

**EXPLANATORY MEMORANDUM TO
THE CHILDREN'S HOMES (AMENDMENT) REGULATIONS 2011**

2011 No. 583

1. This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 These Regulations amend the Children's Homes Regulations 2001 ("the 2001 Regulations"). The 2001 Regulations make provision for a wide range of matters with which registered persons (providers and managers of children's homes) must comply when they provide accommodation and care for children who are accommodated in children's homes. These Regulations amend the 2001 Regulations and streamline them by removing what over time have become unnecessary requirements.
- 2.2 In particular these Regulations (new regulations 17, 17A and 17B) give greater clarification to providers and managers of children's homes about the circumstances in which it may be permissible to physically restrain children in the home. Regulations 17, 17A and 17B are intended to support the providers and managers of children's homes to have in place effective behaviour management policies that minimise the need for children to be restrained.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 None

4. **Legislative Context**

- 4.1 These Regulations are made under section 22 of the Care Standards Act 2000 ("the Act"). Her Majesty's Chief Inspector for Education, Children's Services and Skills ("HMCI") is the registration authority in relation to England and is responsible under Part 2 of the Act for determining whether a person who wishes to carry on or manage an establishment or agency should be registered in respect of that establishment or agency on the basis of both the 2001 Regulations and National Minimum Standards (NMS) issued under section 23 of the Act. The 2001 Regulations provide a clear framework that sets out how children's homes should be run in order to secure positive welfare, health and education outcomes for children, and reduce risks to their welfare and safety. All providers of children's homes and their staff should provide the best care possible for the children cared for and accommodated in homes.
- 4.2 The main amendments made to the 2001 Regulations by these Regulations are as follows:

- Regulation 12 is amended to reflect the provisions in the Arrangements for the Placement of Children by Voluntary Organisations and Others (England) Regulations 2011 (“the 2011 Regulations”) (SI 2011/) and now covers only the placement plans of children who are not looked after by the local authority (a looked after child is defined in section 22 of the Children Act 1989). Regulation 12(1) provides that where a child who is not looked after by a local authority is placed in a children’s home by a voluntary organisation, the registered person in respect of that home must co-operate with the voluntary organisation in agreeing and signing the placement plan in accordance with regulations 4 and 5 of the 2011 Regulations. Regulation 12(1A) provides that where a child who is not looked after is accommodated in a private children’s home and was not placed there by a voluntary organisation, the registered person in respect of that home must prepare the placement plan in accordance with regulations 4 and 5 of the 2011 Regulations. Regulations 4 and 5 of the 2011 Regulations provide that the responsible authority for the child – which will be either the voluntary organisation placing the child or the provider of the private children’s home - must, before placing a child in a children’s home prepare a placement plan for that child and have regard to the matters set out in regulation 5 and Schedules 1 and 2. Regulation 12 (1B) provides that in all other cases the registered person in respect of the home must prepare the child’s placement plan in consultation with the child’s placing authority having regard to the matters set out in that regulation.
- A new regulation 12A is inserted which reflects the provisions in regulation 9 of the Care Planning, Placement and Case Review Regulations 2010 (SI 2010/959) and covers the placement plans of children that are looked after by a local authority. The registered person must co-operate with the child’s placing authority in agreeing and signing the placement plan as required by regulation 9.
- Regulation 16 is amended so that providers and managers of children’s homes are required to have regard to any relevant local authority or police protocols on missing children, whenever a child accommodated in a children’s home goes missing. This imposes a requirement on providers and managers of children’s homes which reflects the requirement placed on local authorities included in the *Statutory Guidance for Local Authorities on Children Missing from Home or Care* issued in July 2009, which can be accessed at the following weblink.

<http://www.education.gov.uk/childrenandyoungpeople/safeguarding/a0066653/young-runaways>

- Regulation 17 is substantially amended to specify the circumstances in which it is permissible for children’s homes staff to restrain children in their care (this is discussed in more detail below).
- Regulation 24 which requires providers and managers to have in place a complaints procedure, is amended, to make clear that records about

complaints may be kept in electronic form provided the information is capable of being reproduced in a legible form.

- Regulations 31 and 32 are amended to remove unnecessary regulation about the fitness of the children's home premises.
- Regulation 41 of the 2001 Regulations has been revoked. Regulation 41 provided that a failure to comply with a number of the regulations was an offence and enabled HMCI to bring proceedings against providers and managers of children's homes who failed to comply with the regulations. Section 22A of the Act (inserted by the Children and Young Persons Act 2008) provides that HMCI may serve a compliance notice on the registered provider or manager of a children's home if they are failing to comply with a requirement imposed on them. Failure to comply with the compliance notice is an offence and on that basis it is considered that there is no need to retain regulation 41 of the 2001 Regulations which makes similar provision.
- A new regulation 42A is added to provide that some of the regulations do not apply to children who are not in the care of a local authority and are placed in a children's home solely for short breaks, as in these circumstances their parents remain responsible for their overall care, health and education.

5. Territorial Extent and Application

- 5.1 This instrument applies to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- 7.1 As part of the Coalition Government's drive to reduce burdens we have revised the regulatory framework in order to ensure that there is no more prescription than is necessary to safeguard children and promote their welfare and to provide a more streamlined framework for local authorities and other children's homes providers to operate within.
- 7.2 In addition, these Regulations and related guidance respond to concerns raised by providers of children's homes, by HMCI and local authorities, by providing that certain regulations do not apply to children placed in children's homes for short breaks and by updating a number of requirements and, as a result, removing those that have become unnecessary.
- 7.3 However, as children placed in children's homes will require highly skilled care due to their complex and challenging needs, there may be occasions in which staff may need to physically intervene to restrain a child and the most substantial amendments to these Regulations and the related guidance are intended to clarify the circumstances in which the use of restraint is permissible.

- 7.4 Concerns have been expressed by a range of organisations that children in residential care are very vulnerable to being restrained inappropriately. In view of these concerns, the new provisions relating to restraint have been based on the following principles, derived from the work of the Children's Rights Director, who has statutory responsibilities in relation to consulting with looked after children and representing their views to Government and HMCI
- Physical intervention and restraint should only be used where no alternative method is available and only when necessary to prevent injury to any person (including the child being restrained) and serious damage to property.
 - No more force than is necessary should be used and the restraint measure must be proportionate.
 - Records must be maintained so that managers are able to review incidents leading to restraint and learn from this information to improve the quality of the home's approach to behaviour management
 - Restraint should only be a small part of the home's wider behaviour management strategy, which should focus on encouraging children to develop positive patterns of behaviour.
- 7.5 The behaviour management and restraint provisions are now set out in three regulations. Regulation 17 covers behaviour management and discipline and specifies measures that must never be used to manage children's behaviour (e.g. corporal punishment). It also specifies that no child must be subject to any measure of control or discipline that is excessive or unreasonable. Regulation 17A provides that children should only be restrained, where there is no other alternative, to prevent injury to any person, including the child being restrained, or serious damage to property. The use of restraint must be proportionate, using no more force than is necessary. The regulation also provides that in a secure children's home restraint may be used to prevent a child absconding from the home. Regulation 17B requires that the registered person must prepare a "behaviour management" policy that sets out the home's approach to control, discipline and restraint and the way in which appropriate behaviour is to be promoted. Restraint must be seen as part of a wider behaviour management policy which explains to the home's staff, HMCI, local authorities who place children and, crucially, to children themselves, how the home will promote children's positive behaviour.
- 7.6 In summary the most significant change made by these Regulations concerns the approach that homes must take to managing children's behaviour. The revised framework gives statutory force to the recommendations included in both the report of the *Independent Review of Restraint in Juvenile Secure Settings* (2008), commissioned following the restraint related death of a child placed in a Secure Training Centre; and also in HMCI's survey into the use of physical intervention and restraint in children's homes - *Minimum Reasonable Force* (2009). The revisions to the regulations set out above and related guidance provide specific requirements on the use of restraint and

emphasise the importance of minimising the use of any restraint on a child in a children's home by developing appropriate behaviour management strategies tailored to each child's individual needs.

8. Consultation outcome

- 8.1 The Department for Education consulted on draft Regulations and guidance between August and November 2010. Most respondents were content with the changes being proposed to the Regulations and with the related revised guidance, which removed overly bureaucratic prescriptive requirements. Minor points were made about the Regulations relating to the responsibilities of the providers and managers of children's homes to support parental contact; about record keeping and about the relationship between the draft Regulations and The Children (Secure Accommodation) Regulations 1991. In response to these points the guidance has been revised although the Department does not consider it is necessary to introduce any additional information about record keeping.
- 8.2 The most significant comments and questions on the detail in the Regulations and guidance related to the specific regulations on "behaviour management and discipline" which are based on the principles summarised at 7.4 above. The Children's Commissioner suggested that the regulations on restraint should be amended in order to proscribe any restraint technique "intended to cause pain". The Children's Rights Director also suggested a similar regulatory change to end the use of "pain inflicting" restraint techniques and to limit the length of time a restraint technique should be used for. Careful consideration has been given to the practicality of these suggestions and in particular how difficult it would be to demonstrate the precise intentions of individual children's home staff members who have to decide whether to make use of restraint to cope with an individual child's behaviour. In light of that consideration it was decided not to amend the regulations to include the suggested changes. The new Regulation 17A requires that the use of restraint in any case must be proportionate. This requirement should in practice prevent the use of restraint techniques, the intention of which is to cause pain to distract a child. The guidance has also been amended to make it clear that certain restraint techniques must not be used in children's homes (see 9.2 below).
- 8.3 Officials in the Department are supporting the work of the Ministry of Justice to put in place a system of independent accreditation for restraint techniques that can be used in the juvenile secure estate, including secure children's homes which are covered by these Regulations. The intention is that restraint techniques used in the secure estate will have to be independently accredited based on evidence demonstrating that any technique is medically safe and appropriate to use with children and young people. Once the accreditation process has been established, we will review the practicality of extending this process to the wider children's homes sector.
- 8.4 A detailed analysis of the responses to the consultation is available on the Department's website:

9. Guidance

- 9.1 These Regulations are being accompanied by revised statutory guidance. The guidance is being issued under section 7 of the Local Authority Social Services Act 1970 and is addressed to local authorities. The guidance is also relevant to private and voluntary providers of children's homes in relation to their responsibilities under these Regulations. The new Volume 5 ("Children's Homes") of the Children Act 1989 suite will supersede Volume 4 "Residential Care" issued in 1991. The guidance has been updated in line with the changes to these Regulations and in order to remove inaccurate information, out of date sections, unnecessary prescription and detail and make it easier for people to use.
- 9.2 The guidance specifies that any method of restraint that is used to physically restrain an individual child must be carefully chosen and take into account factors including the child's age, understanding and their physical and emotional health. The guidance also clearly sets out the risks associated with certain restraint techniques and makes it clear that techniques known as "nose distraction", potentially harmful holds such as "neck holds" and other techniques that may restrict breathing (which may sometimes be referred to as types of "basket holds") must not be used in children's homes.
- 9.3 These Regulations are also accompanied by the National Minimum Standards (NMS) for Children's Homes 2011 issued under section 23 of the Act. Providers and managers should comply with the NMS and the NMS are taken into account by HMCI, in their inspection of children's homes. The NMS set out what is required when establishing a children's home; they provide a basis for the induction and training of staff and they can be used by parents, children and young people as a guide to what, as a minimum, they should be able to expect from residential care. Like the guidance, the NMS have also been amended and streamlined following formal public consultation.
- 9.4 In relation to restraint, the NMS require that all homes have clear written policies about behaviour management that are understood and put into effect by all their staff. Staff and children must be given the opportunity to review incidents of challenging behaviour, so that homes continually review their approach to behaviour management in order to de-escalate confrontations or potentially violent behaviour, so that staff only resort to physical restraint in exceptional circumstances.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is a reduction in burdens (see paragraph 2.1). These Regulations along with the revised guidance and NMS result in a clearer, more coherent and proportionate regulatory framework.
- 10.2 The impact on the public sector is as at 10.1.

10.3 An Impact Assessment has not been prepared for this instrument because the regulatory changes (see 4.2) will not result in children's homes providers incurring any additional costs. In fact, there will be an overall reduction in burdens and in some areas, reduced costs. The Regulations will come into force on 1st April 2011. Training events are planned for providers during spring and summer of 2011.

11. Regulating small business

11.1 The legislation does apply to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken has been to minimise regulatory burdens (as set out in paragraph 10.1).

11.3 The basis for the final decision on what action to take to assist small business results from public consultation which included responses from children's homes provided as small businesses and from organisations representing them.

Monitoring & review

12.1 All children's homes are inspected twice a year by HMCI (which is independent of Government) to assess the quality of children's homes. The inspection process is designed to test that children's homes providers are complying with the relevant Regulations and with the National Minimum Standards that underpin these. Inspections are unannounced and inspection information is used to assess each home's performance. Homes are rated on a scale ranging from "outstanding" to "inadequate". This rigorous assessment process ensures that homes are routinely inspected on their compliance with the 2001 Regulations and related NMS, so that children who are in residential care are provided with the right kind of support to respond to all their needs.

12.2 HMCI publishes inspection reports of individual providers on its website. HMCI also publishes thematic reports which draw on findings aggregated from individual inspection reports. These reports offer an objective assessment of the performance of children's homes providers as a service designed to promote high quality care for children, so that they are effective in working with local authorities, so that looked after children are provided with the support required to achieve positive outcomes and reach their potential. Inspection data and feedback from HMCI to the Department helps inform the Department's monitoring and review of these Regulations and understand where there may be concerns or issues with the regulatory framework which mean it may need revision.

12.3 The Department has initiated a "support and improvement" programme for children's homes which began in September 2010 and will run until at least September 2012. This programme collects evidence about the effectiveness of children's homes from a range of sources, including Departmental statistical data; information held by Ofsted; and information derived from independent academic research. From April 2012 this programme will be able to evaluate

how the introduction of these streamlined Regulations has affected the quality of care provided by children's homes

13. Contact

Mark Burrows at the Department for Education (tel: 020 778 38079 or email: Mark.Burrows@education.gsi.gov.uk) can answer any queries regarding the instrument.