

CHILDREN AND YOUNG PERSONS ACT 2008

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

16. Unless otherwise stated, in these notes the “appropriate national authority” means the Secretary of State for Children, Schools and Families in relation to England and Welsh Ministers in relation to Wales. The “registration authority” refers to HM Chief Inspector for Education, Children’s Services and Skills (the Chief Inspector) in England and, when applied to Wales, the Welsh Ministers.

Part 1 – Delivery of Social Work Services for Children and Young Persons (sections 1 to 6)

Section 1: Power to enter into arrangements for discharge of care functions

17. *Section 1* enables local authorities to enter into arrangements with a body corporate (referred to in this Part as a “provider of social work services”) for the discharge by that body of some or all of the authority’s social services functions in relation to:
- a. individual children who are looked after by the authority; and/or
 - b. care leavers (see Annex A – Glossary of terms)
- referred to in *subsection (2)* as relevant care functions. Social services functions are defined in section 1A of the Local Authority Social Services Act 1970 (the “1970 Act”). *Subsection (5)* provides that the arrangements may make provision for the continuing exercise of the local authority functions by the provider of social work services where the child ceases to be looked after by the local authority.
18. *Subsection (6)* enables the appropriate national authority to make regulations specifying functions which are or are not to be treated as relevant care functions. An order under this subsection is subject to the affirmative resolution procedure. This means that before the order can be made a draft of it must have been laid before, and approved by, each House of Parliament (if it is to be made by the Secretary of State) or the National Assembly for Wales (if it is to be made by Welsh Ministers). This contrasts with the more common “negative” resolution procedure for exercising delegated powers that permits the statutory instrument to be laid before both Houses or, as the case may be, the National Assembly for Wales after it has been made. Under the negative resolution procedure, the instrument is subject to revocation if a resolution for annulment is passed within 40 days.
19. A provider of social work services cannot be a local authority (*subsection (3)(a)*) and regulations may make further provision about the bodies corporate that may, or may not, be providers of social work services (*subsection (7)*). This power is also subject to the affirmative resolution procedure.
20. In addition the appropriate national authority may by regulations provide that arrangements may be entered into for no less than a prescribed minimum period or for no more than a prescribed maximum period (*subsection (8)*).

Section 2: Restrictions on arrangements under section 1

21. *Section 2* places restrictions on the functions that may be the subject of arrangements under this Part. The excluded functions (set out in *subsection (2)*) are functions in relation to the appointment of independent reviewing officers and the local authority's functions as an adoption agency (unless the provider of social work services is also a registered adoption society). The intention is that independent reviewing officers will be one of the mechanisms by which local authorities quality assure the work carried out by providers of social work services. Making arrangements for adoption are excluded as the intention is that providers of social work services are to focus on the provision of support to looked after children, particularly those who are likely to remain in the long term care of the authority.
22. *Subsection (5)* provides that a local authority must not enter into arrangements under Part 1 unless it is satisfied that the functions will be discharged by, or under the supervision of, registered social workers.

Section 3: Effect of arrangements under section 1

23. *Section 3(1)* provides that any acts or omissions of a provider of social work services or their employees are to be treated as the acts and omissions of the local authority. *Subsection (2)* provides that this does not affect the rights and liabilities of the local authority and the provider as between one another; does not apply to criminal offences; does not make the local authority liable under section 6 of the Human Rights Act 1998 in respect of acts of the provider which are private in nature; and does not prevent any civil proceedings being brought against the provider. The liability of the provider to third parties is unaffected by this provision, which means that the local authority will in addition be equally and jointly liable for the acts of the provider. For example, in tort the provider is liable under the common law and the local authority is deemed liable under section 3.

Section 5: Functions under this Part to be social services functions

24. The power to enter into an arrangement with a provider of social work services is a social services function (*section 5* amends Schedule 1 to the 1970 Act). This means that in making arrangements under this Part the local authority must act under any general guidance of the appropriate national authority issued under section 7 of the 1970 Act and comply with any directions issued under section 7A of that Act.

Section 6: Piloting and expiry of arrangements under this Part

25. *Section 6* enables the piloting of arrangements under this Part for a period of up to five years. The intention is to pilot the arrangements in a number of local authorities. The pilots will be evaluated and, subject to that evaluation, the power may be extended to all local authorities. In that event, all providers of social work services will be regulated as agencies under the Care Standards Act 2000 and subject to registration and inspection by the Chief Inspector for Education, Children's Services and Skills and *section 4* makes provision for this. *Subsection (3)* provides that sections 1 to 5 cease to have effect if the piloting period comes to an end after 5 years without section 4 having been commenced. *Subsections (4) and (5)* provide that if section 1(1) is not commenced within a period of 5 years then sections 1 to 5 cease to have effect in relation to England or, as the case may be, Wales.

Part 2 - Functions in Relation to Children and Young Persons

Well-being

Section 7: General duty of the Secretary of State to promote the well-being of children in England

26. *Section 7* places the Secretary of State under a statutory duty to promote the well-being of children in England. The Secretary of State has, for many years, carried out activities for the benefit of children. In particular, he is required by section 10 of the Education Act 1996 (c.56) to promote the education of the people of England and Wales. This section brings the Secretary of State's statutory duties into line with his broader policy commitments for children and young people, which have developed in recent years. The Secretary of State now has responsibility for promoting the well-being of all children and young people (and, by extension, their families and those who care for them) as well as their education. The new statutory duty complements the existing duties on local authorities and governing bodies of schools to promote children's well-being.
27. *Subsection (1)* places the Secretary of State under a general duty to promote the well-being of children (defined as persons under the age of 18) in England. This general duty is subject to any specific duties on the Secretary of State (*subsection (2)*).
28. *Subsection (3)* makes clear that the activities the Secretary of State undertakes to promote children's well-being include activities in connection with parenting, which includes parental care provided by any person to a child not just that provided by a parent or other person who has parental responsibility for the child.
29. In addition, *subsection (4)* gives the Secretary of State a statutory power to promote the well-being of care leavers who are over the age of 18 (both former relevant children within the meaning of section 23C and persons qualifying for advice and assistance under section 24) and other groups of persons under the age of 25 who may be prescribed in regulations subject to the negative resolution procedure (see paragraph 18 above for a description of Parliamentary procedures)
30. The section requires the Secretary of State to have regard to the aspects of well-being mentioned in section 10(2) of the Children Act 2004 when discharging his functions under this section. The aspects of well-being mentioned in section 10(2) are physical and mental health and emotional well-being; protection from harm and neglect; education, training and recreation; their contribution to society; social and economic well-being.
31. The section came into force on Royal Assent (see paragraph 160 below) and applies in relation to England only.

Accommodation

32. Every local authority should have a plan for the future care of each child it looks after. Care plans should describe the child's needs, set out the services that will be provided to meet those needs and the local authority's long term plan for the child. The care plan should include amongst other things:
 - proposed placement (type and details);
 - other services to be provided to the child or family either by the local authority or other agencies;
 - the health plan;
 - the Personal Education Plan; and
 - dates of scheduled reviews of the care plan.

33. Whenever decisions are taken that affect the child, their wishes and feelings must be ascertained and given due consideration, in addition to the wishes and feelings of their parents and carers (section 22 of the 1989 Act). Due consideration must also be given to the child's religious persuasion, racial origin and cultural and linguistic background. Care plans must be reviewed in accordance with regulations i.e. the first review must be within 4 weeks of the date on which the child begins to be looked after, the second review must be within 3 months after that date, and subsequently at intervals of no more than 6 months.
34. The content of care plans and arrangements for reviews is determined by a combination of regulations. In England, these are the Arrangement for Placement of Children (General) Regulations 1991 and the Review of Children's Cases Regulations 1991, made under the 1989 Act. In relation to Wales, the Placement of Children (Wales) Regulations 2007 and the Review of Children's Cases (Wales) Regulations 2007 apply.
35. Amendments to arrangements for care planning and review are made by the provisions in Part 2 of the Act.

Sections 8 & 9 and Schedules 1 & 2: Provision of accommodation and maintenance for children who are looked after by a local authority

36. *Section 8* replaces section 23 of the 1989 Act with new sections 22A to 22F. It re-enacts the duties on local authorities to provide accommodation for children who are in their care (*new section 22A*) and to maintain all looked after children in other respects apart from the provision of accommodation (*new section 22B*). The duties and powers of local authorities to provide accommodation for children under sections 20 and 21 of the 1989 Act (i.e. those who are "voluntarily accommodated" or accommodated for their own protection or by virtue of an order made in criminal proceedings) are unaffected by these changes.
37. *New section 22C* outlines the ways in which the local authority must perform its accommodation functions. *Subsection (11)* enables the appropriate national authority to make regulations for, and in connection with, the purposes of section 22C. Further detail about the regulation making powers is set out in new *paragraphs 12A to 12G* of Schedule 2 to the 1989 Act, inserted by *Schedule 1* to the Act.
38. *Subsections (2) to (4)* of *section 22C* deal with placements with parents and others specified in *subsection (3)* of that section. The local authority must make arrangements for a child they are looking after to live with their parents; any other person who has parental responsibility for the child; or, in the case of a child who is the subject of a care order (i.e. who is "in care"), a person in whose favour a residence order subsisted immediately before the care order was made. This duty applies only where such arrangements are both consistent with the child's welfare and reasonably practicable. The Act re-enacts paragraph 14 of Schedule 2 to the 1989 Act as new *paragraph 12A* (to be inserted by *Schedule 1* to the Act), making further provision for regulations to set out conditions under which a child in care is to be allowed to live with a person specified in *subsection (3)*.
39. *Section 22C(5)* provides that if the local authority is unable to place a child with a person specified in *subsection (3)*, the local authority must place the child in the most appropriate placement available. 'Placement' is defined in *section 22C(6)* as meaning:
 - a placement with a local authority foster parent who may be a relative (defined in section 105 of the 1989 Act), friend or other connected person;
 - a local authority foster parent who is unconnected to the child;
 - placement in a children's home in respect of which a person is registered under Part 2 of the Care Standards Act 2000; or
 - other arrangements.

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40. Placements under *section 22C(6)(d)* may include, for example, supporting young people to live independently in rented accommodation, residential employment, or in supported lodgings/hostels. New *paragraph 12B* (to be inserted in Schedule 2 to the 1989 Act by *Schedule 1* to this Act) re-enacts paragraph 13 of Schedule 2 to the 1989 Act to enable further provision to be made about arrangements made under subsection (6) (d).
41. *Section 22C(7)* provides that in determining the most appropriate placement for a child the local authority must have regard to the other provisions of Part 3 of the 1989 Act, and in particular to its duties under section 22. This includes the duty to safeguard and promote the welfare of the child (subsection (3)(a)) and the duty in particular to promote the child's educational achievement (subsection (3A)); the duty to ascertain the wishes and feelings of the child, his parents and other relevant persons before making a decision with respect to the child they are looking after (subsection (4)); and the duty to give those wishes and feelings and the child's religious persuasion, racial origin and cultural and religious background due consideration (subsection (5)) .
42. *Section 22C(7)(a)* provides that the local authority must give preference to a placement with a relative, friend or other person connected with the child over the other placement options.
43. Under *section 22C(7)(b) and (8)* the local authority must, so far as is reasonably practicable in all the circumstances of the child's case ensure that the placement:
- allows the child to live near their home;
 - does not disrupt the child's education or training (powers to impose requirements with which a local authority must comply before making any decision about a child's placement if he is in Key Stage 4 i.e. aged 14 -16 years are set out in *paragraph 12D*, to be inserted in Schedule 2 to the 1989 Act by *Schedule 1* to this Act);
 - if the child has a sibling who is also being looked after by the local authority, enables the child and that sibling to live together; and
 - if the child is disabled, is suitable to the child's particular needs.
44. Under *section 22C(7)(c) and (9)* the child must be provided with accommodation within the local authority's area unless that is not reasonably practicable. Powers to impose requirements with which a local authority must comply before making a placement out of area are set out in new *paragraph 12C*, to be inserted in Schedule 2 to the 1989 Act by *Schedule 1* to this Act.
45. *Section 22C(10)* enables the local authority to determine the terms on which they place a child with a person specified in subsection (3) or with local authority foster parents, replicating the effect of section 23(2) of the 1989 Act. These terms might include details of the financial support to be provided for the child or other payments to be made to the carer(s); conditions relating, for example, to training for the carer that is relevant to the upbringing of the child; or details of support (other than financial support) by the local authority for both the child and the carer. Terms relating to payments made to local authority foster parents are subject to orders made under section 49 of the Children Act 2004. No such orders have been made to date.
46. *Section 22C(12)* defines a local authority foster parent as a person who is approved as a local authority foster parent in accordance with regulations made by virtue of new *paragraph 12F* of Schedule 2 to the 1989 Act (inserted by *Schedule 1* to this Act). Further provision for regulation of foster care placements is made by new *paragraph 12E* (inserted in Schedule 2 to the 1989 Act by *Schedule 1* to this Act) which, with *paragraph 12F(1)(a)* and *paragraph 12G*, re-enacts paragraph 12 of Schedule 2 to the 1989 Act. The current process for approval of foster carers and regulation of placements is dealt with in the Fostering Services Regulations 2002 and the Arrangements for

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Placement of Children (General) Regulations 1991. The 2002 Regulations provide, amongst other matters for placement of children in emergency with relatives and other connected persons even if that person does not have prior approval as a foster parent (regulation 38). It is intended that regulations under the new provisions will make similar provision for temporary approval of relatives as local authority foster carers in emergencies, and make provision for the approvals process to recognise the different considerations that apply to approval of someone who has a prior relationship to the child.

47. New *paragraphs 12F(1)(b) and (2)–(11)* (inserted in Schedule 2 to the 1989 Act by *Schedule 1* to this Act) will enable regulations to make provision for prospective or existing foster parents to apply to the appropriate national authority for an independent review of the determination of a fostering service provider regarding a person's suitability or continuing suitability to foster a child.
48. Under existing provisions (set out in regulation 28(6)(b) and regulation 29(7)(b) of the Fostering Services Regulations 2002) foster parents are able to challenge a fostering service provider's proposal not to approve them by making written representations to the fostering service provider; the provider must refer the case back to the fostering panel and take any fresh recommendations into account in making its decision. These regulations also set out the approvals process which must be followed by fostering service providers in assessing the suitability of prospective foster parents and the procedures to follow with regard to terminating approval.
49. Regulations made under new *paragraph 12F* of Schedule 2 to the 1989 Act will provide an additional means for foster parents to challenge a proposal relating to their approval, or the continuation of their approval – by applying to a panel established by the appropriate national authority for a review by an independent panel.
50. It is intended that this independent review mechanism ("IRM") for foster parents will operate in a similar way to the current mechanism which considers applications from prospective adopters for an independent review of an adoption agency determination that they are not suitable to adopt or to withdraw their earlier approval. Where the prospective adopters apply for an independent review, the independent review panel convened to review the case considers the case afresh and makes a recommendation to the adoption agency; the adoption agency must take that recommendation into account, along with that of the agency's adoption panel, when making its decision. This mechanism was established by sections 9 and 12 of the Adoption and Children Act 2002 and secondary legislation made under the enabling powers conferred by those provisions.
51. Under *paragraph 12F(1)(b) and (3)* the appropriate national authority may, by regulations, prescribe the details of the IRM. This may include, for example, the procedure for review of the qualifying determination, the functions of the panel and its constitution and membership (e.g. that the panel shall include social workers and those considered by the appropriate national authority to be suitable members, including persons with experience of fostering). It is intended that the regulations will cover similar matters to the Independent Review of Determinations (Adoption) Regulations 2005.
52. *Paragraph 12F(4)* gives the appropriate national authority the power to recover the costs of reviews. However, these costs will not be recoverable from the person who made the application for an independent review. *Paragraph 12F(5)* provides that the sums payable to the appropriate national authority must not, taking one financial year with another, exceed the costs incurred in performing the independent review functions. *Paragraph 12F(9)* makes similar provision in situations where the national authority has made arrangements under *sub-paragraph (6)* of that paragraph for its functions to be performed on its behalf by an organisation. The definitions of "financial year" and "independent review function" are both included in *Paragraph 12F(11)*.

53. *Paragraph 12F(6) to (8)* enables the IRM for fostering to be operated by an independent organisation. The organisation operating the IRM on behalf of the national authority must perform its functions in accordance with any general or special directions which the appropriate national authority may give. *Paragraph 12F(8)* makes provision for payments to be made to the organisation.
54. *Paragraph 12F(10)* gives the Welsh Ministers the power to enter into an arrangement under which their functions in relation to independent reviews are performed by the Secretary of State. A similar power exists in section 12(7) of the Adoption and Children Act 2002 in relation to the adoption IRM, but has not been exercised to date.
55. *Schedule 2* to the Act makes transitory modifications to Schedule 2 to the 1989 Act that closely follow the provisions in *new paragraph 12F* of Schedule 2 to the 1989 Act (to be inserted by *Schedule 1*) described above. The transitory modifications enable regulations on the Independent Reviewing Mechanism for foster parents to be made before the amendments in *Schedule 1* are commenced. When *Schedule 1* is commenced these transitory arrangements will cease to have any effect, but will be replaced by the substantive amendments in *Schedule 1*.
56. *New section 22D* introduces a new procedural requirement in a case where the local authority is considering moving a child from a placement under *section 22C(2) or (6) (a)–(c)* to one that involves making “other arrangements” under *section 22C(6)(d)*. It prevents the local authority from doing so unless there has been a statutory review of the child’s case in accordance with section 26 of the 1989 Act. But this would not prevent such a change of placements if it is necessary for child protection reasons as a matter of urgency.
57. *New section 22E* replicates section 23(2A) of the 1989 Act, inserted by the Care Standards Act 2000. There are at present no children’s homes provided under section 82(5) in England; there is one children’s home in Wales that was established under this provision. *New section 22F* provides for Part 2 of Schedule 2 to the 1989 Act (as amended by *Schedule 1* to this Act) to have effect, replicating the effect of section 23(9) of the 1989 Act.
58. *Section 9* inserts new *section 22G* in the 1989 Act, placing a new general duty on local authorities to take steps to secure sufficient accommodation that is appropriate for the needs of children they look after within their authority area. Local authorities need not take into account those children who can be placed with their parents or those for whom it would not be consistent with their welfare to be placed in the area when discharging this function (*section 22G(3)*). Local authorities must, however, have regard to the benefit of having a number of accommodation providers in their area (because it will usually be beneficial to commission provision from a number of different providers) and to the need to have a range of different types of accommodation capable of meeting the different needs of children in their area (*section 22G(4)*). “Accommodation providers” means local authority foster parents and children’s homes (*section 22G(5)*).

Independent Reviewing Officers (IROs)

59. All local authorities are required to appoint IROs, whose functions include:
 - participating in meetings to review care plans;
 - monitoring the performance of the authority’s functions in respect of the review; and
 - referring a case to an officer of the Children and Family Court Advisory and Support Service (CAFCASS), or in Wales, a Welsh family proceedings officer, if they consider it appropriate to do so.
60. The Review of Children’s Cases (Amendment) (England) Regulations 2004 set out the IRO’s additional responsibilities which include ensuring that:

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- the views of children and young people are understood and taken into account in care planning;
- the persons responsible for implementing any decision taken in consequence of the review are identified; and
- any failure to review the case or to take proper steps to implement review recommendations is brought to the attention of persons at an appropriate level of seniority within the responsible authority.

Section 10: Independent Reviewing Officers

61. *Section 10* replaces section 26(2)(k) and (2A) to (2D) of the 1989 Act with new *sections 25A to 25C* that set out:
 - requirements regarding the appointment of an Independent Reviewing Officer (“IRO”) for each looked after child;
 - the IRO’s functions; and
 - an associated provision enabling the functions of CAFCASS officers and Welsh family proceedings officers to be extended.
62. *Sections 25A(1) to (3)* have the effect that when a child first becomes looked after, a named individual must be appointed by the local authority as the IRO for the child. The appointment must be made before the child’s case is first reviewed (i.e. within four weeks of the date on which the child begins to be looked after) and the local authority must appoint another IRO if a vacancy should arise. The intention is that each looked after child should have a named IRO, to provide continuity in the oversight of the case and to enable the IRO to develop a relationship with the child.
63. *Section 25A(4)* replaces the power of the appropriate national authority to require, by regulation, the IRO to be of a prescribed description.
64. *Section 25B(1)* set out the functions of the IRO which replaces section 26(2A) of the 1989 Act, adding the following new functions:
 - a. *Section 25B(1)(a)* introduces a duty on the IRO to monitor the local authority’s performance of its functions in relation to the child’s case. This duty will extend the IRO’s existing monitoring role which is currently confined to the authority’s functions in respect of the review;
 - b. *Section 25B(1)(c)* introduces a requirement for the IRO to ensure that the local authority give due consideration to any views expressed by the child, which is intended to reinforce the local authority’s duty under section 22(4) and (5) of the 1989 Act to ascertain and give due consideration to the wishes and feelings of the child when making any decision with respect to the child.
65. *Section 25B(2)* replaces the regulation making power in section 26(2)(k) of the 1989 Act, enabling the appropriate national authority to prescribe the manner in which the IRO functions are to be performed. In addition, it gives a new power to the appropriate national authority to issue guidance to which IROs must have regard in relation to the discharge of their functions. *Section 25B(4)* imposes a new duty on the local authority to cooperate with the IRO and take all reasonable steps to enable the IRO to perform his functions.
66. *Sections 25B(3) and 25C(1) and (2)* replace section 26(2A)(c) and (2C) which relate to the IRO’s existing function of referring the child’s case to an officer of CAFCASS or the equivalent in Wales, if he considers it appropriate to do so. The original provisions were inserted in the 1989 Act by the Adoption and Children Act 2002 in response to a House of Lords judgment in the conjoined appeals of *Re S and Re W* [2002] UKHL 10,

[2002] 2 AC 291 (previously known as *Re W, W and B*) which concerned the respective roles of the courts and local authorities in care planning. The judgement concluded that the courts have no general power to monitor the discharge of the local authority's functions but that a local authority that failed in its duties to a child could be challenged under the Human Rights Act 1998. However the judgement also expressed concern that some children with no adult to act on their behalf may not have any effective means to initiate such a challenge. The IRO's power to refer the child's case to a CAFCASS officer provides a remedy for this problem.

67. The intention is that these changes to the statutory framework will enable the IRO to have a more effective independent oversight of the child's case and ensure that the child's interests are protected.

Section 11: Power to make further provision concerning independent reviewing officers: England

68. *Section 11(1)* enables the Secretary of State by order either to:
- a. establish a new body corporate to discharge such functions as may be conferred on it; or
 - b. confer additional functions (of the same nature) on CAFCASS.
69. The intention is that this power will be used to establish a national IRO service, if the amendments made by section 10 to the existing statutory framework do not prove to be effective in achieving significant improvements in the outcomes for looked after children.
70. The functions that may be conferred on the new IRO service include functions in connection with:
- providing training and accreditation for IROs; and
 - appointing and/ or managing IROs (*section 11(2)*).
71. The power would also enable the Secretary of State to make consequential modifications to any enactment (both primary and secondary legislation) in relation to independent reviewing officers or in relation to CAFCASS (*section 11(3)*).
72. *Section 11(4)* enables the inspection of any new body to be added to the responsibilities of the registration authority and for the body to exercise its functions in accordance with directions given by the Secretary of State.
73. Exercise of the powers in section 11 are subject to the affirmative resolution procedure (*section 40(2)* and see paragraph 18 for further explanation of the Parliamentary procedure).

Section 12: Power to make further provision concerning independent reviewing officers: Wales

74. *Section 12(1)* enables Welsh Ministers by order either to:
- a. establish a new body corporate to discharge such functions as may be conferred on it; or
 - b. provide for the discharge by them of such functions as may be conferred on them.

The intention is that this power will be used to establish a national IRO service in Wales, similar to the power in *section 11* to establish a national IRO service in England.

75. *Section 12(2) and (3)* mirrors *section 11(2) and (3)* in relation to England.

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76. *Section 12(4)(a)* will enable independent inspection of any new body established in exercise of the powers under this section and for the order to make consequential modifications to any enactment (both primary and secondary legislation) in relation to the carrying out of inspections. *Section 12(4)(b)* provides for the body to exercise its functions in accordance with directions given by Welsh Ministers.
77. Orders made under *section 12* will be subject to a special affirmative procedure that is described in paragraphs 155 to 157.

Section 13: Orders under sections 11 and 12: supplementary provisions

78. *Section 13* provides that an order under sections 11 and 12 may also:
- confer on the recipient power to do anything which is incidental or conducive to, or designed to facilitate, the discharge of that function (*Section 13(1)*);
 - authorise the recipient to charge fees for the discharge of any function conferred by that order, for example for providing training. It is implicit that these fees must be of a reasonable amount having regard to the cost of performing the function to which the fee relates (*section 13(2)*);
 - transfer property, rights and liabilities to the new service (*section 13(3)*) and if in doing so it would affect employees rights, for example by transferring employees from local authority employment to the new service, the order must make provision for the Transfer of Undertakings (Protection of Employment) Regulations 2006 to apply (*section 13(4)*); and.
 - require the new IRO service to establish a complaints procedure (*section 13(5)*).

Section 14: Expiry of powers conferred by sections 11 and 12

79. *Section 14* is a “sunset clause”: if no order has been made under *section 11* within 7 years from the day the Act receives Royal Assent, then *sections 11 and 13* will cease to have effect in relation to England. Similarly provision is made for *sections 12 and 13* to cease to have effect in relation to Wales, if no order has been made under *section 12* within 7 years from the day the Act receives Royal Assent.

Visiting

Section 15: Duty of local authority to ensure visits to looked after children and others

80. *Section 15* inserts new *section 23ZA* into the 1989 Act. This provision requires local authorities to ensure that all looked after children and children who were looked after, but ceased to be looked after as a result of prescribed circumstances (*subsection (1)*) are visited by a representative of the local authority and that appropriate advice, support and assistance is made available to them (*subsection (2)*). It is intended that the power in *subsection (1)* will be used to place a duty on local authorities to ensure that children who have ceased to be looked after on being taken into custody because they cease to be accommodated by the authority under *section 20* are visited and receive advice, assistance and support while they are in custody.
81. The appropriate national authority may, by regulations, specify how the duties are to be discharged (e.g. that the local authority should provide each child and their carers with emergency contact details so that the child can speak to a social worker between visits); and in particular may specify the frequency of the visits; the circumstances in which the visit must take place and the functions of the visitor. The regulations will make it clear that functions of the visitor will include reporting to the local authority, the IRO and the child’s parents on the visit; supervising the placement and ensuring that it continues to meet the child’s needs and that the child’s welfare is safeguarded and protected; and,

particularly in the case of a child in custody, assessing the child's needs for services and working with the Youth Offending Team to plan for the child's release.

82. Performance of these duties will be subject to any particular statutory requirements that may apply to the circumstances in which, or the place where, the child is actually living, for example in relation to children who are held in custody or who are liable to be detained under the Mental Health Act 1983.

Section 16: Independent visitors for children looked after by local authority

83. *Section 16* replaces paragraph 17 of Schedule 2 to the 1989 Act, extending the group of looked after children for whom an independent person must be appointed to visit, befriend and advise the child to include all those for whom an appointment would be in their interests. The appropriate national authority may by regulations extend those to whom the duty is owed to other prescribed groups of looked after children (*subsection (1)(a)*).
84. *Subsection (9)* allows regulations to be made to describe what is required for a visitor to be regarded as "independent". This re-enacts the existing power in paragraph 17(7) of Schedule 2 to the 1989 Act, under which the Definition of Independent Visitors (Children) Regulations 1991 are made.

Children in long term care

85. Section 85 of the 1989 Act requires a health body (e.g. a Primary Care Trust) or a local education authority (i.e. a local authority exercising its education functions), when providing accommodation for a child for at least three months, or when ceasing to provide accommodation for a child, to notify the local authority for the area where the child is ordinarily resident of the placement (the "responsible authority"). On receiving a notification of this kind, the responsible authority must take such steps as are reasonably practicable to ensure that the welfare of a child (of whom it has been notified under the requirements above) is adequately promoted and safeguarded, and consider whether it needs to exercise its functions under the 1989 Act, for example the provision of services such as parenting support under section 17, if it determines that the child is a "child in need" within the meaning of that section.
86. Section 86 of the 1989 Act requires a person carrying on a care home or independent hospital to notify the responsible authority of any child placed at their establishment in similar circumstances; and places similar duties on the responsible authority so notified.
87. The children to whom these sections relate are most likely to be placed in one of the following settings:
- Children's homes;
 - Care homes and independent hospitals;
 - Health service hospitals; or
 - Residential schools including maintained boarding schools; non-maintained special schools; independent boarding schools and colleges.
88. Most residential schools accommodating children to whom section 85 applies will be children's homes within the meaning of section 1 of the Care Standards Act 2000.

Section 17: Children in long-term care: notification to appropriate officer etc.

89. *Section 17* amends section 85 and 86 to ensure that the notifications described above are sent to the local authority's director of children's services (in England) or lead director for children and young people's services (in Wales). It also inserts a new subsection into section 85 of the 1989 Act to make it clear that responsibility for providing services

under the 1989 Act falls on the local authority in whose area the child was ordinarily resident immediately before the child was accommodated.

Section 18: visits to children in long-term care

90. *Section 18* inserts new section 86A in the 1989 Act, placing a new duty on the responsible authority to make arrangements for the children it is notified of under sections 85 and 86 to be visited. The appropriate national authority will have power to make regulations under section 86A(2), in similar terms to regulations made under section 23ZA of the 1989 Act (inserted by *section 15*) i.e. they may specify the frequency of the visits; the circumstances in which the visit should take place; and the functions of the visitor (e.g. to report to the local authority and the child's parents on the visit) (section 86A(3)).
91. Under *section 44* of this Act, sections 17 and 18 are to be commenced by the Secretary of State in relation to both England and Wales, with consent of the Welsh Ministers. Regulations under new *section 86A* are to be made by the Secretary of State and Welsh Ministers acting jointly. This is ensure that implementation of the Act in relation to cross-border bodies that provide accommodation to which these provisions relate is handled in a co-ordinated way.

Section 19: support for accommodated children

92. *Section 19* inserts *paragraph 8A* into Part 1 of Schedule 2 to the 1989 Act. Part 1 of Schedule 2 sets out the specific functions of the local authority in relation to the provision of services for children in need and their families under section 17 of the 1989 Act. New *paragraph 8A* provides that these services must include such services as the authority considers appropriate with respect to "accommodated children" (i.e. children in respect of whose accommodation the local authority have been notified under section 85 or 86 of the 1989 Act). *Paragraph 8A(3)* requires the local authority to provide these services with a view to promoting contact between the accommodated child and their family. The services may, in particular, include: advice, guidance and counselling; services necessary to enable the child to visit, or to be visited by, members of their family; and assistance to enable the child and members of their family to have a holiday together.

Education and training

Section 20: Designated member of staff at school for pupils looked after by a local authority

93. *Section 20* requires the governing body of a maintained school in England and Wales to designate a member of staff as having responsibility for promoting the educational achievement of looked after children who are registered pupils at the school (the "designated person"). In this context, "maintained school" includes community schools; foundation schools; voluntary including both voluntary aided and voluntary controlled schools; community special schools; foundation special schools; and maintained nursery schools. "Registered pupil" means a person who is registered as a pupil at a school (see further section 434 of the Education Act 1996).
94. The responsibilities of the designated person include both pupils who are looked after by a local authority and those who are "relevant children" or "former relevant children" within the meaning of section 23A or 23C of the 1989 Act (in summary, persons who are no longer looked after but have been at some point since the age of 16). The designated person is also responsible for promoting the educational achievement of children and young persons at the school who have equivalent legal status under the law of Scotland or Northern Ireland.
95. *Subsection (3)* enables the appropriate national authority by regulations to specify the qualifications and/or experience which are necessary to perform the role of the

designated person effectively. The intention is to use this power to require governing bodies to appoint a qualified teacher to perform this role. Under *subsection (4)* the appropriate national authority may give guidance to school governing bodies about the performance of their functions under this provision. The intention is to update guidance issued in England in May 2000 entitled “*The Education of Children and Young People in Public Care*” and to use this power to put the guidance on a statutory footing. Similar guidance was issued in relation to Wales in 2001.

Section 21: Entitlement to payment in respect of higher education

96. This section adds to the duties that local authorities owe to “former relevant children” by amending section 23C of the 1989 Act to require local authorities (in addition to providing assistance under section 23C(4)) to pay a fixed sum to those who go on to pursue a course of higher education. The section includes provision to prescribe by regulations the meaning of “higher education”. The first exercise of this power will be subject to the affirmative resolution procedure (*paragraph 25 of Schedule 3* to the Act and see paragraph 18 for a description of the affirmative resolution procedure). The intention is to use the power to align the definition of higher education for these purposes with the definition used in the Education (Student Support) (No 2) Regulations 2008 (“the 2008 Regulations”) so that the eligibility criteria for the payment (in terms of the courses attended) will be similar to those for student loans, as set out in regulation 6 of, and Schedule 2 to, the 2008 Regulations.
97. The amount of the payment will be set in regulations to be made by the appropriate national authority under section 23C(5B) which is inserted by *subsection (2)*. The regulations will also deal with the eligibility criteria; the arrangements for making the payment (e.g. whether to be paid by instalments and if so the interval between payments); and the circumstances in which instalments may cease or payments must be repaid (e.g. if the young person ceases to attend a course). The duty to make the payment subsists while the young person follows a pathway plan, whether one made under section 23B or one made subsequently under section 23CA. The payment should not affect the young person’s entitlement to other assistance with his educational or training needs under section 23C(4). In addition the payment will be exempt from income tax by virtue of an amendment to the Income Tax (Trading and Other Income) Act 2005.
98. “Former relevant children” are defined in section 23C(1) of the 1989 Act and include those who are over 18 and who were either relevant children (within the meaning of section 23A) or eligible children (within the meaning of paragraph 19B of Schedule 2 to the 1989 Act and regulations made under sub-paragraph (3) of that provision) immediately before their 18th birthday .

Section 22: Assistance to pursue education or training

99. Currently all eligible, relevant and former relevant children (defined by paragraph 19B of Schedule 2 to, and sections 23A and 23C of the 1989 Act respectively) must have a personal adviser who will, in accordance with regulations made under section 23B of the 1989 Act, be involved in drawing up the young person’s pathway plan, make sure that it is regularly reviewed, and that it is implemented. When the young person leaves care, and until they are at least 21, the personal adviser will in practice be responsible for performing the local authority’s duty to keep in touch with them and ensuring that they receive the advice and support to which they are entitled.
100. *Section 22*, by inserting a new section 23CA into the 1989 Act, extends the duties of local authorities to appoint a personal adviser to include a former relevant child who informs the responsible authority (that is, the authority that formerly looked after him) that he is pursuing or intends to pursue a programme of education or training but to whom the local authority would otherwise owe no duty under section 23C because the young person is over 21 years of age and has completed (or abandoned) the programme

set out in his original pathway plan. In relation to such a young person, who must be under 25 years (or such lower age as the appropriate national authority may prescribe), the local authority must also carry out an assessment of needs, prepare a pathway plan and provide such assistance as the person's educational and training needs require. The local authority may take into account any payment made under section 23C(5A) when making their assessment of his needs (*section 23CA(10)*).

101. *Section 23CA(6)* requires the local authority to provide assistance (including appointment of a personal adviser and maintenance of the pathway plan) for as long as the young person continues to pursue the agreed educational or training programme, even where this goes beyond a young person's 25th birthday.

Section 23: Extension of entitlements to personal adviser and to assistance in connection with education or training

102. Section 23D(1) of the 1989 Act enables regulations to be made requiring local authorities to appoint personal advisers for certain groups of young people. This power has not been exercised. *Subsection (1)* of *Section 23* extends the upper end of the age range to which section 23D(1) applies so that regulations under that section will be able to require the appointment of a personal adviser for persons who are under 25.
103. *Subsection (2)* extends the upper end of the age range to which the powers for local authorities to provide assistance towards expenses incurred by a young person in education or training apply to age 25.

Cash payments

Section 24: Extension of power to make payments in cash

104. Under section 17 of the 1989 Act local authorities have a duty to safeguard and promote the welfare of children within their area who are in need and, so far as is consistent with that duty, to promote the upbringing of such children by their families by providing a range and level of services appropriate to those children's needs. The services provided by a local authority in exercising this duty may include giving assistance in kind or, in exceptional circumstances, in cash; they may also include providing accommodation for the child, with or without his family (*section 17(6)*).
105. *Section 24* of the Act lifts the restriction on the making of cash payments by removing the phrase "in exceptional circumstances" from *section 17(6)*. The intention is to allow local authorities to exercise a wider discretion over the circumstances in which they make cash payments to those caring for children in need. The amendment will enable local authorities to provide regular and continuing financial support to children in need where this is assessed as being the most appropriate way to safeguard and promote their welfare.
106. "Child in need" is defined in *section 17(10)* as a child who is unlikely to achieve or maintain a reasonable standard of health or development without provision of services; or a child who is disabled (defined in *subsection (11)*).
107. This service may also be provided for a member of the child's family if its provision will safeguard or promote the child's welfare (*section 17(3)*). Any person who has parental responsibility for the child and any other person with whom he has been living is potentially eligible for this support (see the definition of 'family' in *section 17(10)*).
108. *Section 17(8)* requires the local authority to assess the means of the child and his parents before providing any assistance. Local authorities may decide if the assistance (or its value) should be repaid and the conditions under which this should occur. Persons receiving assistance are, however, exempt from repayment whilst in receipt of certain social security benefits.

Care breaks

Section 25: Breaks from caring for disabled children

109. *Section 25* amends paragraph 6 of Schedule 2 to the 1989 Act (provision for disabled children) to impose a duty on local authorities to provide, as part of the range of services they provide for families, breaks from caring to assist parents and others who provide care for disabled children to continue to do so, or to do so more effectively. The intention is that breaks should not only be provided to those struggling to care for disabled children but also to those for whom a break from their caring responsibilities will improve the quality of the care they provide. Local authorities must provide such services in accordance with regulations made by the appropriate national authority. The first exercise of the power to make regulations is subject to the affirmative resolution procedure (see paragraph 18 for an explanation of this procedure and sections 104(3A) and (3C) and 104A(3) and (5) of the 1989 Act inserted, respectively, by *paragraphs 25 and 26 of Schedule 3* to the Act).

Enforcement of care standards (Sections 26 to 29)

110. Under the provisions of Part 2 of the Care Standards Act 2000, a person who carries on or manages a children's home, a fostering agency, a residential family centre, an adoption support agency or a voluntary adoption agency must be registered with the registration authority. Conditions may be imposed in relation to registration, either at the point of registration or at a later date, and it is an offence to breach those conditions. There is a right of appeal to a Tribunal against a refusal to register a person, a variation of registration conditions or a decision to cancel registration. The registration authority in England is the Chief Inspector of Education, Children's Services and Skills and in Wales is the Welsh Ministers.
111. Standards of provision in children's social care establishments and agencies are inspected by the registration authority for compliance with the applicable regulations made under section 22 of the Care Standards Act 2000, or in the case of adoption agencies, under section 9 of the Adoption Act 1976 and section 9 of the Adoption and Children Act 2002.
112. Each type of establishment and agency is subject to its own set of regulations. For example, children's homes are subject to the Children's Homes Regulations 2001, which impose various obligations on the person carrying on the home and the manager, for example, making sure staff employed at the home have the necessary qualifications and experience. National Minimum Standards (NMS) are also published for each type of establishment and agency under section 23 of the Care Standards Act 2000, these must be taken into account when an establishment or agency is assessed for compliance with the applicable regulations by the registration authority. The degree to which a children's home complies with the requirements in the regulations, with reference to the NMS, will be considered when the registration authority takes any decision relating to registration of an establishment or agency, the imposition of conditions for registration and enforcement action including proceedings for cancellation of registration or prosecution. The NMS are currently being reviewed by the Department and new NMS are expected to be published in 2009, to come into effect in 2010.
113. *Sections 26 to 29* amend the Care Standards Act 2000 to confer additional powers and duties on the registration authority in relation to standards in children's social care settings. The children's social care settings affected by *section 26* are those establishments and agencies regulated under Part 2 of the Care Standards Act 2000, including children's homes, fostering agencies, residential family centres, adoption support agencies and voluntary adoption agencies. *Section 27* (restriction on admissions) applies only to residential settings, i.e. children's homes and residential family centres.

Section 26 Power of Chief Inspector where person is failing to comply with requirement relating to children's homes etc.

114. *Section 26* applies to England only. The section inserts new section 22A into the Care Standards Act 2000 to enable the Chief Inspector to serve a "compliance notice" where he is of the opinion that an establishment or agency is not meeting the required standards, as set out in the relevant regulations and NMS.
115. The notice may be served on the registered owner or proprietor of the establishment or agency as well as on the person managing it. It must specify how, in the view of the Chief Inspector, the establishment or agency is failing to meet the standards and the steps that need to be taken to remedy this (*subsection (3)*). Failing to take these steps within the required timescale is a criminal offence and a person who is found guilty may be fined accordingly (*subsections (4) and (5)*).
116. Failure to act on the compliance notice is a ground for cancellation of registration. *Subsection (1)* of this section amends section 14 of the Care Standards Act 2000 to that effect.

Section 27: Notice restricting accommodation at certain establishments

117. *Section 27* inserts a new section 22B into the Care Standards Act 2000 to enable the Chief Inspector or, in Wales, the Welsh Ministers, (the registration authority) to impose a requirement preventing any new admissions of children to certain residential settings. Where the registration authority imposes such a requirement it is necessary for a notice to be served on each person who is registered in respect of the establishment concerned.
118. The notice must set out the reasons for the notice being served and must explain the right of appeal (*subsection (3)*); it may be time-limited; and it may be revoked (*subsection (4)*). The notice is subject to a right of appeal to a Tribunal provided for in *section 28*.

Section 28: Appeals etc. in relation to notices under section 22B of the Care Standards Act 2000

119. This section amends section 21 of the Care Standards Act 2000 to create new grounds for an appeal to the Tribunal, namely the serving of a notice restricting accommodation (as provided for in section 27). Appeals must be made to the Tribunal within 28 days of the notice being served (*subsection (3)*). Upon hearing the appeal, the Tribunal may confirm the notice and the ensuing restriction on accommodation or uphold the appeal in favour of the provider and direct that the notice no longer has any effect.
120. *Subsection (6)* clarifies that the NMS should be taken into account when the registration authority is considering whether to issue a notice under new section 22B and when the Tribunal makes decisions about appeals regarding these notices.

Section 29: Notification of matters relating to persons carrying on children's homes etc

121. This section places a duty on the Chief Inspector or, in Wales, the Welsh Ministers, to notify each local authority in England and Wales when certain enforcement action is taken. The section inserts a new section 30A into the Care Standards Act 2000 to this effect.
122. The enforcement action may be:
 - a decision to cancel registration;
 - bringing proceedings for an offence (such as the failure to comply with a notice under new section 22A or other offences as specified in section 30A(7)); or
 - service of a notice restricting accommodation (as provided for in new section 22B).

123. The notification will alert local authorities to the underperformance of a provider. It is intended that, in the case of residential settings, and where a child (or children) in their care is currently provided with accommodation with that provider, local authorities will conduct a review as to whether those placements should continue.
124. *Section 30A(3)* enables the appropriate national authority to make regulations to specify the circumstances in which local authorities should be advised of an updated position (e.g. a prosecution is no longer proceeded with or a provider has successfully appealed a decision to cancel registration).
125. *Section 30A(4)* enables the making of regulations specifying the information to be contained in the notification (e.g. the name of the provider and of the relevant establishment or agency).
126. *Section 30A(5)* provides that a notification under this section may be transmitted electronically (as defined in *subsection (7) of that section*) if the local authority has consented to this arrangement.

Emergency Protection Orders

Section 30: Removal of restriction on hearing of application for discharge of emergency protection order

127. Provision for Emergency Protection Orders (EPOs) is made in Part 5 of the 1989 Act. The circumstances in which an EPO will be granted, extended and discharged are set out in sections 44 and 45 of the Act. Section 45(1) provides for an EPO to be made for a period of up to 8 days if the court is satisfied that there is reasonable cause to believe that the child is likely to suffer significant harm if:
 - (a) he is not removed to accommodation provided by or on behalf of the applicant; or
 - (b) he does not remain in the place in which he is then being accommodated.

The court must be satisfied that the child is likely to be in “imminent danger” if he is not removed from home. The court may extend the order for a maximum of a further seven days (under section 45(5)), if the court has reasonable cause to believe that the child is likely to suffer significant harm if the order is not extended.

128. The provisions relating to the discharge of EPOs are contained in sections 45(9) to (11). In a recent judgment of the Northern Ireland High Court, it was held that Article 64(8) of The Children (Northern Ireland) Order 1995 which is identical to section 45(9) of the 1989 Act and provides that “no application for discharge of an emergency protection order shall be heard for 72 hours beginning with the making of the order” is contrary to Articles 6(1) and 8 of the European Convention on Human Rights (ECHR). The Children (Emergency Protection Orders) (Northern Ireland) Act 2007 received Royal Assent on the 14th December 2007 and revoked the 72 hours provision in the 1995 Order.
129. The decision of the Northern Ireland High Court is not binding on the courts of England and Wales. However, the decision would be persuasive in these courts and, accordingly, [section 30](#) repeals section 45(9) of the 1989 Act to ensure that provisions for the discharge of Emergency Protection Orders are compatible with Articles 6 and 8 of the ECHR. The section allows the court to hear an application to discharge an emergency protection order as soon as it is made.

Information and research (sections 31 to 33)

130. The Children Act 2004 places an obligation on local authorities in England and Wales to set up Local Safeguarding Children Boards (LSCBs). A number of persons and bodies, including children’s services authorities, NHS bodies and the police are represented on LSCBs.

131. Local authorities rely on many different sources of information about child deaths including professionals, the public, and the media. Local registrars of births and deaths do not have a statutory power or a duty to provide information about the death of a child to LSCBs or other persons in the absence of a specific request for information about a particular deceased child. There are also no statutory powers or duties for the Registrar General to provide child death information to the Secretary of State or to Welsh Ministers.

Section 31: Supply of information concerning the death of children to Local Safeguarding Children Boards

132. *Section 31* places a new duty on registrars to provide the LSCB in their sub-district with the following information in relation to deceased children (i.e. persons who were or may have been under 18 years of age at the time of death):
- the particulars of death within 7 days of registering the death;
 - notification of any corrections made to the registrar for that sub-district within 7 days of making such corrections; and
 - information about any certificate issued under section 24(2) of the Births and Deaths Registration Act 1953, within 7 days of issue.
133. *Subsection (9)* requires LSCBs to make arrangements for the receipt of such notifications, and to publish these arrangements.

Section 32: Power of Registrar General to supply information to national authorities

134. *Section 32* enables the Registrar General to provide information about a deceased person who may have been a child at the time of death to the Secretary of State and to Welsh Ministers. That information may be used by them for research purposes and may be disclosed by them for the purposes or for the purpose of assisting Local Safeguarding Children Boards to discharge their functions.

Section 33: Research etc. into matters connected with certain statutory functions

135. *Section 33* amends sections 83(1) and 83(2) of the 1989 Act to include LSCBs, to provide a statutory power to the Secretary of State and to local authorities to conduct research into the functions of LSCBs.
136. *Section 33* further amends section 83(3) of the 1989 Act to provide that a local authority must at such times and in such form as the Secretary of State may direct transmit to him such particulars as he may require as to the performance by the LSCB for the local authority's area of all or any of their functions.
137. The section also amends the list of relevant enactments at section 83(9) of the 1989 Act for the purposes of sections 83(1)(a) and 83(2)(a) of this Act, which gives statutory powers to the Secretary of State and to local authorities respectively, to conduct, or assist other persons, in conducting research into specified matters including the functions, of the Secretary of State, and for the purposes of section 83(3), which requires local authorities to provide information to the Secretary of State in respect of the performance of their functions under the relevant enactments. It amends the list of relevant enactments by adding:
- Part 1 of the Adoption and Children Act 2002;
 - the Children Act 2004; and
 - the Children and Young Persons Act 2008.

Part 3 –Adoption and Fostering

Section 34: Independent review of determination relating to adoption

138. *Section 34* amends the existing powers in section 12 of the Adoption and Children Act 2002 which enable regulations to provide for the independent review of qualifying determinations, to ensure that the provisions are aligned with the new provisions that relate to the independent review of qualifying determinations in relation to local authority foster carers set out in *paragraph 4 of Schedule 1* (see new *paragraph 12F*) and *Schedule 2* (transitory provisions).
139. *Subsection (2)* amends section 12 to clarify that the regulations are to provide for the application for a review to be made to the appropriate Minister, and that the review is to be by a panel constituted by that Minister. By virtue section 144(1) of the Adoption and Children Act 2002 and Schedule 11 to the Government of Wales Act 2006, “appropriate Minister” means, in relation to England, the Secretary of State and in relation to Wales, Welsh Ministers.
140. *Subsections (3) to (7)* provide that the regulations may impose a duty to make a payment to the appropriate Minister of such sums as the appropriate Minister may determine, though the sums payable to the national authority must not, taking one financial year with another, exceed the costs incurred in performing the independent review functions. These provisions replace the existing powers under which it is the independent review panel which has a power to recover the costs of a review.

Section 35: Extension of period allowed for making regulations under section 45 or 46 of the Children Act 2004

141. Section 45 of the Children Act 2004 gives the Secretary of State the power to establish, through regulations, a scheme for the registration of private foster carers. Section 46 confers equivalent powers on the Welsh Ministers. These provisions allow the regulations to specify, for example, how a local authority should determine suitability of private fostering arrangements, the grounds on which individuals may be disqualified from private fostering, how individuals may appeal against decisions regarding their registration and how the registration scheme application would work in practice.
142. *Section 47* provides that if no regulations have been made under either section within four years of Royal Assent, then the relevant section will cease to have effect. This operates independently in England and Wales, so if regulations are not made in England within the four year period, the power in section 45 (to make regulations in England) expires even if regulations have been made under section 46 in Wales (and vice versa).
143. *Section 35* amends section 47 so that the powers will not lapse for a further 3 years i.e. until November 2011.
144. Private fostering is regulated by Part 9 of and Schedule 8 to the 1989 Act and the [Children \(Private Arrangements for Fostering\) Regulations 2005/1533](#).
145. A “privately fostered” child is one who:
- a. is cared for by a person who is not a relative and who does not have parental responsibility and is provided with accommodation in that person’s home, and;
 - b. is under the age of 16, or under the age of 18 if they are disabled,
- where the care and accommodation have been provided for more than 28 days (or where the intention is to accommodate for longer than 28 days). This is defined in section 66 of the 1989 Act.

Part 4 – Orders under Part 2 of the 1989 Act

Residence orders

Section 36: Entitlement of relative to apply for a residence order

146. *Section 36* provides that an application for a residence order may be made by a relative, without first seeking the permission of the court, in circumstances where the child has been living with them for one year immediately prior to the application. The section inserts a new subsection (5B) in section 10 of the 1989 Act to that effect. The existing qualifying condition for relatives is that the child must have been living with them for a period of three years out of the last five years.
147. Section 113 of the Adoption and Children Act 2002 amended the qualifying condition for a local authority foster carer applying for a section 8 order, including a residence order to a one year period. These sections are intended to align the position of relative carers with local authority foster carers.
148. A relative is defined in section 105 of the 1989 Act as a grandparent, brother, sister, uncle or aunt (whether of the full blood or half blood or by marriage or civil partnership) or step-parent.

Section 37: Duration of residence orders

149. 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 e.g. the child has a learning disability. Section 114 of the Adoption and Children Act 2002 empowered the courts to direct in appropriate cases 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.
150. *Section 37* amends sections 9 and 12 of the 1989 Act so that a residence order, unlike other section 8 orders, will last until the child reaches the age of 18 unless the courts direct that the order should end earlier or another order is made discharging the residence order prior to that date. The intention is to provide enhanced security for the child where the holder of a residence order who is not the child's parent is caring for the child on a long term basis.

Special guardianship orders

Section 38: Entitlement of relative to apply for a special guardianship order

151. *Section 38* mirrors the provision in *section 36* above in relation to relatives applying for special guardianship orders and amends section 14A(5) of the 1989 Act to that effect.

Part 5 – Supplementary, General and Final Provisions (Sections 39 to 45)

152. *Sections 39 to 45* contain general provisions including those relating to the exercise of powers to make orders and regulations; general interpretation provisions, commencement, extent of the Act, repeals and the short title of the Act.

Supplementary

Section 39 and Schedule 3: Minor and supplementary amendments to the 1989 Act

153. Provisions in the Act, notably *sections 8, 9, 10, 15, 16, 18, 19* and *25*; and *Schedules 1 and 2* insert new provisions into the 1989 Act, primarily into Part 3 and Schedule 2. The new provisions reflect the current status of devolution under the Government of Wales Act 2006 and, where appropriate, refer to “Welsh Ministers” directly, or to the Welsh Ministers as the “appropriate national authority”. These references are not textually consistent with existing references in Part 3 of the 1989 Act to the “Secretary of State”,

which are to be read (where appropriate) as references to the Welsh Ministers by virtue of the Government of Wales Act 2006. Therefore, in order to achieve clarity and textual consistency in the Parts of 1989 Act that are amended by this Act, [section 39](#) gives effect to [Schedule 3](#), which amends Parts 3 and 7 of, and Schedule 2 to, the 1989 Act by substituting references to the Welsh Ministers or to the appropriate national authority, for existing references to the Secretary of State. [Schedule 3](#) also inserts a new section 104A into the 1989 Act, which makes provision for regulations and orders made by the Welsh Ministers under Part 3 and certain other parts of that Act.

General

Section 40: Orders, regulations and guidance

154. [Section 40](#) provides that all subordinate legislation made under the Act is to be made by statutory instrument. Any statutory instruments made by the Secretary of State under [section 1\(6\) or \(7\)](#) (social work practices) or [section 11](#) (independent reviewing officers) are subject to the affirmative resolution procedure ([subsection \(2\)](#)). All other statutory instruments made by the Secretary of State will be subject to the negative resolution procedure ([subsection \(3\)](#)), except for commencement orders made under section 44 which will not be subject to any parliamentary procedure. (See paragraph 18 for an explanation of the affirmative resolution procedure and the negative resolution procedure.)
155. [Subsection \(4\) of section 40](#) mirrors [subsection \(2\)](#), and makes the exercise by the Welsh Ministers of their power to make regulations under section 1(6) or 1(7) subject to approval by a resolution of the National Assembly for Wales, the equivalent in relation to Wales of the affirmative resolution procedure.
156. [Subsection \(5\)\(a\)](#) provides for the exercise by Welsh Ministers of their power under section 12 to create a new body to carry out functions in relation to Independent Reviewing Officers, or to confer those functions on themselves, to be made subject to approval by a resolution of the National Assembly for Wales (affirmative resolution procedure). [Subsection \(5\)\(b\)](#) provides for additional scrutiny by Parliament of the exercise of the power under section 12, following the passing of the resolution required by [subsection \(5\)\(a\)](#). The additional Parliamentary scrutiny is considered necessary because the power conferred on the Welsh Ministers by section 12 extends beyond the current legislative competence of the National Assembly for Wales under the Government of Wales Act 2006.
157. [Subsections \(6\) and \(7\)](#) make provision for the procedure to be followed by the First Minister (appointed under section 46 of the Government of Wales Act 2006) and by the Secretary of State, following the passing of the resolution required by [subsection \(5\)\(a\)](#).
158. [Subsection \(8\)](#) removes the requirement in [subsection \(5\)\(b\)](#) for additional Parliamentary scrutiny following the passing of the resolution required by [subsection \(5\)\(a\)](#), in the event that an order is made under section 105 of the Government of Wales Act 2006 bringing the Assembly Act provisions into force. The effect of making such an order would be to substantially extend the legislative competence of the National Assembly for Wales, bringing the power conferred on the Welsh Ministers by section 12 within the Assembly's legislative competence, with the result that the requirement for additional Parliamentary scrutiny of the exercise of the power in [subsection \(5\)\(b\)](#) would become inconsistent with the new stage of devolution, and therefore no longer be necessary.
159. A commencement order made by Welsh Ministers under [section 44](#) is not to be subject to scrutiny by the National Assembly for Wales ([subsection \(11\)](#)). Any subordinate legislation made by the Welsh Ministers – other than subordinate legislation made under sections 1(6) or (7), 12 or 44 – will be capable of being annulled by a resolution of the National Assembly for Wales.

*These notes refer to the Children and Young Persons Act 2008
(c.23) which received Royal Assent on 13 November 2008*

Section 42 and Schedule 3: Repeals

160. *Section 42* introduces the repeal schedule (*Schedule 4*) which specifies the extent to which the enactments listed are to be repealed.