nine **quality standards** prescribed in the regulations, and it specifies ways in which homes must ensure that children are supported to express their views and have them taken into account.

Young people were actively involved in developing the Quality Standards (Department for Education, 2015a) and their collective voice continues to be heard via charities that represent young people in care (e.g. Action for Children, Become, Catch22) and regular meetings between care leavers and Ofsted to discuss issues relating to children's homes and social care. Placing authorities also gather young people's views through reviews, consultations, complaints and compliments procedures, and Children in Care Councils, as well as indirectly through Regulation 44 reports, reports from the homes, and Ofsted inspections.

In 2019, Ofsted's annual survey found that 95% of children living in children's homes felt they were well looked after 'most' or 'all of the time' (Ofsted, 2019a, p. 5). The response rate was high (around 2,000 children in children's homes responded), but there is a concern that children facing the most complex and significant challenges may engage less well with surveys of this type.

Apps such as **Mind of My Own** aim to enable all young people to speak up easily and at any time they want. Evidence suggests that many young people feel more at ease in digitally mediated communication (PCFSW Network & Social Work England, 2020, p. 3). Greater use of such apps may help to extend the reach of evidence gathering to include the views of the most marginalised children and provide crucial data to inform rethinking of regulatory regime.

'Regulating with love': regulating for the quality of relationships

When the Independent Review of Children's Social Care (IRCSC) was launched in England in March 2021, its 'early plans' identified 'love' as one of three 'basic foundations' (and 'perhaps the most important foundation') of a good childhood (IRCSC, 2021).

This review will listen deeply to those who have experienced children's social care about what a childhood with love means to them and how it can be achieved. We need to do so much more to ensure that every child feels loved as they grow up. (IRCSC, 2021, p. 2)

This explicit acknowledgment of the importance of love isn't new. The opening principle that underpins the statutory guidance to the 2015 Regulations states: 'Children in residential child care should be loved, happy, healthy, safe from harm and able to develop, thrive and fulfil their potential' (Department for Education, 2015b, p. 6). And the stated goal of the [Scottish Independent Care Review](#) (announced in 2016) was to 'put love at the heart of the care system'.

In England, the regulatory approach has focused increasingly on the quality of relationships between children and staff in the home. In some ways, the Quality Standards can be thought of as a parenting model, and good examples of children being nurtured and well cared for in residential homes are regularly noted in inspections. Clear expectations around corporate parenting and policy initiatives such as Staying Close encourage local authorities to see the whole child and to fulfil their responsibilities with the mindset of 'a parent who loves this child'.

Nevertheless, it is fair to say that more still needs to be done to explore what love really means for children living in residential children's homes – in particular, to explore the challenges around giving and receiving love, and how to assess this in practice and through the regulatory framework. Building relationships of trust takes time and requires professional commitment and skill. Children and residential care workers need time to get to know each other, and workers need time to support and develop the child's interests and to convey that they will not give up on the child. So if trusting and loving relationships are to be achieved in the context of a residential children's home, then we may need to consider how the regulatory framework and inspections can focus on the conditions that enable those relationships to develop, as much as on the relationships themselves.

One aspect of this is the regulatory response to risk. If relationships between staff and children are challenged by potential safeguarding concerns, the regulatory response can harm or strengthen relationships. Responding to risk, and developing strategies to manage it, is part of the parenting function: done well it leads to innovative practice and maintains relationships. When a home is struggling (just as parents sometimes struggle), a sensitive judgment is needed to assess whether temporary circumstances are affecting the home's ability to care safely and lovingly for children, which means support is required to maintain and strengthen relationships, or whether a more assertive compliance approach is needed.

Working together: regulating for partnerships that work

No children's home can meet all of a child's needs on its own, and the 2015 Regulations require homes to work with the wider system to ensure that children's needs are met. Close partnerships are required with all those who play a significant role in the child's life (Department for Education, 2015b, p. 11), including the child's family. The role of the child's social worker is of critical importance, and, at a more strategic level, the roles of the local authority and Ofsted are significant also.

Partnerships between children's homes and local authorities

Some children's homes have strong and positive relationships with placing authorities and feel supported by them to meet children's needs; others feel over-burdened by commissioners' demands and inflexible attitudes (usually budget-driven) to meet increasing or emerging needs (see, for example, ICHA, 2020, p. 11; 2021, p. 16). The nature of the relationship between home and authority can have a positive or negative impact for both at inspection. When the relationship is poor, difficulties can arise in a number of areas. Regulation 5 requires homes to challenge placing authorities to ensure the needs set out in children's care plans are met: for some local authority-run homes, internal relationships within the authority may make this difficult; for others, easier access and a shared desire for successful outcomes may make the process more straightforward. And as annual surveys by the Independent Children's Homes Association (ICHA) have illustrated, private and voluntary homes can also have difficulty in obtaining necessary and relevant information from local authorities or in securing schools places and tuition (ICHA, 2019, p. 12; 2021, p. 11). These difficulties can lead to inspection requirements being made against the home based on their failure to take sufficient steps to secure places. Escalation procedures are therefore often in place within children's homes to evidence the action taken to obtain information or services from other agencies.

Regulation 5 requires homes to engage with the wider system to ensure that children's needs are met. Regulators can use this requirement to promote the expectation that providers, including local authority providers, and placing authorities collaborate to ensure they support each other and the child. This should include agreeing how to jointly assess quality, based on children's experiences, in order to support and inform their respective inspections.

Unregulated and unregistered provision: ensuring flexibility in the system

Recent concerns around unregulated and unregistered provision illustrate some of the challenges and practical difficulties that placing authorities and providers can face when trying to make critical, best interests decisions for the care of individual children within the context of a regulatory landscape that is 20 years old and does not necessarily always reflect the reality on the ground.

Following a consultation in early 2020 (Department for Education, 2020), the government announced plans to ban the use of unregulated provision for all under-16s from September 2021 (Department for Education, 2021, pp. 9-11). The government also set out its intention to introduce national standards to ensure the quality of independent and semi-independent provision for 16 and 17-year-olds, overseen by a new Ofsted-led registration and inspection regime (p. 12). At the same time, the Secretary of State made clear his intention to bring forward 'at the earliest opportunity' legislation that will enable Ofsted to take quicker enforcement action against illegal unregistered providers (p. 4).

The majority of consultation respondents supported a ban on the use of unregulated placements for under-16s, and it is a move that enjoys widespread support across the children's sector, including from the outgoing Children's Commissioner (2021) who argued that the ban should be extended to cover all under-18s. However, concerns remain as to whether there is sufficient flexibility within the regulatory system to respond to the very real dilemmas that practitioners and placing authorities commonly face when trying to meet children's needs. In its consultation response, for example, ADCS (2020b, p. 4) asked what a placing authority is supposed to do 'if they are unable to find a placement for a young person who is not yet 16'.

In Scotland, where all supported accommodation must already be registered with and inspected by the Care Inspectorate, the regulator has sometimes granted exemptions in response to cases of individual need. In one case, for example, a 15-and-a-half-year-old was allowed to move to supported accommodation provided by Action for Children with a bespoke package of care. And providers can, with agreement, use their existing registration to place children in accommodation that is physically safe and homely, but before the registration process is complete.

In England, Ofsted has shown its willingness to work flexibly with placing authorities (see case study) but must do so within the parameters of the law and current regulatory framework. ADCS (2020b, p. 5) has made clear that it would welcome a more flexible regulatory framework that allows the registration of providers rather than individual homes ('physical settings'), as applies in fostering and adoption. This would improve flexibility within the sector and enable established providers to respond more quickly and effectively to meet the needs of children and placing authorities. Arrangements like those cited in Scotland are likely to happen when the organisation is known and trusted. Whilst there is a case for the development of closer working links between regulators, providers and placing authorities, this may undermine the concept of independence and exclude small providers.

Case study: Shropshire⁶

After several placement breakdowns Shropshire Council concluded that a solo placement was needed for a young person and began the process of registering a children's home specifically to meet this need. After approximately three months the home was operational, but the registration process was not complete. The young person experienced a few short-term holiday and activity placements before moving into the home prior to formal registration. The local authority kept Ofsted fully informed and the application was expedited as swiftly as possible. The local authority described the working relationship with Ofsted as 'really supportive' and could not praise them enough. The process followed was not the local authority's preferred route, but Shropshire took a pragmatic view in the best interests of the child. They remain confident that it led to positive outcomes for the child.

A broader remit for the regulator?

Currently, the number and type of residential care placements available to placing authorities are rarely the result of strategic planning by local authorities; rather, they largely reflect decisions taken by children's homes providers. In its 2018-19 annual report, Ofsted cited 'sufficiency and capability' as the main challenges facing the sector and emphasised that 'national oversight and strategic leadership' are needed to make the system 'work as a whole' (Ofsted, 2020, p. 16). Yet as regulator, Ofsted has no overview role. The situation is different in adult social care: as regulator, the Care Quality Commission has a specific remit to consider the financial viability of the largest providers as part of its oversight of the sector.

So it is timely to ask whether a comparable broadening of the regulator's role in relation to children's residential care is due, or indeed, overdue. Considerations will need to take into account the idea of 'regulatory sensitivity' and include a careful analysis of cost and perceived benefit. But effective regulation cannot be divorced from realistic discussions about cost, sufficiency, and the purpose of residential care. In addition, the diversity of children's homes – a sector that also includes short-breaks homes for disabled children and secure accommodation – means that regulation must properly meet the needs of all. Care must be taken to ensure that the regulatory framework is not developed exclusively around the needs of the most dominant parts of the sector and in a way that has unintended consequences (or creates additional burdens) for others.

⁶ Case study based on interview with author.

A changing cohort: regulating for high-needs placements

The needs of children in care, including in residential care, are more complex today than they were 20 or even 10 years ago. Studies have long demonstrated a high level of unmet mental health needs among the residential care population (Ford et al., 2007; Bentley et al., 2016). More recently, the Children's Commissioner (2019d, p. 8, 2020b, pp. 4-5, 2020c) has highlighted the growing proportion of older children in care and teenage entrants to care, who tend to have more complex needs and experience much higher levels of instability.⁷ The Commissioner described this situation of more and more older children entering care in need of specialist homes as the 'new normal' but warned that the government and some local authorities have 'yet to catch up' (Children's Commissioner, 2019b).

On the other hand, many local authorities and providers are seeking to develop services that can address and be tailored to meet more complex individual needs. In light of these changes and developments, sector leaders need to consider to what extent the regulatory framework can effectively assess the 'treatment' element. Research suggests that 'residential treatment works best for very complicated, high-need, and high-risk youth' (Lyons et al., 2015, p. 64). Although there are many types of therapeutic model in use and various measures of their effectiveness (Harder, 2018), the current regulatory approach is not designed to consider the validity of therapeutic models and focuses more on the 'experiences and progress' young people make (Ofsted, 2019b).

⁷ The Children's Commissioner's (2019b) Stability Index 2019 reported that between 2012-13 and 2017-18, the number of teenagers (i.e. aged 13 or over) in care rose by 21%, while the number of 0 to 5-year-olds fell by 15%. During the same period, the number of over-16s entering care grew by 25%. As a result, nearly one in four children in care (23%) were over 16, and a further two in five (39%) were aged between 10 and 15.

We know that relationship-based practice is at the heart of effective therapeutic care (Kilpatrick et al., 2008), and we know that it is difficult – and takes time – to build relationships with young people who have had negative care experiences (Barnhoorn et al., 2013). Whenever inspectors visit a children’s home, the impact of earlier trauma is likely to be having a significant impact on the ‘progress’ that some young people will have so far been able to make. Ofsted acknowledges that a ‘minority’ of homes may be reluctant to accept/provide a place for children with complex and challenging needs because of ‘misplaced fears’ that a lack of progress could become a contributory factor to a negative inspection judgment (Schooling, 2018; Stanley, 2021). But the concern is that good homes, which could offer the right therapeutic approach to care for a young person, may decide against the particular challenges that a young person may bring because of the likely impact on current placements and staff and also the potential impact on their inspection rating (ICHA, 2019, p. 12). In its response to the government’s consultation on the use of unregulated provision, ADCS referred to ‘the perverse incentives we see in registered children’s homes whereby access is restricted for children with complex needs due to fear of impact on inspection judgements’ (ADCS, 2020b, p. 7). This argument is supported by the Chief Executive of one major provider, Hexagon Care, who points out that managers of children’s homes strive to achieve good and outstanding ratings, which, once achieved, they naturally seek to protect.⁸ Some Hexagon managers feel that inspection outcomes do not always fairly reflect reality – for example, if most children have made progress but one has not, the judgment may be based on that exception.

This reality should challenge us to consider the extent to which inspection ratings and the current inspection approach (or perceptions of that approach) may be acting as very real barriers to the appropriate placement of children with high levels of need. We need also to explore, including through urgently commissioned research, whether young people are, in consequence, being placed in environments less capable of meeting their needs, and whether this is increasing the potential for placement breakdown.

⁸ Interview with the author.

Regulating for a professional workforce

Residential care workforce

Children consistently cite staff as the main factor in making life in a children's home a good experience (Children's Commissioner, 2015, 2019c, p. 4, 2020a, p. 26; Morgan, 2009, p. 4; Narey, 2016, pp. 55-56), and the skills and ability of practitioners to provide good quality care are central to achieving good outcomes for children.

In 2015, a rapid literature review of residential care for the Department for Education noted the view of some commentators that the qualification framework prescribed by regulators in England was 'flawed' because neither the competency-based approach of a National Vocational Qualification nor social work training equip care staff well enough for the task (Hart et al., 2015, p. 9 & p. 51). The Children's Homes Regulations, which came into force in April 2015, do go further: they require staff to continuously develop their professional skills and ensure that they have the experience and knowledge to meet children's needs ([Regulation 33](#)), but it is left to the provider to determine how this is evidenced. Hart et al. also highlighted that residential care staff in countries such as Denmark and Germany receive a significantly higher level of mandatory training and have more status and autonomy as a result (p. 9 & p. 101).

The qualification threshold stipulated in the 2015 Regulations was intended to help professionalise the workforce by ensuring that all residential care workers hold a mandatory qualification. However, the target that most staff in children's homes would be qualified by 2018 was not achieved, with only 46% of staff holding the Level 3 qualification⁹ by then.¹⁰ Ofsted's response to this 'extremely disappointing' (Ofsted, 2018, p. 99) shortfall did not address the challenge of how best to meet the growing demand for competent staff. Nor did it explicitly acknowledge research for the Department for Education (White et al., 2015), which had identified the significant recruitment and retention issues faced by the sector. Rather, in its annual report for 2017-18, Ofsted stated: 'Our inspectors will continue to take any lack of staff qualifications, and the impact of this on the care and welfare of children, into account when considering the inspection judgement or taking enforcement action' (Ofsted, 2018, p. 99). Good and outstanding homes, Ofsted noted, are more likely to have higher proportions of staff with Level 3 qualifications (p. 99).

9 Level 3 Children and Young People's Workforce Diploma with Social Care Pathway, NVQ 3 Caring for Children and Young People and NVQ 3 Health and Social Care.

10 Data for 2017-18 show that 46% of staff had the required Level 3 qualification and another 18% of staff were working towards one. Local authority-run homes had the highest proportion of qualified staff (61%) compared with 46% in private homes and 29% in voluntary-run homes (Ofsted, 2018, p. 99). The overall proportion of qualified staff had increased by 2018-19, by which time more than four in five (82%) staff either had a Level 3 qualification or were working towards one (Ofsted, 2020, p. 42).

Yet the reality is that those entering this physically, emotionally and mentally challenging profession commonly have low professional status and salaries comparable to supermarket workers. In its annual report for 2018-19, Ofsted described the residential care workforce as 'low-paid and undervalued' (Ofsted, 2020, p. 16) and called on the government and sector organisations to develop a workforce strategy 'to increase capacity and competence' (p. 17). The Department for Education is currently considering further regulation of the workforce, having issued a call for evidence in June 2019.¹¹ This may be appropriate; however, comprehensive consideration must be given to the impact of further regulation in an environment in which the number of homes is increasing, and the supply of staff appears to be decreasing.

We know most children return to their families when they move on from care, and even those who do not will have a psychological need to make sense of their relationship with their family (Hart et al., 2015, p. 9). But most child and family social work is undertaken by community-based social workers and is likely to centre on whether or not the child can return home. Although there are some dedicated 'edge of care' children's homes, as well as innovative approaches to residential care and family work such as No Wrong Door (Lushey et al., 2017), the reality is that this work is likely to decline or cease altogether if the child is not returning home. This is not the case in some other countries. In Denmark and Germany, for example, there is an expectation that ongoing 'family work' will take place whatever the care plan and that residential staff will be directly involved in that work (Cameron, 2011).

It is timely, then, to reflect on how the regulatory framework might better contribute to the professionalisation of the workforce and, in particular, in a way that ensures a more holistic and relationship-based response to children's needs. The level of practical training and academic knowledge that is required by social pedagogues, for example, has been cited as a factor in the better outcomes experienced by children in environments where social pedagogy is well established and supported (Cameron, 2011). The ability of pedagogues to work across professional boundaries, undertake therapeutic work, provide aftercare and work with families is inherent to the role; it also makes the role more attractive for both recruitment and retention purposes.

¹¹ In June 2019 the Department issued a call for evidence in response to a recommendation made by the Independent Inquiry into Child Sexual Abuse (IICSA, 2018, p. 18) that the government should introduce professional registration requirements for all those working in a care role in children's homes.

A number of promising models for residential care have already been identified (Hart et al., 2015), so it is timely to consider whether there is potential for the regulatory framework to be strengthened to support improved training in pedagogy and other therapeutic approaches in a way that will help to ensure genuine placement choice across the residential care sector. Of course, improved specialised training will not be enough on its own; but by regulating for a wider and more ambitious range of training for the residential care workforce, it might be possible to achieve a step change towards greater diversity of provision so that children's residential care is better placed to meet the needs of a changing cohort of young people with increasingly diverse and complex needs.

Inspectors

In his review of children's residential care, Sir Martin Narey noted that Ofsted was sometimes portrayed by those who gave evidence 'as some sort of ogre strangling the ability of homes to excel through over prescription and by making critical assessments on the basis of minor inadequacies' (Narey, 2016, p. 47). Yet rather than seek to impose a narrow and rigid approach, the regulatory framework actually **encourages** providers and homes to exercise professional judgment when making practice-related decisions. A schedule to the Children's Homes Regulations 2013 detailed 28 specific areas that homes must cover when monitoring the quality of care; by contrast, the 2015 Regulations simply require the home to undertake a review of the quality of care, which should include the views of all key people and outline what actions will be taken to improve.

On the one hand, this latitude can be seen as a liberating means of empowering the sector to demonstrate a setting's good practice; on the other, there is a concern that inspectors may not accept or understand the evidence. The impact of receiving a rating that is less than good cannot be overstated; for the provider, the impact is likely to be exacerbated if they feel the judgment is not justified. This raises the perennial issue of inspector consistency – and the extent to which a regulatory framework can, realistically, be applied consistently while also allowing bespoke consideration for each home and local authority practice. Much will depend on the knowledge, experience and skill of the inspector as well as the confidence of leaders of the homes inspected to provide positive and negative feedback to support continuous development of regulatory practice.

Inconsistency of approach in inspections is a common concern among care home providers, as is apparent from recent annual membership surveys by the ICHA, whose members run homes in either the private or voluntary sector. (ICHA, 2018, p. 10; 2019, p. 35). For its 2020 survey, ICHA did not collect information on inspections as these had been suspended because of the COVID-19 pandemic; nevertheless, ICHA members identified ‘more consistent and professional’ inspection and regulation as a top priority to be addressed by the independent children’s social care review (ICHA, 2021, p. 37). The CEO of Hexagon Care, one of the ten largest providers of children’s homes, confirms that inconsistency across inspections is a concern within his organisation.¹² The CEO praises one Regional Inspection Manager that the organisation has worked with as ‘excellent, robust, fair and focused’, but says this has not always been the case.¹³ Reviewing inspections across the national breadth of its organisation, Hexagon believes that an inconsistency in approach is apparent, with some homes having been rated ‘requires improvement’ for issues that were not regarded as a concern in other homes. The CEO acknowledges that most inspections are effective and balanced, but says that at the worst end of the spectrum some inspections have been very negatively focused. This could result in less confident managers feeling unduly pressured and homes receiving grades that did not accurately reflect their performance.

Ofsted (n.d.) describes its inspector workforce as having undergone ‘rigorous assessment and training’ to ensure that they are suitable and qualified to carry out inspection work, but acknowledges that inconsistencies in approach do occur (Ofsted, 2018, p. 96) and that some relationships between inspector and provider are less positive than others. The extent to which providers are enabled and empowered to express concerns about their experience of inspections is worthy of further research. One current measure is the number of complaints that Ofsted receives; Ofsted reports that only 2.5% of all its inspection and regulatory activities in 2019-20 resulted in complaints (Ofsted, 2020a, p. 22). However, this is not necessarily a reliable indicator of satisfaction: it might reflect a high-quality service that users are happy with; or, given the power imbalance, it could point to a wary client group who feel reluctant or unable to make their voices heard.

There is little independent research on the purpose and impact of inspection. In England, a rethink of the regulatory landscape could be enhanced by commissioning research similar to that undertaken by Pålsson (2020) in Sweden. In Pålsson’s study, a researcher closely observed inspectors throughout the inspection process. Standards were found to display ‘a marked variation’ and there appeared to be a ‘limited link to good-quality care’ as defined in empirical research. Pålsson also concluded that where there was no obvious malpractice in care, inspections appeared to have ‘rather unclear formative effects’ (Pålsson, 2020). While Pålsson’s research took place in the context of a different regulatory regime, similar independent research into the impact of inspections in England could provide a valuable contribution to debates around the effectiveness and emphases of the inspection process under the current regulatory approach.

12 <https://www.gov.uk/government/publications/inspection-outcomes-of-the-largest-childrens-social-care-providers>

13 Interview with author.

Conclusion

The regulatory framework for children's homes has become increasingly robust since responsibility was taken from local authorities and a national approach introduced in 2002. Arguably, this has led to the provision of an increasingly higher standard of care: according to Ofsted's annual report for 2018-19, four in five homes were judged good or outstanding (Ofsted, 2020, p. 40). In the same year, one in two (48%) local authorities were judged good or outstanding under ILACS, a 12% point improvement on the previous year (p. 16).

Some providers of children's homes may be tempted to review these figures (of homes' consistently high levels of performance against the lesser performance of the authorities that place the children) and question the apparent disparity. Any home that is not yet 'good' or is facing enforcement action may wonder why the regulator's 'catch before they fall' approach to local authorities does not seem to extend to them. They may wonder also why the Department for Education does not provide children's homes with a role that is broadly similar in remit to that of the directly appointed Children's Services Commissioner (Department for Education, 2016, p. 54). Of course, local authority children's homes may benefit from strategies put in place to support a failing authority, but there is no comparable safety net for homes run by the voluntary or private sector. While it might be argued that there is a basic difference between the state's responsibility in respect of publicly run services and those in the private sector, the reality is that success for children requires success across the sector as a whole – and for children, it is the 'nature of their care experience' that matters rather than the 'ownership structure or the sign on the door' (Children's Commissioner, 2020a, p. 27).

A key strength of Ofsted's approach is its commitment to listening closely to the sector and addressing issues where it can, as indicated by recent changes to the complaints system, for example. Providers and local authorities can also engage with Ofsted via provider forums or local relationships to contribute their views on areas of regulation or practice that require strengthening. And as part of its commitment to engage with stakeholders and offer opportunities for feedback and challenge, Ofsted has exceeded its own internal targets for the number of speaking engagement sessions delivered by its officers. This presents an encouraging basis for discussion of the issues raised in this paper, as does the recently launched Independent Review of Children's Social Care.

A major challenge in trying to re-imagine the regulatory landscape is the rising numbers of children in need of a residential children's home placement, the complexity of their needs, and the attendant costs – all at a time of acute public sector austerity, which is likely to be exacerbated as the country seeks to recover from the economic impact of the COVID-19 pandemic. Rising to this challenge requires a more holistic consideration of how increasing needs can be met – either at higher quality and lower cost or, alternatively, an acceptance that it costs what it costs. A year ago, the ADCS (2020a) challenged Ofsted and the Department for Education to consider strategies to address the 'excessive profits being made by some providers on the backs of vulnerable children'. For its part, the ICHA (2020) made clear that 'without investment, this country cannot provide enough registered children's homes and we will fail to meet the needs of our children'.

The reality is that issues of cost, profit, investment, sufficiency, and value for money present increasing difficulties for the regulation of the sector – and they are challenges that must be addressed. Addressing them successfully may require a renewed emphasis and consideration of the importance of family support, early help services and preventative measures to ensure that effective work takes place earlier, thereby reducing the need for placement in residential homes, particularly high-cost ones. Can the regulatory framework be fashioned in such a way to drive good outcomes in early help and family support services? Given that safeguarding is at the heart of all we do, how can regulators drive and assess the quality of safeguarding practice from the initial referral to beyond care?

The challenge of creating a regulatory framework that is both sufficiently flexible, yet consistent for providers (including very different types of provider seeking to meet diverse needs) and local authorities cannot be underestimated. The need to place children at the centre of this and ensure the regulatory framework can guide and review all stages of their care journey is central. As demonstrated throughout, certain issues will at times challenge and conflict; but this in itself is a valuable driver for enabling the regulatory framework to continually develop and better support child-focused care.

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A fresh look at regulation

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This think piece on *A fresh look at regulation* reflects on where we are now and where conceivably we could be if we were to re-imagine how the regulatory system is framed and operates. In other words, if we were drawing up a regulatory framework today, how might it look?

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