

EXPLANATORY MEMORANDUM TO
THE ADOPTION AND CHILDREN (CORONAVIRUS) (AMENDMENT)
REGULATIONS 2020

2020 No. 445

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Education and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument temporarily amends 10 sets of Regulations relating to children’s social care to support services manage the coronavirus (COVID-19) outbreak (“the outbreak”). The changes prioritise the needs of children, whilst relaxing some administrative and procedural obligations to support delivery of children’s services but maintaining appropriate safeguards in such extraordinary circumstances. The changes will support services to try and manage the increased pressure on children’s social care and staff and carer shortages who are ill with coronavirus. The Regulations amended are:

In relation to local authorities:

- The Children Act 1989 Representations Procedure (England) Regulations 2006;
- The Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007;
- The Children Act 2004 (Joint Area Reviews) Regulations 2015;

In relation to adoption:

- The Adoption Agencies Regulations 2005;

In relation to foster care and care planning:

- The Children (Private Arrangements for Fostering) Regulations 2005;
- The Care Planning, Placement and Case Review (England) Regulations 2010;
- The Fostering Services (England) Regulations 2011;

In relation to residential care:

- The Residential Family Centres Regulations 2002;
- The Children’s Homes (England) Regulations 2015 and
- Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (Fees and Frequency of Inspections) (Children’s Homes etc.) Regulations 2015.

- 2.2 Further detail about these Regulations and the amendments is set out in the policy background to this explanatory memorandum. The changes aim to provide local

authorities, providers and services with additional flexibility in meeting statutory obligations whilst still maintaining appropriate safeguards.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 It is not possible in the case of this instrument to comply with the 21-day rule which requires relevant instruments to be laid before Parliament for at least 21 days prior to coming into force. Children's social care resources are already stretched as a result of staffing shortages and an increased demand for services. The Department has consulted informally with the sector who have asked for these changes to be in force as a matter of urgency. Waiting 21 days will put extraordinary pressure on local authorities, providers and services to try to meet statutory obligations while continuing to provide care for vulnerable children and young people during the outbreak.
- 3.2 It was not possible to make the Regulations earlier. The Government announced social distancing guidance on 16th March, then introduced 'stay at home' rules on 23rd March. The Department was not in a position to assess the extent and impact of the 'stay at home' rules on children's social care immediately and needed to consult with the sector to understand the impact and practical difficulties local authorities would have in administering their duties.
- 3.3 The Department has shared proposed changes to regulations widely with the children's social care sector via key stakeholders to consult and give notice that regulatory changes are coming into force.
- 3.4 The instrument will make temporary changes to provide additional flexibility for local authorities, providers and services to meet statutory duties whilst maintaining appropriate safeguards. These are low risk changes to ease administrative and procedural duties and are required to ensure stability of children's social care during the outbreak.
- 3.5 The instrument places an obligation on the Secretary of State to keep the amendments under review, and it will remain in force until 25 September 2020, which coincides with the date that the Coronavirus Act 2020 requires parliamentary renewal. Further detail is set out in section 14 of this memorandum.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.6 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
- 4.2 The territorial application of this instrument is England.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Changes to existing secondary legislation are required to provide children's social care with additional flexibility in meeting a number of statutory duties, while maintaining a clear focus on safeguarding and promoting the welfare of children.
- 6.2 The Regulations being amended are: The Residential Family Centres Regulations 2002; The Adoption Agencies Regulations 2005; The Children (Private Arrangements for Fostering) Regulations 2005; The Children Act 1989 Representations Procedure (England) Regulations 2006; The Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007; The Care Planning, Placement and Case Review (England) Regulations 2010; The Fostering Services (England) Regulations 2011; The Children Act 2004 (Joint Area Reviews) Regulations 2015; The Children's Homes (England) Regulations 2015 and Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) Regulations 2015. Further context and background to these Regulations are set out in the policy section of this explanatory memorandum.
- 6.3 The Regulations also include a number of savings provisions to ensure that some amendments made by these Regulations continue to apply in certain circumstances after the expiry of the amendments on 25 September 2020.
- 6.4 The amendments will be in place until the 25 September 2020 which is the date by which the powers in the Coronavirus Act 2020 are subject for Parliamentary renewal. Whilst these amendments are not being made under powers in that Act, they will mirror the renewal date of the Coronavirus Act as the date the amendments will cease to have effect unless extended. The legislative changes are being made in the context of a public health emergency and there is no current evidence to suggest the amendments will be necessary for a longer period of time.
- 6.5 The instrument contains an obligation for the Secretary of State to keep the regulations under continuous review. Should the outbreak or its impacts last longer, there will be an opportunity to make another statutory instrument which omit the expiration provision in this instrument, for any amendments we want to continue beyond 25 September 2020.

7. Policy background

What is being done and why?

- 7.1 Ensuring that vulnerable children are properly safeguarded and have their welfare promoted remains a top priority for Government. At the same time, the challenging context of the outbreak means that local authorities and partners may struggle to meet the full range of statutory duties relating to child protection, safeguarding and care at present due to administrative and procedural requirements set out in legislation.
- 7.2 The Department has consulted informally with a variety of local authority stakeholders, including their representative body The Association of Directors of Children's Services, and with Ofsted as regulator, and have informed the Children's Commissioner. These consultations have helped identify which changes would be most helpful to local authorities during the outbreak. Feedback has been set out against the amendments within this section of the memorandum to provide clarity.
- 7.3 It is therefore necessary to temporarily amend 10 sets of regulations, related to children's social care, to provide additional flexibility in meeting statutory

obligations, whilst maintaining appropriate safeguards. The changes will affect local authorities, children's homes, fostering services, adoption agencies and Ofsted inspections. Most changes are procedural; easing administrative burdens, allowing visits and contact to take place remotely and relaxing strict timescales where possible.

- 7.4 The Department will publish an updated version of guidance¹ which has already been published for local authorities to reflect changes implemented by the instrument [and should be read in tandem with this memorandum to aid further understanding of the changes].

Local Authorities

- 7.5 The Children Act 1989 Representations Procedure (England) Regulations 2006 set out the procedures that local authorities must follow when considering representations made to them about the services they provide to children and young people. This includes the conduct of a review panel formed of three independent people, set up to further investigate the representations made by a complainant where they are dissatisfied with the original response from the local authority. This instrument amends the statutory timeframes for the review process to require local authorities to comply with the existing timeframes or as soon as is reasonably practicable. These amendments allow more time for the review to be carried out, because it may not be possible for the review process to be carried out within the existing statutory timeframe during the outbreak.
- 7.6 A savings provision has also been included in respect of any representations made before the expiry of the amendments to enable them to continue to be processed and concluded under the regulations as amended.
- 7.7 The Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007 set out the process a local authority must follow to publish an inspection report and a written statement of action following an inspection by Ofsted of the Local Authority Children's Services (often referred to as ILACs). Through consultation, Ofsted informed the Department that some local authorities raised concerns about their capacity to provide the written response within the timescale in current circumstances. Therefore, to ease resource pressures on local authorities during the outbreak, the timescale which a local has to publish its written statement of action following its Ofsted inspection report is 70 working days or as soon as is reasonably practicable.

The Children Act 2004 (Joint Area Reviews) Regulations 2015 set out the process that Ofsted and the principal authority (for example, the local authority, health services or police) must follow after Ofsted and other inspectorates have completed their review of local partnerships' joint services for children in the local authority area in England. Through consultation, Ofsted informed the Department that some local authorities raised concerns about their capacity to provide the written response within the timescale in current circumstances. Therefore, to ease resource pressures during the outbreak, the timescale which a principal authority has to publish its written statement of action following its Ofsted inspection report is 70 working days or as soon as is reasonably practicable.

Adoption

¹ <https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care>

7.8 The Adoption Agencies Regulations 2005 (“the Adoption Regulations”) govern how adoption agencies exercise their functions in relation to adoption under the Adoption and Children Act 2002. Stage 1 of the adopter approval process includes initial registration with the adoption agency as well checks and references, stage 2 of the process is the assessment and training of potential adopters. Through consultation, local authorities and regional adoption agencies have identified the need to provide additional flexibility in the adoption process as a result of government guidance on self-isolation and social distancing, as well as the availability of critical workers at certain stages. The Adoption Agencies Regulations 2005 are amended as follows:

Stage at which medical and DBS Checks are completed

7.9 Currently the regulations require prospective adopters to secure medical and DBS checks by the end of stage one of the process. Local authorities have expressed concerns that these checks will take longer than usual to clear, particularly due to availability of healthcare professionals and those that carry out DBS checks during the outbreak. Therefore, this instrument allows those checks to be completed as part of stage 2 of the process, enabling adoptions to continue to progress rather than stall.

7.10 In recognition of this, applicants will not be able to access the Independent Review Mechanism (IRM) where their applications are unsuccessful for reasons relating to DBS or health checks, as would have been the case if these checks were completed in stage 1. Adopters will be able to access the IRM after stage 2, if their application fails for any other reason not relating to DBS or health checks.

Adoption reviews and adoption panels

7.11 Through consultation, local authorities advised that due to coronavirus (COVID-19)-related staff absences, it would not always be possible to meet the quorum number of adoption panel members, which would lead to delays in the adoption process.

7.12 The amendments relax the requirement for adoption reviews (the reviewing of a child’s plan for adoption if not placed or a review of placement once placed) for agencies where it is not reasonably practical to do so, unless the agency has concerns about the welfare of the child.

7.13 The requirement for an adoption panel (which make a recommendation to the agency on whether the adopters are suitable) has been removed, to allow agencies maximum flexibility. Should agencies decide to conduct a panel, the minimum number of panel members required have reduced from 5 to 3 to ensure that adoption approvals and matches can continue even where there is a shortage of available panel members.

Timescales for the adoption process

7.14 Timescales for stage one and stage two of the process from 2 months (stage 1) and 4 months (stage 2) remain in place but agencies are only required to meet the timescales where reasonably practicable during the outbreak. The 6 month limit on the length of time a prospective adopter could leave between stage 1 and stage 2 has been removed. This is to provide maximum flexibility to agencies working with families and continue to progress in the adoption process.

7.15 A savings provision has also been included in relation to cases where the adoption agency is in the process of assessing a prospective adopter on the 25 September 2020 to enable them to continue and conclude under the assessment under the amended regulations when the amendments expire.

Foster care and care planning

- 7.16 The Children (Private Arrangements for Fostering) Regulations 2005 (“Private Fostering Regulations”) set out the actions that the local authority must take following notification that a child is, or is going to be privately fostered. These regulations provide a timeframe for visits to take place, and the frequency of visits. This instrument amends the statutory timeframe to provide that visits are carried out within the statutory timeframe, or as soon as is reasonably practicable. The amended timeframe gives the local authority more flexibility regarding when visits are carried out, and the frequency of visits, because during the outbreak it may not be possible for visits to be carried out within the existing statutory timeframe.
- 7.17 A savings provision is also included in relation to any relevant notifications that are made under the Private Fostering Regulations to local authorities whilst these amendments are in force to enable the continuation of the process under the legislation as amended once the amendments have otherwise ceased to apply.
- 7.18 The Fostering Services (England) Regulations 2011 (“the Fostering Regulations”) provide a regulatory framework for fostering agencies (independent agencies and voluntary organisations) and local authority fostering services and how fostering services should deliver their functions. The Department consulted with Ofsted who were content with the approach and welcomed many of the changes. The Department has also used requests from stakeholders through regular conversations and emails to inform the amendments. For example, amendments to the requirement for a formal medical report was an issue raised early by stakeholders as a blocker to approvals of new foster careers, hence our decision to remove this requirement (see paragraph 7.22). The Fostering Regulations are amended as follows:

Procedural timeframes

- 7.19 The amendments ease procedural practicalities for fostering services by removing the requirement for reviews of approval of foster carers to be carried out within a year of approval, and thereafter whenever considered necessary but at least at yearly intervals. Instead the Fostering Regulations now allow reviews of approval to be completed as soon as reasonably practicable.
- 7.20 The amendments provide flexibility in timeframes to notify Her Majesty’s Chief Inspector of certain events, such as the appointment of a manager to a fostering agency and changes to the service’s statement of purpose if any are made. These notifications have been relaxed from needing to be made without delay (which may not be possible with staff shortages and isolation measures), to as soon as reasonably practicable.

Fostering Panels

- 7.21 The amendments change referrals to fostering panels. Fostering panels were previously required to be set up to assess applications for potential foster carers, ongoing suitability of existing foster carers and any cases referred to it where the foster carer was deemed not suitable by the fostering service provider and then to make a recommendation to the fostering service provider. The instrument changes this so that fostering panels are optional, in order to help speed up the process in light of increasing demand and where places are required more urgently. In cases where the decision is not to set up a fostering panel the relevant decision will be made by the fostering service provider based on their own assessment. Where a panel is formed the

number of people required to be part of the foster panel is reduced to cater for panel member shortages.

Medical information and DBS Checks

- 7.22 It allows foster carers to self-report medical information in the short term as a medical report may not be able to be obtained from the doctor in current circumstances.
- 7.23 To ensure the foster carer assessment process continues without delays, suitability assessments can be carried out whilst waiting for medical information and DBS (criminal records) checks, and there is flexibility to the timescale in which prospective carers are notified if they are found unsuitable.

Duration of short-break placement

- 7.24 As set out below in relation to the Care Planning, Placement and Case Review (England) Regulations 2010, amendments to the Fostering Regulations have been made so that a child can now remain in the same short break placement for up to 75 days instead of the previous requirement that each short break placement would last for up to 17 days (75 days in total in a 12-month period). This amendment has been made to support the stability and continuity of these placements.
- 7.25 The Care Planning, Placement and Case Review (England) Regulations 2010 make provision about care planning for looked after children for all placement types. The changes to this regulation have been limited to prevent widespread changes to practice and to protect safe placement planning. As a result, there are no major proposed changes to the decision-making around placements and the measures to protect children and monitor placements. The Department consulted with stakeholders, including Ofsted, to make amendments to keep children in stable and familiar placements, and to identify emergency placements, for example by extending the duration of temporary approvals for foster carers. The amendments are as follows:-

Timescales for placement plans and reviews

- 7.26 The instrument relaxes timescales around formalising a placement plan and deadlines for placement reviews to allow placements to proceed without delay and reviews to continue flexibly. The instrument also clarifies that visits from the child's responsible authority may be conducted by telephone, video-link or other electronic means.

Temporary foster carers

- 7.27 As a large proportion of foster carers are vulnerable to coronavirus (COVID-19) because of their age profile, it allows individuals who are not connected persons to the child, to be approved as temporary foster carers and extends the timescales for placements in an emergency. This will help to provide additional flexibility to build capacity should there be a temporary increase in the need for foster care placements.

Nominated Officer for approvals

- 7.28 This instrument removes the requirement for a nominated officer from the local authority to approve a fostering for adoption placement (where a child is placed with a local authority foster carer who is also an approved prospective adopter in accordance with s.22C(9B)(c) of the Children Act 1989) in order for the placement to proceed. Instead the requirements on the nominated officer when making a decision about these placements have now been moved onto the local authority. This means that

these placements are able to proceed swiftly, ensuring children are not waiting due to procedural delays.

Duration of short break placements

- 7.29 In the case of short breaks (where the responsible authority has arranged to place the child in a series of short term placements with the same foster carer or in the same accommodation but the child's parents remain responsible for their overall care, health and education), the instrument removes the restrictions around the duration of each single placement. Previously, no single short break placement could last for more than 17 days (allowing placements amounting to a total of 75 days in a 12-month period). The instrument now allows one placement to last up to 75 days. The instrument also adds flexibility around visiting requirements for these placements, so that these can be done remotely, at regular intervals and reviews conducted as soon as reasonably practical.
- 7.30 These amendments will be subject to the review provision in the instrument. In regard to longer-term impact, the savings provisions in Part 13 of this instrument allow certain amendments (such as those relating to suitability assessments under regulation 26 of the Fostering Services (England) Regulations 2011) to continue as though they are still in force after 25 September 2020. This means there will be continuity for cases still being dealt with under the amendments introduced by this instrument. The Department will also consider what other action may be required once the amendments are no longer in force.

Residential care

- 7.31 As of 31 March 2019, there were 2,304 children's homes in England, which includes conventional children's homes, residential special schools registered as children's homes and secure children's homes. These offer 12,035 places for some of the country's most vulnerable children and young people. There are 58 residential family centres in England which are establishments that provides residential services for parents and their children in order to monitor and assess the parents' ability to respond to their children's needs and to safeguard and promote their children's welfare. The centres offer places for 315 families and similarly to children's homes, these are registered and inspected by Ofsted. Through various departmental conversations with sector partners, particularly Ofsted and the Independent Children's Homes Association, they identified and expressed the need for flexibilities within the current operating frameworks to enable children's homes to continue to remain open and keep children safe.
- 7.32 The Residential Family Centres Regulations 2002 set out the standards that must be met for every residential family centre such as safeguarding children and vulnerable adults and promoting good health and wellbeing. The amendments:
- alter the requirement to allow the registered person to use reasonable endeavours during the outbreak when promoting and making provision for the care, treatment, education and supervision of residents.
 - relax timeframes around the registered person contacting a complainant with information about any action proposed in respect of a complaint made to ease administrative burdens.
 - ease requirements in relation to visits. Registered provider visits must still take place at least once a month as far as reasonably practicable during the

outbreak, and the registered provider may use telephone or other video-link equipment as appropriate to interview residents or those working at the residential family centre.

- 7.33 The Children’s Homes (England) Regulations 2015 set out the standards that must be met for everyone providing residential care to looked after children (those children accommodated by or in the care of a local authority). The Department consulted with Ofsted on all the proposed amendments and they agreed with the changes. The amendments are as follows:

Health, developmental and educational requirements

- 7.34 The instrument relaxes requirements in relation to the delivery of care relating to health and development, so it is met as far as reasonably practicable during the outbreak.
- 7.35 In light of school closures and staffing shortages, children’s homes will need to use reasonable endeavours to ensure children make measurable progress towards achieving their educational potential.

Enforcing self-isolation requirements

- 7.36 The instrument allows children’s homes to enforce a temporary deprivation of liberty where powers under the Coronavirus Act 2020 in relation to isolation are being exercised in respect of a young person who is infectious or suspected of being infectious with coronavirus (COVID-19) to prevent the virus from spreading. In practical terms this would mean consideration by a Public Health Officer and isolation enforced through a range of means as set out in Department of Health and Social Care guidance. The amendment would only capture cases where the young person is infectious or suspected of being infectious and the relevant power is being exercised by a Public Health Officer and could not be used to generally enforce restrictions on movement. In all other cases where restrictions of movement that amount to a deprivation of liberty are being sought to be enforced, local authorities will have to apply for a court order.
- 7.37 A savings provision has been included to ensure that a children’s home enforcing a deprivation of liberty in accordance with this provision as amended can continue to do so once the amendments expire.

Visits

- 7.38 The registered person must ensure that suitable facilities are provided for a child to meet privately at any reasonable time with their parents, relatives advocates etc. Where this is not possible due to the outbreak, the child should be able to speak privately over the telephone or other video-link facility.
- 7.39 The registered person must ensure that an independent person visits the children’s home at least once a month. The instrument allows reasonable endeavours to be taken to meet this requirement, and the expectation is that video-link or other electronic means will be used where appropriate.
- 7.40 Her Majesty’s Chief Inspector of Education, Children’s Services and Skills (Fees and Frequency of Inspections) (Children’s Homes etc.) Regulations 2015 prescribe the fees payable to HMCI and the minimum frequency of inspections in relation to children’s homes and other establishments and agencies. The Secretary of State

announced suspended routine inspections of children’s social care services, and this instrument revokes the minimum Ofsted inspection intervals, although Ofsted will still have powers to inspect in accordance with powers in the Care Standards Act 2000. Ofsted is content with this change.

- 7.41 Beyond monitoring these regulation amendments, the Department will be considering their longer-term impact and what future action may be required once the changes are no longer in force.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 The instrument does not make any provision for consolidation given the temporary nature of the amendments.

10. Consultation outcome

- 10.1 Key stakeholders across the children’s social care sector were consulted including Ofsted, the Association of Directors of Children’s Services, the Local Government Association, Principal Social Workers and Practice Leaders in local authority children’s social care. The Children’s Commissioner was also informed. Consultees provided suggestions for suitable amendments and have subsequently been provided with further detail of the changes that are being made and have provided broad support. There has been no public consultation due to the urgency of the regulatory amendments.

11. Guidance

- 11.1 The Department will publish an updated version of guidance² which has already been published for local authorities to reflect changes implemented by the instrument.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies. Whilst children’s homes are predominantly in the private and voluntary sector the proposed changes are not anticipated to increase costs or significantly amend working practices.
- 12.2 There is no, or no significant, impact on the public sector. Whilst local authorities are responsible for the children’s social care system the proposed changes are not anticipated to result in additional costs or significant changes to working practices.
- 12.3 An Impact Assessment has not been prepared for this instrument because the changes are temporary (in force for less than 12 months) and there is no, or significant, impact on businesses, charities, voluntary bodies, or the public sector.
- 12.4 The impact is limited as the amendments are only in force during the outbreak and are in place to support children’s social care meet its statutory obligations more flexibly

² <https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-childrens-social-care-services/coronavirus-covid-19-guidance-for-local-authorities-on-childrens-social-care>

so services can continue to provide high quality care. The changes will only impact local authorities, Ofsted, residential care and fostering and adoption agencies to ensure stability and continuity of children's social care during the outbreak.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses, namely independent children's homes and independent fostering agencies, which are not run by local authorities.
- 13.2 It is the Department's view that these amendments will alleviate temporary burdens on small businesses caused by coronavirus (COVID-19) as the instrument enables them to provide support to vulnerable children in their care more flexibly during the period of the outbreak in support of public health outcomes.
- 13.3 The guidance published on GOV.UK has been shared with small businesses to understand the regulatory changes.

14. Monitoring & review

- 14.1 The instrument contains an obligation for the Secretary of State to keep the regulations under continuous review. This will be undertaken by the relevant policy officials by keeping in touch with the sector. The amendments will be in place until the 25 September 2020 which is the date by which the powers in the Coronavirus Act 2020 are subject for Parliamentary renewal.
- 14.2 The Department will continue to monitor and review the amendments and should the public emergency last longer, a statutory instrument will be made to revoke the expiry provision in this instrument. This will be determined as part of the continuous review as we approach 25 September 2020.

15. Contact

- 15.1 Olivia Greenan at the Department for Education, Telephone: 07825723676 or email: Olivia.Greenan@education.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Matthew Edwards, Deputy Director for Children's Services Improvement and Interventions in the North, at the Department for Education can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Vicky Ford MP, Parliamentary Under Secretary of State for Children and Families can confirm that this Explanatory Memorandum meets the required standard.