

EXPLANATORY MEMORANDUM TO
THE ADOPTION AGENCIES AND INDEPENDENT REVIEW OF DETERMINATIONS
(AMENDMENT) REGULATIONS 2011

2011 No. 589

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

2. Purpose of the instrument

2.1 These Regulations amend the Adoption Agencies Regulations 2005 (SI 2005/389) (“the 2005 Regulations”) and the Independent Review of Determinations (Adoption and Fostering) Regulations 2009 (SI 2009/395) (“the IRD Regulations”). They make provision about the establishment and membership of adoption panels and independent review panels.

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

3.1 None.

4. Legislative Context

4.1 These Regulations make changes to the setting up and membership of adoption panels and independent review panels with the aim of giving greater flexibility for adoption agencies and the Secretary of State (in relation to the independent review panels – see paragraph 4.3).

4.2 An adoption agency is defined in section 2 of the Adoption and Children Act 2002 (“the 2002 Act”) as a local authority or a registered adoption society (in practice the term “voluntary adoption agency” is commonly used to mean a “registered adoption society”). Adoption agencies are currently required under the 2005 Regulations to establish adoption panels for the purpose of considering:

- whether a child should be placed for adoption,
- the suitability of prospective adopters, and
- whether a child should be placed for adoption with a specific prospective adopter.

4.3 Independent review panels are constituted by the Secretary of State to review qualifying determinations made by an adoption agency and fostering provider. Qualifying determinations are:

- a determination made by an adoption agency made under regulation 27(4) of the 2005 Regulations that it proposes not to approve a prospective adopter as suitable to adopt a child;
- a determination made by an adoption agency made under regulation 15(1) of the Disclosure of Adoption Information (Post-Commencement Adoptions) Regulations 2005 (SI 2005/888) in relation to an application under section 61 of the 2002 Act for the disclosure of protected information:
 - (a) not to proceed with an application for disclosure of protected information;
 - (b) to disclose information against the express views of the person the information is about; or

- (c) not to disclose information about a person to the applicant where that person has expressed the view that the information should be disclosed; and
- a determination made by a fostering service provider under the Fostering Services Regulations 2002 (these are replaced by the Fostering Services (England) Regulations 2011 (SI 2011/581) from 1 April 2011) that it:
 - proposes not to approve the person as a foster parent;
 - proposes to terminate a foster parent's approval; or
 - proposes to revise the terms of a foster parent's approval.

4.4 The function of both the adoption panel and the independent review panel, in respect of adoption, and the function of the independent review panel in respect of adoption and fostering, is to make recommendations to the adoption agency or fostering service provider, respectively, who must take them into account when making their decisions on the matters set out above.

4.5 The Fostering Services (England) Regulations 2011 make corresponding changes in relation to fostering panels constituted to consider applications for approval and to recommend whether or not a person is suitable to be a foster parent. Those Regulations come into force on 1st April 2011.

5. Territorial Extent and Application

5.1 These Regulations apply to England only.

6. European Convention on Human Rights

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

7. Policy background

- *What is being done and why*

7.1 As part of the Coalition Government's drive to reduce delays in the adoption of looked after children, provisions in the 2005 Regulations have been revised to give greater flexibility for adoption agencies in the operation of adoption panels. It is expected that these changes will result in children's and prospective adopters' cases being heard by adoption panels more quickly because more than one panel can be constituted and because fewer panel meetings will be postponed due to the unavailability of panel members. A small number of consequential changes have also been made to the independent review panels to align the arrangements for both adoption and review panels (see paragraph 7.7). All of these changes are part of a larger package of changes to children's services. The Explanatory Memorandum to the Fostering Services (England) Regulations 2011 sets out in detail the package of changes. A copy of that Explanatory Memorandum is attached.

7.2 The changes are to ensure that the legislative framework for the setting up and operation of adoption and review panels is no more prescriptive than is necessary and to give greater flexibility to adoption agencies to operate adoption panels and to the Secretary of State to operate review panels.

7.3 These Regulations remove the need for adoption agencies to establish an adoption panel with fixed membership. The requirements to have a maximum number of members, fixed tenure of office and an elected member of the local authority or management representative of the registered adoption society to act as panel members have also been removed. Adoption agencies

may establish panels as and when necessary to exercise the functions of an adoption panel. The number of adoption social workers required to be a members of the panel has been reduced from two to one, and up to two vice chairs may be appointed. The Regulations remove some of the restrictions relating to who may be considered as an independent member of the panel.

7.4 Under the changes made by these Regulations, each adoption agency must maintain a central list of persons suitable to be panel members. The number of persons who may be included on the list is not limited. This will be for the adoption agency to decide but must include the adoption agency's medical adviser and an adoption social worker with at least three years' relevant post-qualifying experience.

7.5 When constituting a panel to consider cases as set out in paragraph 4.2 above, the agency must appoint members from the persons included on its central list. It will be a matter for agencies to decide how many panel members will sit at each panel meeting, subject to the panel being quorate. An adoption panel will only be quorate where either the chair or one of the vice chairs, a social worker with at least three years' post-qualifying experience and three other members (or four, in the case of a panel established jointly by one or more local authorities) are present. Where the vice chair is not independent, an independent member must be present (defined in regulation 4(7)).

7.6 Having a pool of people on a central list with different skills, experience and qualifications to draw from will allow the most appropriate members to be appointed to panels to consider cases and will remove the current difficulty of not being able to recruit panel members until a vacancy arises or to appoint members to cover for short-term absences. In addition, removing the requirement of fixed tenure of office allows the agency to retain individuals for as long as they remain suitable to be panel members. As stated above, it is expected that these changes will result in more frequent adoption panel meetings.

7.7 In relation to independent review panels, these Regulations remove the requirement to have a maximum of ten panel members, reduce the number of social workers required to sit on a panel from two to one and remove some of the restrictions relating to who may consider cases. The effect of these changes is an alignment of the arrangements for adoption and independent review panels.

- ***Consolidation***

7.10 Not considered necessary. These Regulations will be the sixth amendment to the 2005 Regulations and the first amendment to the IRD Regulations.

8. Consultation outcome

8.1 A formal consultation ran between 27 August and 19 November 2010. With the exception of the proposal to reduce the prescribed quorum from five to three, which we have not taken forward, respondents supported the proposed changes to the Regulations. The Government's response to the consultation including a summary of responses can be found on the Department for Education's website.¹

9. Guidance

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<http://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1729&external=no&menu=3>

9.1 The statutory guidance to the 2002 Act has been revised (not because of the changes in these Regulations) and sets out the functions and responsibilities of adoption agencies. The guidance has been issued under section 7 of the Local Authority Social Services Act 1970 and is addressed to local authorities. The guidance is also relevant to voluntary adoption agencies. The guidance reflects the changes to be made by these Regulations and can be found in Chapter 1. The revised guidance can be found on the Department of Education's website <http://www.education.gov.uk/childrenandyoungpeople/families/adoption/b0072314/guidance>

9.2 As part of the package of changes to children's services, revised National Minimum Standards (NMS) for adoption 2011 issued under sections 23 and 49 of the Care Standards Act 2000 are being published. These apply to local authority adoption services, voluntary adoption agencies and adoption support agencies. The NMS should be complied with by adoption agencies and adoption support agencies and are taken into account by Her Majesty's Chief Inspector of Education, Children's Services and Skills (HMCI) in the inspection and regulation of adoption agencies and adoption support agencies. They are also important in other ways. Adoption agencies, adoption support agencies and their staff may use the standards in the self-assessment of their services. The standards provide a basis for the induction and training of staff. Children and young people, and birth and adoptive parents and families can use them as a guide to what they should expect as a minimum adoption service to provide and to do. The standards can provide guidance on what is required when setting up an adoption or adoption support agency. The NMS have also been amended following formal public consultation resulting in the NMS being streamlined.

10. Impact

10.1 The impact on business, charities or voluntary bodies is greater flexibility for registered adoption societies in the operation of adoption panels.

10.2 The impact on the public sector, i.e. on local authority adoption services is as above for business, charities and voluntary bodies. As stated in paragraph 7.1 above, it is expected that the changes made by these Regulations will result in more children's and prospective adopters' cases being considered by adoption panels, and considered earlier because panel meetings will not be postponed due to the meetings not being quorate.

10.3 An Impact Assessment has not been prepared for these Regulations because the revised framework is a streamlining of the existing framework. As such, there will be an overall reduction in burdens resulting from increased flexibility in the setting up and operation of adoption and independent review panels. The Regulations will come into force on 1st April 2011.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 Local authority adoption services, voluntary adoption agencies and adoption support agencies are all inspected by HMCI and agencies are regulated. HMCI is independent of the Department. The purpose of inspection is to assess the quality of adoption agencies and adoption support agencies and of the services provided to children and young people, birth and adoptive parents and families, and adopted adults. The inspection process is designed to test that adoption agencies and adoption support agencies are complying with the relevant Regulations and with the NMS that underpin these. Inspection information is used to assess each agency's performance.

12.2 HMCI publishes inspection reports of individual agencies on its website. HMCI also published thematic reports that draw on findings aggregated from individual inspection reports.

These reports offer an objective assessment of the performance of agencies as a service designed to promote high quality adoption services for children and their birth and adoptive families. Inspection data and feedback from HMCI to the Department helps inform the Department's monitoring and review of these Regulations and understand where there may be concerns or issues with the regulatory framework that mean it may need revision.

13. Contact

Ruth Wilson at the Department for Education at (tel: 0207 783 8071 or email: ruth.wilson@education.gsi.gov.uk) can answer any queries regarding these Regulations.

EXPLANATORY MEMORANDUM TO
THE FOSTERING SERVICES (ENGLAND) REGULATIONS 2011

2011 No. 581

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

2. Purpose of the instrument

2.1 These Regulations revoke and replace the Fostering Services Regulations 2002 (SI 2002/57) (“the 2002 Regulations”). They make provision about the way in which fostering agencies (independent fostering agencies and voluntary organisations) and local authority fostering services are conducted, and in particular about the process for approving foster parents and safeguarding children placed with foster parents.

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

3.1 None

4. Legislative Context

4.1 These Regulations revoke and replace the 2002 Regulations which, in addition to making provision about the conduct of fostering agencies and local authority fostering services and the approval of foster parents, also made provision about the placement of children with foster parents

4.2 The Care Planning, Placement and Case Review (England) Regulations 2010 (S.I. 2010/959), which come into force on 1st April 2011, bring together all the provisions in previous Regulations relating to the placement of looked after children by local authorities, and include provisions about the placement of looked after children with foster parents. (A looked after child is a child who is in the care of a local authority by virtue of a care order, or a child who is provided with accommodation by a local authority in the exercise of their social services functions, with some exceptions).

4.3 The Arrangements for Placement of Children by Voluntary Organisations and Others (England) Regulations 2011 (S.I. 2011/xxx) which come into force on 1st April 2011 make similar provision in relation to the placement of non looked after children with foster parents.

4.4 These Regulations make changes to the establishment and membership of panels set up by fostering services to assess potential foster parents (fostering panels). The Adoption Agencies and Independent Review of Determinations (Amendment) Regulations 2011 (S.I. 2011/xxx) which come into force on 1st April make corresponding changes in relation to panels set up to assess potential adopters.

4.5 To this extent these Regulations are related to the Care Planning, Placement and Case Review (England) Regulations 2010, the Arrangements for Placement of Children by Voluntary Organisations and Others (England) Regulations 2011 and the Adoption Agencies and Independent Review of Determinations (Amendment) Regulations 2011.

5. Territorial Extent and Application

5.1 This instrument applies in relation to England only.

6. European Convention on Human Rights

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

7. Policy background

- *What is being done and why*

7.1 Around three quarters of looked after children are placed with foster parents and it is therefore key that foster parents are properly assessed and supported to provide quality care to looked after children wherever they may live and whether they are approved by a local authority fostering service or a fostering agency. It is also important that local authorities and fostering agencies understand their duties in relation to looked after children and that the people who carry on and manage fostering services are suitably fit and qualified to do so.

7.2 These Regulations provide the regulatory framework for fostering agencies (that is, independent fostering agencies and voluntary organisations) and local authority fostering services, by placing duties on the ‘fostering service provider’. The fostering services provider in the case of a fostering agency is the person who is registered in respect of the agency under Part 2 of the Care Standards Act 2000 as carrying on, or as the manager of, the fostering agency. The fostering services provider in relation to the local authority fostering service is the local authority.

7.3 As part of the Coalition Government’s drive to reduce burdens we have revised the regulatory framework in order to ensure that it contains no more prescription than is necessary to safeguard children and to provide a more streamlined framework for local authorities and fostering services to operate within. For example by:

- Allowing for greater flexibility within the Regulations for the operation of fostering panels. For example, removing the requirements which were provided for in the 2002 Regulations for fixed membership and tenure thus allowing panels to draw more flexibly on a pool of expertise and not have to remove experienced panel members who can continue to make valuable contributions because ‘their time is up’. The new Regulations relating to panels maintain high level safeguards, which were strongly supported by local authorities, fostering services, and third sector organisations, such as the requirement for an independent chair and the need for 5 people for a panel to be quorum with a pragmatic reality of operation on the ground e.g. reducing the level of prescription about who must make up quorum.
- Not re-enacting what is regulation 48 of the 2002 Regulations within the new Regulations. Regulation 48 provided that a failure to comply with a number of the regulations was an offence and enabled Her Majesty’s Chief Inspector for Education, Children’s Services and Skills (“HMCI”) to bring proceedings against a registered person who failed to comply with the regulations. Section 22A of the Care Standards Act 2000 (inserted by the Children and Young Persons Act 2008) provides that HMCI may serve a compliance notice on the registered person if they are failing to comply with a requirement imposed on them. Failure to comply with the compliance notice is an offence and therefore it is considered that there is no need to retain regulation 48 of the 2002 Regulations which makes similar provision.
- Regulation 42 has been added to modify the application of the Regulations in relation to children who are not in the care of a local and who are placed in a series of “short breaks”

with the same foster parent, as in these circumstances the child's parents remain responsible for their overall care, health and education.

7.4 We have also updated a number of requirements and references so that there is a coherent regulatory framework for local authorities and fostering services. For example, so that regulations are appropriately aligned with the Care Planning, Placement and Case Review (England) Regulations 2010 and references to missing from care are in line with Statutory Guidance for Local Authorities on Children Missing from Home or Care¹.

7.5 In addition, these Regulations and the accompanying guidance respond to concerns raised by fostering services and local authorities. For example by:

- Removing the provision, (formerly in regulation 20(6) of the 2002 Regulations), which meant that a fostering service provider could not employ to work for the purposes of the service a foster carer they had approved or member of their household for certain activity or for more than a certain amount of time. This is intended to increase providers' ability to utilise foster carers and their household members' skills more flexibly for example helping in training or mentoring.
- These Regulations also make some provision in relation to parent and child arrangements whereby a local authority arrange for a child and parent to live with a foster parent whether or not the child/parent is placed (regulation 2). The Statement of Purpose must cover any parent and child arrangements (regulation 3) and that the child protection policy must include a statement of measures to be taken to safeguard any child before making a parent and child arrangement with that foster parent (regulation 12). In addition, the guidance clarifies the legal position of such arrangements within the framework of these Regulations.
- Other areas of clarification of the regulatory framework within the guidance are around the delegation of authority to foster parents to improve their role in day to day decisions about the child so as to avoid needless bureaucracy and delays which negatively impact on the child and to explain that there is no requirement to approve certain individuals, who may care for the child, as foster parents for example relatives of the foster parent who the foster child may stay with on a holiday

- *Consolidation*

7.6 Not necessary. These Regulations consolidate previous amendments made to the 2002 Regulations which these Regulations revoke and replace.

8. Consultation outcome

8.1 Prior to the consultation views were sought from groups representing both local authority and independent providers of fostering services and third sector organisations for looked after children and foster parents about changes to improve fostering services. A formal consultation ran between 27 August and 19 November 2010 on both these Regulations and the Children's Homes Regulations 2011 and accompanying statutory guidance. A total of 136 responses were received which included a good range of local authority and independent fostering providers along with key third sector children's and foster parent organisations who fed back views from their members. Fostering organisations held events to inform their feedback to the Department for Education and officials provided materials and attended events on request.

¹Issued in July 2009, which can be accessed at the following weblink.

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

8.2 The overwhelming majority of respondents supported the principles set out in the Regulations and guidance commenting that the Government's objective to streamline the Regulations and remove any unnecessary bureaucracy has been achieved and that there is greater clarity and less unhelpful prescription. The Government's response to the consultation including a summary of responses can be found on the Department for Education website.¹

9. Guidance

9.1 These Regulations are being accompanied by revised statutory guidance. The guidance is being issued under section 7 of the Local Authority Social Services Act 1970 and is addressed to local authorities. The guidance is also relevant to providers of independent fostering agencies and voluntary organisations. The guidance sets out the functions and responsibilities of local authorities and their partner agencies in relation to fostering services including setting out the responsibilities of local authorities and foster parents, how to help ensure the best for children in foster care, management of the fostering service and approving and supporting foster parents. The guidance has been updated in line with the changes to these Regulations and in order to remove inaccurate information, out of date sections, unnecessary prescription and detail and make it easier for people to use. This guidance will be Volume 4 of the Children Act 1989 suite and it supersedes Volume 3 Family Placements issued in 1991.

9.2 These Regulations are also accompanied by the National Minimum Standards (NMS) for fostering services 2011 issued under sections 23 and 49 of the Care Standards Act 2000. These apply to both local authority fostering services and fostering agencies. The NMS should be complied with by fostering services providers and are taken into account by HMCI in the inspection and regulation of fostering services. They are also important in other ways. The standards may be used by providers and staff in self-assessment of their services; they provide a basis for the induction and training of staff and carers; they can be used by parents, children and young people as a guide to what they should expect as a minimum fostering service to provide and to do; and they can provide guidance on what is required when setting up a fostering service. Like the guidance, the NMS have also been amended following formal public consultation resulting in the NMS being streamlined.

10. Impact

10.1 The impact on business, charities or voluntary bodies is a reduction in burdens (see paragraph 7.2 – 7.5). These Regulations have been consolidated and that along with the revised guidance and national minimum standards has resulted in a clearer, more coherent and proportionate regulatory framework.

10.2 The impact on the public sector is as above for business, charities and voluntary bodies. There are some differences in the Regulations resulting from the fact that local authority fostering services are not required to be registered with HMCI and enforcement action resulting from failure to meet the Regulations is for the Secretary of State.

10.3 An Impact Assessment has not been prepared for these Regulations because the revised framework is a streamlining of the existing framework. As such, there will be an overall reduction in burdens and in some areas, reduced costs. The Regulations will come into force on 1st April. In March the Department will be providing training materials online which will explain the changes made to the regulatory framework. These materials will also be publicised at regional training also being held in March.

13. Regulating small business

13.1 The legislation does apply to small business.

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

11.3 The basis for the final decision on what action to take to assist small business, and indeed all fostering agencies, results from public consultation and subsequent amendments implemented, following advice from groups representing the interests of fostering agencies.

14. Monitoring & review

12.1 Both local authority fostering services and fostering agencies are inspected by HMCI and agencies are regulated. HMCI is independent of the Department. The purpose of inspection is to assess the quality of fostering providers and of the foster care provided to children and young people. The inspection process is designed to test that fostering providers are complying with the relevant Regulations and with the National Minimum Standards that underpin these. Inspection information is used to assess each provider's performance.

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

12.3 Local authorities have been asked to develop Children in Care Councils, so that looked after children and care leavers can be consulted on the development of services affecting their care. These Councils offer a mechanism so that young people can have regular contact with senior officers and lead council members of the authority responsible for their care, so that are able to provide them with first-hand views about the quality of the services and the support that they receive. Feedback through Children in Care Councils and other forums such as the Minister's regular meetings with looked after children and care leavers provides the Department with views direct from foster children about the operation of the regulatory framework.

13. Contact

13.1 Rachel Taylor at the Department for Education (telephone: 0207 783 8255 or email: Rachel.Taylor@education.gsi.gov.uk) can answer any queries regarding the instrument.