

EXECUTIVE NOTE

THE LOOKED AFTER CHILDREN (SCOTLAND) REGULATIONS 2009 SSI 2009/210

1. The above instrument was made in exercise of the powers conferred by Section 5 (2), (3) and (4) of the Social Work (Scotland) Act 1968 (“the 1968 Act”), sections 17, 31 and 103 (2) and (3) of the Children (Scotland) Act 1995 (“the 1995 Act”) and sections 110 and 117 of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”). The instrument is subject to negative resolution procedure.
2. The purpose of the instrument is to set out the duties and functions of local authorities in respect of children who are looked after by them in terms of section 17(6) of the 1995 Act.

Legislative Background

3. The 2009 Regulations will revoke and replace both the Fostering of Children (Scotland) Regulations 1996 and the Arrangements to Look After Children (Scotland) Regulations 1996 (collectively referred to as “the fostering Regulations” for the purposes of this Note).
4. The Regulations should be read with the Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003; and the Residential Establishments - Child Care (Scotland) Regulations 1996, which remain in force.

Policy Objectives

5. There have been a number of policy and legislative developments in recent years that necessitate an updating of the fostering Regulations:
 - the publication of 'Getting it right for every child in kinship and foster care', the national strategy, in December 2007.
 - the work of the ‘Getting it right for every child in kinship and foster carer’ reference group, culminating in the publication of the report ‘Moving forward in kinship and foster care’ in March 2009.
 - the findings of the Adoption Policy Review Group, which reported in 2005.
 - the introduction of the permanence order by the 2007 Act, due to come into force in September 2009.
6. The Regulations apply to children who are formally looked after by the local authority (by virtue of section 17(6) of the 1995 Act). A child is “looked after” by the local authority where they are:
 - subject to a supervision requirement (an order made by the children’s hearing where compulsory measures of supervision are necessary)
 - subject to any other order, authorisation or warrant made under chapter 2, 3, or 4 of Part II of the 1995 Act (for example a child protection order made under section 57);
 - subject to a permanence order made under section 80 of the 2007 Act (which transfers parental rights and responsibilities to the local authority and named carers);

- placed with a carer or in a residential establishment under the 1995 Act .

A child may also be “looked after” but able to reside at home.

7. The Regulations reflect a child's journey through the ‘looked after’ system. All looked after children will be assessed and a ‘child’s plan’ will be created setting out the child’s immediate and long term needs and how they will be met. The formation of a case record and the requirement to regularly review the child's case will also apply uniformly to all looked after children. The Regulations also make different provision where the child is being cared for at home or where they are placed with a kinship carer, with a foster carer, or in a residential setting.
8. The Regulations introduce a number of new measures and some new duties on local authorities. These include:
 - the recognition of a separate group of carers, known as “kinship carers”, who care for children who are formally “looked after” in terms of section 17(6) of the 1995 Act. The Regulations make separate provision for the assessment and approval of kinship carers;
 - the duty to produce a ‘child’s plan’ for each child has been strengthened by removing the previous condition “so far as practicable”;
 - there are new duties to consult with the child (taking into account their age and maturity) at different stages throughout the Regulations;
 - changes to the composition of fostering panels which now must have a minimum of 6 members and a quorum of 3. Local authorities will now also have the power to appoint a legal adviser for the purpose of advising the foster panel;
 - a new power to extend emergency placements in certain circumstances for a further 6 week period.
9. The Regulations make provision for looked after children and their carers as follows:
 - Part II establishes the care planning process, including gathering information on the child; assessment of that information and the formation of the 'child's plan'. There is a new requirement that the child (depending on their age and maturity) should be consulted before the plan is prepared.
 - Part III makes general provision affecting all looked after children. It prescribes the notification requirements where a looked after child dies. It also provides for the local authority to make recommendations on the child’s placement to a children’s hearing.
 - Part IV makes provision for a looked after child to be cared for by their parents at home. It also establishes the notification requirements should the child die, suffer serious illness or injury, or absent themselves.
 - Part V concerns kinship care. It makes provision for the assessment and approval of kinship carers, placement of the child with kinship carers and establishes the agreement which must be in place between the local authority and the kinship carer. It also makes provision for the compilation of case records for kinship carers and for

the retention and confidentiality of those records. These regulations place new, additional requirements on local authorities.

- Parts VI and VIII concern foster care. Part VI establishes fostering panels and makes provision for their constitution, composition and functions. The Regulations place a new requirement on local authorities to ensure the panel has six members and a quorum of three.
- Part VII concerns the assessment, approval and placement of a child with a foster carer. It establishes the agreement that must be in place between the local authority and the foster carer and a further agreement that must be in place with regards to the particular looked after child being placed. It also provides for the review of the foster carer's approval, enabling local authorities to terminate the approval or vary the terms. The Regulations further provide for the compilation of case records for foster carers and for the retention and confidentiality of those records.
- Part VIII makes provision for the payment of allowances to kinship and foster carers.
- Part IX establishes the notification procedure and information required for a child placed in a residential establishment. Detailed provision on residential establishments is contained in the Residential Establishments - Child Care (Scotland) Regulations 1996 which remain in force.
- Part X makes provision for local authorities to place a child in an emergency placement with a kinship or foster carer, a person known to the child or in a residential establishment. It also provides for the review and extension of emergency placements and the notification requirements for the placement or extension.
- Part XI makes provision for the establishment of a case record for the child and for the retention and confidentiality of the case record.
- Part XII establishes the review processes for the child's case, where they are looked after at home by their parents, placed with a kinship or foster carer or in a residential establishment or subject to a permanence order. This Part also makes provision for the child to be visited in their placement at set intervals.
- Part XIII makes provision for the local authority to delegate certain duties and functions (in relation to these Regulations) to a 'registered fostering service'. This allows local authorities to make arrangements with bodies who are registered under the Regulation of Care (Scotland) Act 2001. In practice this means that providers must operate under the principle of 'not for profit' in respect of providing fostering services in Scotland, as the Regulation of Care (Scotland) Act states that in order to register, a person providing an adoption or fostering service must be a 'voluntary organisation'.
- Although the 1968 Act and these Regulations permit local authorities to delegate certain duties and functions to registered fostering services, overall responsibility for the looked after child remains with the local authority at all times.

Consultation

10. The Scottish Government consulted on the first draft of the Regulations between December 2007 and March 2008. Responses to the first consultation highlighted a number of issues including a need to restructure the Regulations.
11. The Scottish Government commenced a second round of consultation on the Regulations between October 2008 and January 2009. Respondents welcomed the revised structure of the regulations; commenting that they now helpfully and clearly identified the differences in regulation for children looked after at home and in kinship, foster and residential care.
12. Respondents also welcomed the fact that the Regulations will give kinship carers of looked after children, for the first time, a formal statutory basis with a range of responsibilities and duties for both the local authority and the carer to meet the needs of the looked after child.
13. Responses again highlighted some additional issues and recurring themes. Some comments also sought a high level of detail prescribing matters that are not always appropriate in legislation (many of which would be for professional judgement). Good relations and active consultation between officials in the Scottish Government and stakeholders has ensured that whilst these comments have been taken into account, such matters will be considered for inclusion in guidance.

Regulatory Impact Assessment

14. A Regulatory Impact Assessment has not been submitted with the instrument as it is considered that the instrument will have no impact on business as it carries over existing arrangements between local authorities and registered fostering services. Although the regulations do introduce new provisions on kinship care, these functions may not be delegated to registered fostering services, so there is little change to the present system.

Financial Effects

15. The instrument has no significant effect on the Scottish Government, local authorities or the voluntary sector as the Regulations, in many places, broadly restate some of the existing provisions in the Fostering of Children (Scotland) Regulations 1996 and the Arrangements to Look After Children (Scotland) Regulations 1996.
16. The Regulations do not set the level of fostering allowance as this will be determined by the local authority by reference to local need and priorities.
17. Fostering allowances are already provided for under the existing legislation and therefore, we do not foresee an increase in the cost to local authorities. Any additional cost would be consequent to an increase in successful applications for fostering allowances and not because of provisions in these Regulations.
18. Part V of the Regulations introduces the assessment and approval of kinship carers which places new, additional requirements on local authorities. However, the Regulations do not introduce anything new in terms of the payment criteria for kinship carers. The commitment in the concordat agreement between COSLA and the Scottish Government is

to pay kinship carers of children who are looked after, as defined by section 17 of the Children (Scotland) Act 1995.

19. The financial effect of introducing the kinship care allowance was set out in the concordat agreement. The Scottish Government and COSLA agreed that sufficient resources were included within the total financial settlement for local authorities to meet this commitment. This agreement was based on estimates at a national level on the number of looked after children living with kinship carers.