

ADOPTION AND CHILDREN ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Amendments of the Children Act 1989

266. **Part 2** amends the Children Act 1989. Regulations under this group of sections will be made by the Secretary of State in England and the National Assembly in Wales. The National Assembly for Wales (Transfer of Functions) Order 1999 (TFO) transferred the functions of the Secretary of State under the Children Act 1989 to the Assembly so far as those functions are exercisable in Wales. *Section 141(1)* provides that the TFO is to be treated as referring to the Children Act 1989 as amended by this Act. Consequently, references in this Part of the explanatory notes to the Secretary of State should be read accordingly.

Section 111: Parental responsibility of unmarried father

267. *Section 111* amends section 4 of the Children Act 1989 to provide that a father who is not married to the mother at the time of the child's birth is to have parental responsibility if registration or re-registration of the birth takes place according to the provisions of the Births and Deaths Registration Act 1953 and equivalent provisions for Scotland and Northern Ireland. Parental responsibility granted to an unmarried father under these provisions may only be terminated by the order of a court. Applications for the termination may be made by any person who has parental responsibility for the child or, with leave, the child.

Section 112: Acquisition of parental responsibility by step-parent

268. *Section 112* inserts *section 4A* into the Children Act 1989 to enable a step-parent to acquire parental responsibility for a child of his spouse. This may be acquired either by agreement between the step-parent and the parents who have parental responsibility for the child, or by order of the court. This measure is intended to provide an alternative to adoption where a step-parent wishes to acquire parental responsibility for his or her step-child. It has the advantage of not removing parental responsibility from the other birth parent and does not legally separate the child from membership of the family of the other birth parent.

Section 113: Section 8 orders: local authority foster parents

269. *Section 113* amends section 9 of the Children Act 1989. Section 9(3) provides that local authority foster carers may not seek leave of the court to apply for a section 8 order (including a residence order) in respect of a child unless they have the consent of the local authority, they are a relative of the child, or the child has been living with them for three years. This section replaces the period of three years in section 9(3) with a one year period. This is intended to align the position with the residence requirement for local authority foster carers who wish to adopt a child living with them (see *section 42(4) and 44(4)*).

Section 114: Residence orders: extension to age of 18

270. *Section 114* amends section 12 of the Children Act 1989 to empower the court to direct in an appropriate case that a residence order made in favour of someone who is not the parent or guardian of a child may be extended until the child reaches the age of 18. At present a residence order ceases to have effect when the child reaches the age of 16, unless the court is satisfied that the circumstances are exceptional. *Section 114* further provides that where the court has directed that the order may be so extended, an application to vary or discharge the order may only be made with the leave of the court. The intention of this measure is to provide a further means of delivering enhanced security where the holder of a residence order who is not the child's parent is caring for the child on a long term basis.

Section 115: Special guardianship

271. Special guardianship orders are intended to meet the needs of children who cannot live with their birth parents, for whom adoption is not appropriate, but who could still benefit from a legally secure placement.

272. *Section 115(1)* inserts new *sections 14A to 14G* into the Children Act 1989 to provide for the new special guardianship order. The new sections provide for who may apply for an order, the circumstances in which orders may be made, the nature and effect of special guardianship orders, and for local authority support services for special guardians.

273. New *section 14A* provides for who may apply for a special guardianship order and the application process. The person in whose favour a special guardianship order is made is a 'special guardian'. People may apply jointly to become special guardians. They need not be married. *Subsection (2)* provides that special guardians must be 18 or over and that the parents of a child may not become his special guardian. *Subsections (3) to (5)* make provision about who may apply for an order. A court may make a special guardianship order in respect of any child on the application of:

- any guardian of the child;
- a local authority foster carer with whom the child has lived for one year;
- anyone who holds a residence order with respect to the child, or has the consent of all those in whose favour a residence order is in force;
- anyone with whom the child has lived for three out of the last five years;
- where the child is in the care of a local authority, anyone with the authority's consent;
- in any other case, anyone who has the consent of all those with parental responsibility for the child;
- anyone else, including the child, who has the leave of the court to apply.

274. Under *subsection (6)* the court may also make special guardianship orders in any family proceedings concerning the welfare of a child if they consider an order should be made, even if no application has been made. Family proceedings are defined in section 8(3) of the Children Act 1989 and include adoption proceedings under this Act. When considering making a special guardianship order the child's welfare is the court's paramount consideration, and the welfare checklist in section 1(3) of the Children Act 1989 applies.

275. *Subsections (7) onwards* set out the application process. Applicants must give 3 months' written notice to the local authority of their intention to apply for the order. The only exception to this is where a person has the leave of the court to make a competing application for a special guardianship order at a final adoption order hearing, in which case the 3 month period does not apply. This is in order to prevent

the competing application delaying the adoption order hearing. On receipt of notice the local authority must then investigate and prepare a report to the court about the suitability of the applicants to be special guardians and any other relevant matters. Regulations may prescribe matters to be covered in the report. The local authority may arrange for someone else to carry out the investigation or prepare the report under *subsection (10)*. It is intended to use these arrangements to ensure a proper assessment process is followed for special guardians. The court may not make an order unless it has received a report covering the suitability of the applicants. It is intended to provide in secondary legislation that a CAFCASS officer is to be appointed in appropriate special guardianship proceedings.

276. New *section 14B* provides that before making a special guardianship order the court must consider whether or not to vary or discharge any other existing order made under section 8 of the Children Act 1989 (such as a contact order or residence order) and also whether a contact order (for example, to enable continued contact with the child's birth parents) should be made at the same time as the special guardianship order. The court may also on making the special guardianship order give leave for the child to be known by a new surname and give permission for the child to be taken out of the United Kingdom for any period longer than three months.
277. New *section 14C* sets out the effect of special guardianship orders. *Subsection (1)(a)* gives the special guardian parental responsibility for the child. Subject to any later order made under the Act, the special guardian may exercise parental responsibility to the exclusion of others with parental responsibility apart from another special guardian (*subsection (1)(b)*). An exception applies in those circumstances where the law provides that the consent of all parties with parental responsibility may be or is required (for example, the sterilisation of a child) (*subsection (2)(a)*). *Subsections (3) and (4)* provide that while an order is in force the child may only be known by a different surname or be removed from the United Kingdom for longer than three months with the consent of all those who have parental responsibility, or with the leave of the court.
278. The intention is that the special guardian has clear responsibility for all the day to day decisions about caring for the child or young person and for taking decisions about his upbringing. But the order retains the basic legal link with the birth parents, unlike adoption. They remain legally the child's parents, though their ability to exercise their parental responsibility is limited. They retain the right to consent or not to the child's adoption or placement for adoption (*subsection 2(b)*). *Subsection (5)* provides that the special guardian must also take reasonable steps to inform them if the child dies.
279. New *section 14D* provides that, unlike adoption orders, special guardianship orders can be varied or discharged on the application of:
- the special guardian;
 - the child's parents or guardian (they may only apply with the leave of the court and leave is to be granted only if there has been a significant change of circumstances since the order was made);
 - any step parent who has parental responsibility by virtue of *section 4A* (with the leave of the court, to be granted only if there has been a significant change of circumstances);
 - anyone who had parental responsibility immediately before the special guardianship order was made (with the leave of the court, to be granted only if there has been a significant change of circumstances);
 - the child (with the leave of the court);
 - if a care order is made in respect of the child, the local authority can apply to discharge the special guardianship order;

*These notes refer to the Adoption and Children Act 2002
(c.38) which received Royal Assent on 7th November 2002*

- anyone who has a residence order in respect of the child.
280. *Subsection (2)* provides that the court may, during any family proceedings in which a question arises about the welfare of a child who is subject to a special guardianship order, vary or discharge the order in the absence of an application.
281. New *section 14E* makes supplemental provisions, including allowing the court to set timescales for proceedings involving special guardianship applications.
282. New *section 14F* makes provision for local authority support services for special guardians, children subject to special guardianship orders and others. Each local authority must arrange to provide support including counselling, advice and information, and such other services as are prescribed in regulations (*subsection (1)*). *Subsection (2)* provides that the power to make regulations under *subsection (1)(b)* is to be exercised so as to secure that local authorities provide financial support. Regulations will be made prescribing the circumstances where local authorities must, at the request of special guardians, children subject to special guardianship orders, their parents and other prescribed persons, carry out an assessment of that person's needs for special guardianship support services (*subsection (3)*). It is intended to use these regulations to ensure that local authorities put in place a range of support services to be available where appropriate for special guardians and children subject to special guardianship orders, their parents, and where appropriate, to others, which could include members of the birth family. *Subsection (4)* gives local authorities the discretion to carry out an assessment of need for support services at the request of any other person. *Subsections (5) to (11)* govern the assessment process and, where support services are to be provided, the arrangements for their provision. As with adoption support services, the needs assessment may be carried out at the same time as an assessment of that person's needs for any other purpose (*subsection (10)*). Again, the intention is to facilitate joined up planning and provision of public services support. There is provision for local authorities to delegate assessments and the provision of special guardianship support services to other local authorities or prescribed persons (*subsection (9)*).
283. New *section 14G* obliges every local authority to establish a procedure for considering representations (including complaints) made to them in respect of special guardianship support services by those eligible to receive the services. *Subsection (3)* provides that in considering representations local authorities must follow any regulations made by the Secretary of State. It is intended to use these powers to require authorities to establish complaints procedures for special guardianship support modelled on the revised Children Act 1989 complaints procedure to be established under section 27 as amended by [section 117](#) (paragraphs 290 to 295).
284. *Subsections (2) to (4)* of [section 115](#) amend sections 1 and 5 of the Children Act 1989. *Subsection (3)* amends section 1 to apply the welfare checklist to special guardianship applications. *Subsection (4)* amends section 5 to make provision about the appointment of guardians for children after the death of a special guardian.
285. Further provision about special guardianship is made in Schedule 3. Schedule 3 amends the provisions added to the Children Act 1989 by the Children (Leaving Care) Act 2000 to place a duty on local authorities to consider whether to provide advice and assistance to former looked-after children aged between 16 and 21 subject to special guardianship orders, including support for employment, education and training. Where the authority determines the child is in need of advice and assistance that the special guardian cannot give him, the authority is placed under a duty to advise and befriend him and may also provide him with assistance, for example in respect of education and training.
286. [Schedule 3](#) also provides that the making of a special guardianship order discharges any existing care order. However, if the need arises, a care order or a residence order may be made while a special guardianship order is in force. If made, the special guardianship

order is not automatically discharged but the local authority concerned or person in whose favour the residence order is made will have the right to apply for discharge or variation of a special guardianship order by new *section 14D*.

Section 116: Accommodation of children in need etc.

287. *Section 116* amends section 17(6) of the Children Act 1989 to make clear the power for local authorities to provide accommodation for children in need under that subsection (*subsection (1)*). As amended, section 17(6) permits local authorities to provide assistance in kind, accommodation or, in exceptional circumstances, cash.
288. *Subsection (2)* amends section 22 of the Children Act 1989, which provides for the general duties of local authorities towards children who are looked after by them. A looked after child is defined in section 22(1) of the Children Act 1989. As amended, section 22(1) does not apply to children who are accommodated under section 17. Should they need to be looked after children as defined in section 22(1), they will be accommodated by local authorities under section 20.
289. *Subsection (3)* amends section 24A of the Children Act 1989, which provides for advice and assistance for certain children who were looked after while aged 16 or 17. As amended, section 24A permits local authorities, in exceptional circumstances, to provide accommodation or cash to these young people. Section 24A accommodation may only be given in exceptional circumstances.

Section 117: Inquiries by local authorities into representations

290. *Section 117* amends sections 24D and 26 of the Children Act 1989 by making further provision for inquiries carried out by local authorities into representations about services provided under that Act. It implements some of the changes being taken forward as a result of the recent “Listening to People” consultation exercise on improving social services complaints procedures which require primary legislation. This section enables regulations to be made to impose time limits for the making of representations, to provide for an informal resolution stage and to extend the complaints procedure to services provided under Parts 4 and 5 of the Children Act 1989.
291. *Subsection (1)* inserts a new 24D(1A) that enables the Secretary of State to make regulations imposing time limits on the making of representations under section 24D(1) of the Children Act 1989. Section 24D was inserted into the Children Act 1989 by the Children (Leaving Care) Act 2000.
292. *Subsections (2) to (7)* amend section 26 of the Children Act 1989, which requires local authorities to establish a procedure for considering any representations about services provided by them under Part 3 of that Act. Under the amendment made by *subsection (6)*, the Secretary of State may make regulations imposing time limits on the making of representations under that section.
293. *Subsection (3)* amends section 26(3) of the Children Act 1989 to provide that every local authority must establish a procedure for considering representations in respect of “qualifying functions”. Qualifying functions are referred to in *subsection (4)*. They include functions under Part 3 of the Children Act 1989, which are covered by section 26(3) at present, functions under Parts 4 or 5 of that Act as specified in regulations and functions under this Act as specified in regulations. The extension of the procedure to specified functions under Parts 4 and 5 of the Children Act 1989 and to specified functions under this Act will ensure that representations about the exercise of a local authority’s functions in relation to children are brought within one child-centred procedure. The regulations will be used to extend the procedure to appropriate local authority functions under Parts 4 and 5 of the Children Act 1989, without impinging on any matter which is subject to the jurisdiction of the courts.

294. New section 26(3B)(b) of the Children Act 1989, as inserted by *subsection (4)*, provides that the persons listed at *section 3(1)* of this Act and other persons to whom the arrangements for the provision of adoption support services extend will be able to make a complaint under section 27 in respect of a function specified in the regulations.
295. *Subsection (5)* amends section 26(4) to provide that the requirement to involve an independent person in the complaints procedure is subject to the provisions in the new section 26(5A) that is inserted by *subsection (7)*. New section 26(5A) enables regulations to be made providing that the requirement for an independent person does not apply in relation to the procedure for any informal resolution stage established in regulations. An informal resolution stage is currently required by the complaints procedure established in directions made under section 7B of the Local Authority Social Services Act 1970.

Section 118: Review of cases of looked after children

296. *Section 118* amends section 26 of the Children Act 1989 (review of cases of looked after children) to provide that regulations may be made to require a local authority to review the care plan of a looked after child. These requirements apply in the case of both children who are subject to a care order and those who are accommodated by the local authority. When reviewing a section 31A plan the local authority may revise the plan or make a new one where necessary (new *subsection (2)(a)(i)*). Where the child does not already have a care plan, the local authority is required to prepare one (new *subsection (2)(b)(ii)*).
297. New *subsection (2)(k)* requires the local authority to appoint a person of a prescribed description to carry out the functions listed at new *subsection (2A)* and any other prescribed functions. The manner in which that person must perform his functions will be set out in regulations. The functions listed at new *subsection (2A)* are participating in the review of the case, monitoring the performance of the authority's functions in respect of the review and referring the case to a CAFCASS officer, if this is considered appropriate. The Lord Chancellor may by regulations extend the functions of Officers of the Service in respect of family proceedings (within the meaning of section 12 of the Criminal Justice and Court Services Act 2000) to enable them to take action with regard to cases referred to them under new *subsection (2A)(c)*.

Section 119: Advocacy services

298. *Section 119* inserts new section 26A into the Children Act 1989 to place a duty on local authorities to make arrangements for assistance to looked after children and young people leaving care who make or intend to make complaints under sections 24D and 26 of the Children Act 1989. *Subsection (2)* provides that the assistance to be provided must include representation.
299. *Subsection (3)(a)* provides that the advocacy service must not be provided by a person who is prevented from doing so by regulations. This provision will be used to ensure the independence of the service for example, by providing that no person involved in the management of the case in question or in considering the complaint may act as an advocate. *Subsection (3)(b)* provides that the arrangements must also comply with any other provision made by the regulations.
300. *Subsection (4)* provides for local authorities to monitor the provision of assistance under this section to ensure that they comply with regulations. This reflects section 26(6) of the Children Act 1989. *Subsection (5)* provides that every local authority shall give such publicity to their arrangements for the provision of assistance as they consider appropriate. This reflects section 26(8) of the Children Act 1989.

Section 120: Meaning of “harm” in the 1989 Act

301. *Section 120* clarifies the definition of harm in the Children Act 1989 to make clear that the harm a child may be at risk of suffering includes any impairment of the child’s health or development as a result of witnessing the ill-treatment of another person, such as domestic violence. “Ill-treatment” is already defined in section 31(9) of the Children Act 1989. It is broader than physical violence and includes sexual abuse and forms of ill-treatment which are not physical. Any harm a child suffers because a parent is being harassed or intimidated is caught by the definition of “harm”. The amendment will apply to all proceedings where the court applies the ‘welfare checklist’ in section 1(3) of the Children Act 1989. This includes proceedings for contact or residence orders.

Section 121: Care plans

302. *Section 121* amends section 31 of the Children Act 1989 to provide that a court may not make a care order until a care plan has been prepared by the local authority and considered by the court (*subsection (1)*). *Subsection (2)* inserts a new *section 31A* into the Children Act 1989. This places a duty on the local authority in whose favour a care order is intended to be or may be made to prepare a care plan within a timescale set by the court and to review and modify the plan, if necessary, while the application to the court is pending. A care plan prepared under new *section 31A* is to be referred to in the Children Act 1989 as a “section 31A plan”. Regulations will set out how the plan is to be drawn up and the information to be included (new *section 31A(3)*). These requirements will not be binding on an interim care order.

Section 122: Interests of children in proceedings

303. *Section 122* amends section 41 of the Children Act 1989, with the effect that applications for the making or revocation of a placement order under this Act become specified proceedings as defined in the Children Act 1989. As such a children’s guardian will be appointed and the child separately represented in every case (unless the court decides this is unnecessary). It also provides that proceedings for section 8 orders can, in circumstances established by rules of court, also be specified proceedings. Finally *section 122* amends section 93 of the Children Act 1989 (rules of court) to provide that the Lord Chancellor may make rules to provide for the separate representation of children.