

**EXPLANATORY MEMORANDUM TO
THE INDEPENDENT REVIEW OF DETERMINATIONS (ADOPTION AND
FOSTERING) REGULATIONS 2009**

2009 No. 395

1. This explanatory memorandum has been prepared by the Department for Children, Schools and Families 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 The Independent Review of Determinations 2009 (Adoption and Fostering) Regulations (“IRM Regulations”) make provision for the review, by an independent panel, of qualifying determinations made by adoption agencies and fostering service providers. A qualifying determination is one that relates to (as the case may be) suitability of a prospective adopter to adopt a child; suitability to act as a local authority foster parent¹, or the terms of approval as a local authority foster parent; or the disclosure of adoption information. The IRM Regulations set out the function, membership and operation of independent review panels.
- 2.2 The function of the independent review panel is to consider the qualifying determination and to make a recommendation to the adoption agency or fostering service provider which made the qualifying determination. The adoption agency or fostering service provider must then take that recommendation into account when making its final decision, in accordance with the (separate) regulations relating to the making of the relevant decision – see paragraphs 4.1, 4.2 and 4.4.
- 2.3 The IRM Regulations revoke the Independent Review of Determinations (Adoption) Regulations 2005, S.I 2005/3332 (which with its Explanatory Memorandum can be found at: <http://www.opsi.gov.uk/si/si200533>) but replicates provision made in those Regulations in respect of qualifying determinations relating to adoption, with four minor changes (see paragraph 7.9 below).

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

- 3.1 None

¹ “Local authority foster parent” is defined in section 23(3) of the 1989 Act; the term includes foster parents approved by a local authority and those approved by an independent fostering provider.

4. Legislative Context

- 4.1 The Adoption Agencies Regulations 2005 (S.I. 2005/389) make provision in relation to the operation of adoption agencies, including their duties in relation to the assessment of the suitability of a prospective adopter to adopt a child.
- 4.2 Sections 56 to 65 of the Adoption and Children Act 2002 (c.38) provides for the disclosure of information in relation to a person's adoption. The Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 (S.I. 2005/888) make provision for the disclosure of adoption information and applications for such disclosure in relation to adoption orders made after 30th December 2005.
- 4.3 Section 12 of the Adoption and Children Act 2002 (as amended by section 57 of the Children Act 2004 (c.31) and section 34 of the Children and Young Persons Act 2008 (c.23)) provides that regulations made under section 9 of that Act may establish a procedure under which any person in respect of whom a qualifying determination has been made by an adoption agency may apply to a panel constituted by the Secretary of State (in relation to England) for a review of that determination.
- 4.4 The Fostering Services Regulations 2002 ("FSR") (S.I. 2002/57), make provision in relation to the operation of fostering service providers, including the assessment of the suitability of a person to act as a local authority foster parent.
- 4.5 Section 8(2) of, and Schedule 1 to, the Children and Young Persons Act 2008 ("the 2008 Act") make various amendments consequential on and supplementary to the provisions of section 8, including a power to make regulations about an independent review mechanism for qualifying determinations relating to local authority foster parents.
- 4.6 Section 8(3) of the 2008 Act provides that until the coming into force of section 8(1), Schedule 2 to the Children Act 1989 has effect with the modifications specified in Schedule 2 to the 2008 Act. Those modifications include a power to make regulations about an independent review mechanism for certain qualifying determinations relating to local authority foster parents.

5. Territorial Extent and Application

- 5.1 The IRM Regulations apply in relation to England only.

6. European Convention on Human Rights

- 6.1 As the IRM Regulations are subject to negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

7.1 In June 2007, the Department for Education and Skills (now the Department for Children, Schools and Families) published a White Paper, *Care Matters: Time for Change*, which proposed the introduction of an independent review mechanism (“IRM”) for fostering in relation to the process of assessing the suitability of a person to act as a local authority foster parent (“foster parent”). This was considered necessary because of concerns about the absence of an option for those seeking approval as a foster parent to have an independent review of a provider’s decision not to grant approval. Stakeholders had raised concerns that the current approval process is insufficiently independent; the introduction of the IRM for fostering brings the assessment process for local authority foster parents into line with the assessment process for prospective adopters.

Qualifying determination (fostering)

7.2 The IRM will enable prospective and approved foster parents to apply to the Secretary of State for the review by an independent panel of a “qualifying determination” by their fostering service provider (“provider”), as an alternative to making representations about the determination to the provider. The review will be conducted by an independent review panel appointed by the Secretary of State.

7.3 A qualifying determination (in relation to fostering) is a determination by a provider under the FSR made on or after 1st April 2009 that it:

- proposes not to approve the prospective foster parent as a foster parent;
- proposes to terminate a foster parent’s approval; or
- proposes to revise the terms of a foster parent’s approval.

7.4 If the determination is made because the person or a member of their household has committed a specified offence or been cautioned in respect of a specified offence and admitted to it (see regulation 27 of the Fostering Services Regulations 2002), the determination is not a “qualifying determination” within the meaning of the Independent Review of Determinations (Adoption and Fostering) Regulations 2009, and the provider does not need to notify the person that they may apply to the Secretary of State for a review.

Process

7.5 The FSR (as amended by the Fostering Services (Amendment) Regulations 2009) will require fostering service providers, from 1st April 2009, to inform prospective and approved foster parents (“prospective/foster parents”), on the making of a determination, that they may within 28 days:

- make representations to the provider; or

- (unless the determination was made pursuant to regulation 27(6)) apply to the Secretary of State for a review of the determination by an independent panel.
- 7.6 The provider cannot make its decision until:
- (a) 28 calendar days has elapsed and the provider has received no representations from the prospective/foster parent and no notification that the individual has applied to the Secretary of State for a review of the qualifying determination; or
 - (b) the fostering panel or independent review panel (as relevant) has made its recommendation.
- 7.7 If the individual makes representations to the provider, the provider will refer the case to their own fostering panel in accordance with the FSR. The fostering panel will make a fresh recommendation to the provider. This is currently the only option available for review of such determinations.
- 7.8 If the individual chooses the new option of applying to the Secretary of State for a review of the determination by an independent panel, the Secretary of State will set up a review panel. The panel will review all the information that was provided to the provider's fostering panel and, after a hearing at which the individual will be able to make oral submissions (as well as written submissions beforehand), make a fresh recommendation as to the suitability of the individual to be a foster parent, and/or as to the terms of the approval as the case may be. The fostering service provider will be required to take this recommendation into account in coming to its decision.
- 7.9 There will be no cost to the individual in applying to the IRM, but a contribution to the cost of a review will be recovered from the provider (regulation 21 of the IRM Regulations).

IRM adoption

- 7.10 An IRM for adoption has been in place since 2004. The IRM Regulations revoke and replace the Independent Review of Determinations (Adoption) Regulations 2005 (S.I. 2005/3332), with minor amendments. The amendments:
- 7.10.1 clarify that applications must be made to the Secretary of State (in relation to England) who then constitutes a panel, rather than to the review panel;
 - 7.10.2 place a duty on adoption agencies to pay to the Secretary of State (in relation to England) a sum set by him to contribute to the cost to him of performing his independent review functions. This replaces the current power of the panel to recover the costs of the review from the adoption agency which made the qualifying determination, but this is a procedural rather than a substantive change for adoption agencies;

7.10.3 impose a duty on adoption agencies to provide so far as is reasonably practicable any information or assistance requested by the review panel. This change has been made to be in line with the IRM for fostering. The Adoption Agencies Regulations 2005 already provide that, where representations are made to the agency (rather than an application to the IRM) and the case is referred to the adoption panel of the adoption agency, the adoption agency must obtain, so far as is reasonably practicable, any other relevant information requested by the panel and send that information to the panel. To date, there has been no express duty to provide information or assistance to independent review panels but, in practice, adoption agencies have been providing information or assistance as requested by the independent review panel since the IRM for adoption came into force in 2004; and

7.10.4 confirm that, where the independent review panel makes a recommendation to the adoption agency that the prospective adopter is suitable to adopt a child, the panel may consider and give advice to the adoption agency about the number of children the prospective adopter may be suitable to adopt, their age range, sex, likely needs and background. This change brings independent review panels into line with adoption panels and the IRM for fostering.

- ***Consolidation***

7.11 The IRM Regulations now provide in a single instrument for the procedural aspects relating to both the IRM for adoption and the IRM for fostering.

8. Consultation outcome

Fostering

8.1 A public consultation was held between 25 November and 24 December 2008. Key stakeholders were informed directly at the start of the consultation so that they were aware and had time to respond.

8.2 A 4-week consultation was considered sufficient because:

- The introduction of the IRM for fostering was covered by the *Care Matters* White Paper and there was opportunity to debate it in Parliament. No concerns were raised.
- The changes will not affect the public at large or business generally, so a shorter consultation that targeted key stakeholders, such as independent fostering agencies and foster parent representative bodies, was considered more effective.

8.3 48 responses were received overall. 61% agreed with the general approach to the IRM, indicating that it would improve fairness and transparency for the

applicant. Of the 26% who disagreed with the approach, a number were concerned about the financial implications for fostering service providers. The Department expects costs per provider to be small (and in proportion to the size of the provider), as estimated numbers of reviews are low and costs will be instead of those associated with the case being referred back to the fostering service provider's own fostering panel. However, funding will be made available to local authorities, through the Area Based Grant, for implementing the *Care Matters* White Paper; this includes any increased costs to both local authority and independent fostering providers.

- 8.4 In line with the opinion of the majority of respondents, the time limit for applicants to make representations to the Secretary of State will be set at 28 calendar days, rather than 40 working days (50% were in favour); and the IRM regulations will provide that the independent review panel may seek additional information (78% were in favour).
- 8.5 The majority of respondents were in favour of a medical member of the independent review panel (59%). However, comments indicated that the main concern was that the independent review panel could access medical advice. The IRM Regulations will therefore be drafted to make clear that independent review panels may seek medical advice.
- 8.6 A report of the consultation is available on the Departmental website at <http://www.dcsf.gov.uk/consultations/index.cfm?action=conResults&consultationId=1581&external=no&menu=3>

Adoption

- 8.7 A one-week consultation took place between 19-23 January 2009 with three key stakeholders (Association of Director Children's Services, British Association for Adoption and Fostering and the Consortium of Voluntary Adoption Agencies) in respect of giving review panels the power to give advice to adoption agencies outlined in paragraph 7.9.4 above. All three were in favour of giving review panels the power to give advice to adoption agencies as outlined above. The change relating to costs and to whom applications for review by the independent review panel must be made come directly from the 2008 Act.

9. Guidance

- 9.1 A letter will be sent to providers which will set out the changes regarding fostering panels and actions they will need to make to prepare for implementation of the IRM for fostering. The current guidance for adoption agencies will be updated to reflect the changes made by the IRM Regulations.

10. Impact

- 10.1 The impact on business, charities or voluntary bodies is minimal. Independent fostering service providers (which discharge fostering functions on behalf of local authorities and may be businesses, charities or voluntary bodies) already

have a duty to refer representations regarding a qualifying determination to their fostering panel for review. All fostering service providers will be required to contribute a standard amount each time a qualifying determination which they have made is reviewed by the IRM panel. However, our estimates indicate that the annual number of IRM reviews per provider is likely to be small and funding will be made available to local authorities as part of the budget for implementing the *Care Matters* White Paper, which will include the cost to independent providers.

- 10.2 The impact on the public sector (local authorities) will be similar to the impact on independent fostering service providers. A new burdens assessment has been conducted and approved by the Local Government Association.
- 10.3 An Impact Assessment was prepared for the Independent Review Mechanism for fostering, and can be found at:
<http://www.dcsf.gov.uk/consultations/index.cfm?action=conResults&consultationId=1581&external=no&menu=3>
- 10.4 The IRM for adoption has been in existence since 2004. The Independent Review of Determinations (Adoption and Fostering) Regulations 2009 have not imposed any additional burdens in practice on voluntary adoption agencies or local authorities, so it has not been necessary to prepare a new impact assessment.

11. Regulating small business

- 11.1 The introduction of the independent review mechanism for decisions relating to fostering will affect all fostering service providers, including those that are small businesses (but not small businesses generally). However, the impact on such providers should be minimal. The requirement to inform prospective/foster parents about the option of seeking review of a qualifying determination by an independent review panel will be included in the notice that providers are already required to send; and the requirement to provide information to the independent review panel replaces the current practice of providing this information to the fostering panel. Fostering service providers will only be charged a contribution when a determination made by the provider is to be reviewed by the IRM panel. The number of reviews per provider should be in proportion to the number of foster parents a provider deals with and so smaller independent fostering service providers should have fewer determinations than larger providers and thus costs should be in proportion to the size of the provider.

- 11.2 In practice, there are no additional burdens placed on adoption agencies.

12. Monitoring & review

- 12.1 The Department will gather evidence through the contractor running the IRM of their views on its implementation and the number of applications to the IRM. Using existing data collection on looked after children, the Department will monitor placement stability and outcomes for children and track

improvements year on year as this policy, and others arising from the *Care Matters* White Paper, are implemented.

13. Contact

Louise Lawrence at the Department for Children, Schools and Families, Tel: 020 7273 5807 or email: louise.lawrence@dcsf.gsi.gov.uk can answer any queries regarding the instrument.