

**EXPLANATORY MEMORANDUM TO THE INDEPENDENT REVIEW OF
DETERMINATIONS (ADOPTION AND FOSTERING) (WALES)
REGULATIONS 2010**

This Explanatory Memorandum has been prepared by the Directorate of Children's Health and Social Services and is laid before the National Assembly for Wales in conjunction with the above subordinate legislation and in accordance with Standing Order 24.1

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Independent Review of Determinations (Adoption and Fostering) (Wales) Regulations 2010 and I am satisfied that the benefits outweigh any costs.

Gwenda Thomas

Deputy Minister for Social Services

11 March 2010

1. Description

These 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 the adoption information. The IRM Regulations set out the function, membership and operation of independent review panels.

2. Matters of special interest to the Constitutional Affairs Committee

None

3. Legislative background

These regulations are made under Section 8(2) of, and Schedule 1 to, the Children and Young Persons Act 2008 which 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.

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

The Adoption Agencies (Wales) Regulations 2005 (S.I. 2005/1313) (W.95) 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.

Sections 56 to 65 of the Adoption and Children Act 2002 (c.38) provide for the disclosure of information in relation to a person's adoption. The Adoption Information and Intermediary Services (Post-Commencement Adoptions) (Wales) Regulations 2005 (S.I. 2005/2689 (W.189) make provision for the disclosure of adoption information and applications for such disclosure in relation to adoption orders made after 30 December 2005.

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 Welsh Ministers (in relation to Wales) for a review of that determination.

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

The Fostering Services (Wales) Regulations 2003 (“FSR”) (S.I 2003/237) (W.35) 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.

The IRM Regulations revoke the Independent Review of Determinations (Adoption) (Wales) Regulations 2005, SI 2005/1819 (W.147) but replicate provision made in those Regulations in respect of qualifying determinations relating to adoption with some minor changes.

This statutory instrument follows the negative resolution procedure.

4. Purpose & intended effect of the legislation

The lack of an independent mechanism for reviewing a fostering provider’s decision not to approve a person as a foster carer is a concern to existing and prospective foster carers. When approval has been turned down, an individual is entitled to request a review, but this is currently undertaken by the provider’s panel which made a recommendation regarding the original decision. This is in contrast to adopters who can choose review either by the agency’s panel or by the independent review mechanism.

The Independent Review of Determinations (Adoption and Fostering)(Wales) Regulations 2010 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 parent; or the terms of approval as a local authority foster parent; or the disclosure of the adoption information. The IRM Regulations set out the function, membership and operation of independent review panels. The introduction of the IRM for fostering brings the assessment process for local authority foster parents in line with the assessment process for prospective adopters.

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 determination, in accordance with the (separate) regulations relating to the making of the relevant decision.

By allowing the review process to be independent of the original provider panel, it is expected to contribute to improving the recruitment, retention and supply of foster carers. Whilst the current supply of foster carers have the capacity to deal with current cases, the objective is for placements to better match the individual needs of looked after children, providing them with increased stability. We anticipate that as a result, children in foster care will enjoy better levels of

wellbeing, are more likely to be engaged with education and will avoid poor outcomes such as teenage pregnancy and involvement in crime.

Qualifying determination (fostering)

The IRM will enable prospective and approved foster parents to apply to Welsh Ministers for the review by an independent panel of a 'qualifying determination' by their fostering service provider, as an alternative to making representation about the determination to the provider. The review will be conducted by an independent review panel appointed by Welsh Ministers.

A qualifying determination (in relation to fostering) is a determination by a provider under the Fostering Services Regulations made on or after 2 April 2010 that it:

- Proposes not to approve the 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.

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 (Wales) Regulations 2003), the determination is not a 'qualifying determination' within the meaning of the Independent Review of Determinations (Adoption and Fostering)(Wales) Regulations 2010 and the provider does not need to notify the person that they may apply to Welsh Ministers for a review.

Process

The FSR (as amended by the Fostering Services (Wales)(Amendment) Regulations 2010 will require fostering service providers, from 2 April 2010 to inform prospective and approved foster parents ("prospective/foster parents"), on the making of a determination, that they may within 28 days:

- Make representation to the provider; or
- (unless the determination was made pursuant to regulation 27(6)) apply to Welsh Ministers for a review of the determination by an independent panel.

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 Welsh Ministers for a review of the qualifying determination; or
- (b) The fostering panel or independent review panel (as relevant) has made its recommendation.

If the individual makes representations to the provider, the provider will refer the case to their own fostering panel in accordance with the FSR (W). The

fostering panel will make a fresh recommendation to the provider. This is currently the only option available for a review of such determinations.

If the individual chooses the new option of applying to Welsh Ministers for a review of the determination by an independent panel, Welsh Ministers 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.

There will be no cost to the individual 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

An IRM for adoption has been in place since 2005. The IRM Regulations revoke and replace the Independent Review of Determinations (Adoptions)(Wales) Regulations 2005 with the following amendments:

- ✓ A duty on adoption agencies to pay Welsh Ministers a sum set by them to contribute to the cost to them of performing their independent review functions. The contribution has been set at £2,227 in line with England. There will be no cost to the individual applying to the IRM
- ✓ A duty on adoption agencies so far as is reasonably practicable to provide 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 (Wales) 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 2005.
- ✓ To 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

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

Implementation

It is intended that these regulation come into force on 2 April 2010.

In England parallel legislation was introduced on 1 April 2009. Implementation of the legislation has been delayed in Wales whilst funding was being secured for implementation of this and other provisions in the Children and Young Persons Act 2008. We are not aware of any legal and/or other implications for the Assembly should the intended target dates for making these regulations not be achieved.

5. Consultation

Consultation has been undertaken and details are included in the Regulatory Impact assessment (RIA) below.

6. Regulatory Impact Assessment (RIA)

The RIA is attached below.

PART 2 – REGULATORY IMPACT ASSESSMENT

7. Options

Two options have been considered.

Option One: Making no policy change

Option Two: Implementing an optional Independent Review Mechanism (IRM) through regulations under the Children and Young Persons Act 2008.

It was decided that change is necessary in order to improve the transparency of the approval process for foster carers and bring it into line with other parts of the children's social care workforce.

8. Costs & benefits

Option One

There are no benefits to be gained from Option 1.

Option Two

We expect the following benefits from implementing policy at option 2:

- A realisation of Welsh Assembly Government's commitment to introduce an IRM for fostering;
- Bringing the fostering review process in line with other members of the children's workforce who have access to an independent review of decisions;
- Giving foster parents a choice about how they have their agency's qualifying determination reviewed;
- Reinforcing a perception of fairness, transparency and independence in relation to the foster parent's approval system;
- Addressing concerns about the independence of the approval process, increasing the number of applicants to fostering, thus increasing the pool of foster parents, which should enable better placement matches and therefore contribute to better outcomes for looked after children.

Improving the approval process for foster carers and enabling better placement matches will contribute to better outcomes for looked after children. A range of benefits can result but cannot be estimated accurately.

It is hoped that improving the transparency of the approvals process will help to attract more people to become foster carers. Current estimates by the Fostering Network indicate a shortage of 750 foster carers in Wales. By allowing prospective and current foster carers the choice of having decisions about their approval reviewed by an independent panel it is expected to contribute to improving the recruitment, retention and supply of foster carers to

achieve the policy objective is for placement to better match the individual needs of looked after children.

We expect that as a result of better matching, children in foster carer will benefit from having higher levels of wellbeing, more likelihood of being engaged with education and also avoid poor outcomes such as teenage pregnancy and involvement with crime.

Educational outcomes are predictors of outcomes in later life. Attaining five or more GCSE's at grades A* to C was identified in the National Child Development Study as the threshold between those whose adult lifestyle was similar to that of their original families and those who had 'escaped from disadvantage'; (Pilling 1990).

Jackson and Martin (1998, 1998b, 2002) found that the factors most strongly associated with later educational success for children in care were:

- Stability and continuity of home and school placements – where possible remaining in the same school when a placement change is unavoidable.
- Educationally successful care leavers viewed positive encouragement from carers or parents as the most important contributory factor in their achievement.
- The educational background and expectations of carers is highly significant;
- Peer support of friends who do well at school;
- A significant adult – a role model or mentor (not necessarily a parent or carer) who offered consistent support, encouragement and advocacy was identified as an important factor by high achieving care leavers.
- Regular school attendance;
- Developing out of school interest.

Assuming that by introducing the IRM will improve the stability and continuity of home and school placements of children being placed in foster care, we expect that educational attainment will improve for foster children. As at 31 March 2009 78% of all looked after children were in foster homes.

Costs

The costs include £56 k plus initial start up costs of £16k to be paid to the contractor running the IRM on behalf of Welsh Ministers and £33,405 k which is the estimated annual cost to the sector of the standard charge per review to be made by a provider whose decision is considered by the IRM based on an estimate of 15 in a year.

We do not expect the introduction of the independent review mechanism to introduce significant administrative or financial burdens on individual fostering providers because foster carers can already apply for a review from the provider's panel. This means that (1) fostering providers are already used to preparing copies of documentation and making staff available to attend panel meetings for the purpose of reviews, and (2) the papers would still have to be

provided by the fostering providers if the applicant had decided to apply to the provider's panel rather than to the independent review mechanism.

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 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.

Similarly, Adoption agencies will only be charged a contribution when a determination made by the provider is reviewed by the IRM panel. Again, the number of reviews per provider should be in proportion to the number of adoptions the agency deals with and so smaller adoption agencies should have fewer determinations than larger agencies and thus costs would be in proportion to the size of the provider.

The impact on businesses, charities or voluntary bodies is minimal. Independent fostering service providers (which discharge fostering functions on behalf of local authorities 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 (£2,227) 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 is being made available to local authorities as part of the budget for implementing the Children and Young Persons Act 2008.

The impact on the public sector (local authorities) will be similar to the impact on independent fostering service providers. The Welsh Local Government Association has been consulted and is content with the proposals.

It is difficult to estimate likely take up of IRM Reviews by potential/existing fostering carers but experience of the Adoption IRM to date suggests no more than 15 fostering and adoption IRMs a year in total. In addition it is difficult to gauge the impact the IRM will have on foster carer recruitment. Estimates on potential benefit to educational attainment provided above but lack of clear evidence to establish causality.

9. Consultation

An eight week consultation period on the draft regulations took place over July and August 2009. An eight week consultation period was considered sufficient because:

- The introduction of the IRM for fostering was debated in Parliament during the passage of the Children and Young Persons Act 2008. No concerns were raised.
- The changes will not affect the public at large or business generally, so a shorter consultation that targets key stakeholders such as independent fostering and adoption agencies and foster parent and adoption representative bodies was considered more effective.

Copies of the consultation were sent to all independent fostering providers and adoption agencies. In addition the consultation was posted on the Welsh Assembly Government website and the Fostering Network website inviting responses from all their members including foster carers.

The majority of respondents (86%) agreed with the general approach to the Independent Review Mechanism for fostering commenting that it would improve fairness and transparency for the applicant. As a result of the consultation we propose to amend the regulations to:

- (i) Amend the constitution and tenure of existing adoption and fostering panels and their power to seek information legal and medical assistance;
- (ii) Amend the time limit for prospective adopters to apply to Welsh Ministers to have their case reviewed.
- (iii) Reduce the requirement for social workers on the panel to possess social work post qualifying experience from 5 years to 3 years.
- (iv) Introduce a fee to adoption and fostering agencies for each application for an independent review.

Introducing a charge for fostering service providers and adoption agencies

The majority of respondents (56%) disagreed with the proposal to charge fostering service providers and adoption agencies a contribution towards the review. However the pressing need for the panel to be seen to be independent and transparent in line with the IRM panels in England outweighed the argument for change. Representation from the Administrative Justice and Tribunals Council also provided an argument in favour of outsourcing the operation of the IRM to an independent body which necessitated the introduction of a charge to Fostering providers and adoption agencies. The charge will contribute to the cost of the operation of the Independent Review Mechanism process and also incentivise service providers to provide a robust and equitable service to prospective adopters and prospective and existing foster carers.

The cost will be set at £2,227 for each IRD review in line with charges made by DCSF. Drawing on past figures and England's operation of the service for the past year, we estimate around 15 IRMs a year. IRD Providers will only contribute to the cost of reviews of qualifying determinations that they themselves have made; the number of reviews should therefore be proportional to the size of the agency. We propose to introduce a set fee and monitor the situation closely in its first year of operation and annually thereafter.

The financial implications on local authorities in relation to the IRM have been accounted for within an uplift of £2 m in the 2010/11 settlement to cover burdens arising from implementation of provisions on the Children and Young Persons Act 2008, including the introduction of the IRM for fostering.

10. Competition Assessment

No impact on competition was identified and as such it was not considered necessary to carry out a detailed assessment.

11. Post implementation review

The Welsh Assembly Government will monitor the effectiveness of the Regulations through its management of the IRM contract and will meet regularly with the British Association for Adoption and Fostering (BAAF), the contractor running the IRM contractor to monitor quality assurance of all aspects of the contractors work programme. The contractor will provide the Directorate of Children's Health and Social Services with timely and ongoing evaluation feedback including the provision of information on customer satisfaction. We will gather evidence (BAAF) of their views on its implementation and the number of applications to the IRM. Using existing data collection on looked after children, we will monitor placement stability and outcomes for children and track improvements year on year on this policy.