

EXPLANATORY MEMORANDUM TO

THE CHILDREN AND FAMILY COURT ADVISORY AND SUPPORT SERVICE (REVIEWED CASE REFERRAL) (AMENDMENT) REGULATIONS 2018

2018 No. 67

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 This instrument amends the Children and Family Court Advisory and Support Service (Reviewed Case Referral) Regulations 2004 (S.I. 2004/2187) (“the 2004 Regulations”). It reinstates provisions in the 2004 Regulations unintentionally revoked by the Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) (Secondary Legislation) Regulations 2016 (S.I. 2016/211 (W.84)) (“the 2016 Regulations”). The reinstatement of these provisions restores Cafcass Cymru’s power to make applications to the court in response to a referral from a local authority Independent Reviewing Officer in child protection cases.

3. Matters of special interest to Parliament

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

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 As this instrument is subject to the negative procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 An unintended consequence of the implementation of the Social Services and Well-being (Wales) Act 2014 (“the 2014 Act”), which came into force on 6 April 2016, has been identified in that the 2004 Regulations have as part of that implementation been erroneously disapplied in relation to Wales (by Schedules 2 and 3 to the 2016 Regulations).
- 4.2 The 2004 Regulations enable local authority Independent Reviewing Officers to make a referral to Cafcass Cymru should a concern arise about a child in care that cannot be resolved internally within the local authority. Independent Review Officers fulfil an independent review function for all children looked after by a local authority. Cafcass Cymru represents children in the family justice system in Wales. Upon receipt of a referral, Cafcass Cymru endeavours to resolve the issue. In the event that the issue remains unresolved, Cafcass Cymru has previously been able to make an application to the court to safeguard the welfare of the child. It is this power to make a court application which has inadvertently been revoked by the 2016 Regulations. The power to make a court application is considered to be a last resort and Cafcass Cymru would not take such a step until all other options had been exhausted.

4.3 This instrument will rectify this situation by amending the 2004 Regulations so that the pre-April 2016 position is restored, and Cafcass Cymru again has the power to make court applications in the circumstances described above. The instrument is made by the Lord Chancellor under the powers conferred on him by sections 101(1) and 196(1) and (7) of the 2014 Act, and with the consent of the Welsh ministers pursuant to section 101(2) of that Act. Despite having disapplied the 2004 Regulations, the Welsh ministers cannot now amend them to restore the provisions which that disapplication had the effect of revoking, since the relevant power is conferred on the Lord Chancellor.

5. Extent and Territorial Application

5.1 The extent of this instrument is England and Wales.

5.2 The territorial application of this instrument is Wales. The instrument relates to powers exercisable by Cafcass Cymru, which provides services in Wales only.

6. European Convention on Human Rights

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

7. Policy background

What is being done and why

7.1 The 2004 Regulations originally provided for an extension of the functions of the Children and Family Court Advisory and Support Service (“Cafcass”) to enable court proceedings to be brought, as necessary, following a referral from a local authority Independent Reviewing Officer of the case of a child who is being looked after by a local authority to a Cafcass officer.

7.2 The 2004 Regulations were then amended by the Children and Family Court Advisory and Support Service (Reviewed Case Referral) (Amendment) Regulations 2005 (“the 2005 Regulations”), as a consequence of the then National Assembly for Wales and Welsh Family Proceedings Officers being allocated functions previously discharged by Cafcass across both England and Wales on a devolved basis.

7.3 During the making of the 2016 Regulations an error was made that resulted in the unintended disapplication of the 2004 and 2005 Regulations in their entirety in relation to Wales. Both Schedules 2 and 3 to the 2016 Regulations had this effect. The erroneous disapplication in Schedule 2 was reversed by further regulations made by the Welsh Government before the 2016 Regulations took effect. However, Schedule 3 was inadvertently not amended before 2016 Regulations came into force, and therefore the 2004 and 2005 Regulations continue not to apply in relation to Wales. Now that the 2016 Regulations are in force, it is not possible for the Welsh Government to amend them hence the need for this instrument under sections 101 and 196 of the 2014 Act.

7.4 The unintended disapplication of the 2004 and 2005 Regulations has meant that while the Independent Reviewing Officer can refer a child to a Welsh Family Proceedings Officer employed by Cafcass Cymru, the Welsh Family Proceedings Officer is unable to exercise their functions following that referral as described in section 4 of this Explanatory Memorandum. This power is considered a last resort and Cafcass Cymru

has not in fact had occasion to make an application of this type to the court in the period since the function was conferred on the National Assembly for Wales and Welsh Family Proceedings Officers. However, the ability to do so acts as an incentive to local authorities to resolve any disputes that may arise and, in the event that resolution cannot be reached, it provides an essential mechanism for Cafcass Cymru to safeguard children in Wales. It is therefore important that this power should be restored.

- 7.5 This instrument restores the relevant functions of the Welsh family proceedings officers as originally set out in the 2004 Regulations (as amended by the 2005 Regulations).

8. Consultation outcome

- 8.1 There has been no consultation as this instrument is designed to restore provisions unintentionally revoked in the 2004 Regulations. However, family stakeholder groups were consulted about those Regulations as described in paragraph 7.3 of the Explanatory Memorandum produced for them. The 2004 Regulations were developed in the light of consultees' comments, particularly to include timeframes. The Explanatory Memorandum for the 2004 Regulations is available at: http://www.legislation.gov.uk/uksi/2004/2187/pdfs/uksiem_20042187_en.pdf.

9. Guidance

- 9.1 A revised Independent Reviewing Officer Protocol will be issued by Cafcass Cymru and the Association of Directors of Social Services (ADSS) Cymru. The Protocol together with an accompanying Guidance Note will be issued by Cafcass Cymru shortly after this instrument been made.

10. Impact

- 10.1 There is no impact on business, charities or voluntary bodies. The instrument relates solely to a public authority's power to make a court application in relation to child protection functions undertaken by the public sector in Wales.
- 10.2 There is a limited impact on the public sector beyond rectifying a previous legislative error, so that Cafcass Cymru has the power to exercise the power described above.
- 10.3 An Impact Assessment has therefore not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

- 12.1 There are currently no plans in place for monitoring and reviewing this instrument as it restores unintentionally revoked provisions in the 2004 Regulations.

13. Contact

- 13.1 Henry Vaile at the Welsh Government, telephone: 0300 025 8075 or email: henry.vaile@gov.wales can answer any queries regarding the instrument.