

EXPLANATORY MEMORANDUM TO
THE CHILDCARE (EXEMPTIONS FROM REGISTRATION) (AMENDMENT)
ORDER 2011

2011 No. 584

1. 1.1 This Explanatory Memorandum has been prepared by the Department for Education (DFE) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order amends the Childcare (Exemptions from Registration) Order 2008 (“the 2008 Order”)¹. It makes provision to exempt from registration under the Childcare Act 2006 (“the 2006 Act) certain local authority foster carers who would otherwise be required to register as a childminder where they care for another local authority foster carer’s foster child for reward.

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

3.1 None

4. Legislative Context

4.1 Under sections 33(1) and 52(1) of the 2006 Act all persons who provide childcare for a child who is under the age of 8 years on domestic premises for reward must register as a childminder with Ofsted (unless exempt).

4.2 Section 18 of the 2006 Act defines childcare as “any form of care for a child and ... includes education for a child and any other supervised activity for a child”. For the purposes of the 2006 Act, time spent at school, health care and care provided for a child by a parent, step parent, person with parental responsibility, relative or foster parent do not fall within the meaning of “childcare”.

4.3 Under sections 33(2) and 52(2) of the 2006 Act the Secretary of State has powers to specify circumstances where childminding is exempt from the requirement to register under those sections. The 2008 Order (as amended in 2010) prescribes those circumstances. The categories of childminding exempted by the 2008 Order include-

- any care for a particular child for two hours or less per day or which is only provided between 6pm and 2am;
- care for a child in the child’s own home or for children from two families in either family’s home (e.g. nannies or au pairs);
- childminding for the child of a friend where it is not provided in return for payment of money or money’s worth.

4.4 This instrument adds a further category of exempt childminding to the 2008 Order. Foster Parents who have been approved under the Fostering Services Regulations 2011 who provide childcare for another local authority foster parent’s

¹ The 2008 Order was previously amended by the Childcare (Exemptions from Registration)(Amendment) Order 2010 (SI 2010/744).

foster child will be exempt from the registration requirements under the 2006 Act. Such childcare arrangements will instead be regulated and monitored by the fostering service in accordance with the Care Planning, Placement and Case Review (England) Regulations 2010.

5. Territorial Extent and Application

5.1 This instrument applies 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 The Government has a responsibility to take all reasonable steps to make sure that children are safe and have the best start in life when they are being provided with childcare and parents have a right to expect this. Under the current system in some circumstances foster parents who have already been approved through a rigorous process are also required to register with Ofsted as a childminder. The Government's view is that it is disproportionate to subject such arrangements to two systems of regulation, monitoring and inspection. The Government is committed to reducing unnecessary burdens and duplication where possible.

7.2 The 2006 Act was intended to provide a streamlined childcare regulatory system, with Ofsted as the single body responsible for registering and monitoring providers to ensure that registered childcare meets required standards. The requirements on childminders take account of the age of children attending their provision. Those caring for children aged 0-5 years are required to meet stricter requirements than those caring for children aged between 5 and 8 where requirements are focused on the fitness of the person and premises rather than activity undertaken with the child.

7.3 The Government recognises that there is a balance between regulating to protect children's interests and allowing parents and carers to take decisions about the most appropriate childcare arrangements for their children, including whether to use formal or informal childcare. Therefore under the 2006 Act there are a number of exemptions from the need for a person to register with Ofsted as a childminder (see paragraph 4.3 above).

7.4 Unless care given to a child falls outside the definition of childcare (see 4.2 above) or is exempted under the 2008 Order (see paragraph 4.3 above), anyone who provides childcare on domestic premises for reward must register as a childminder and meet the relevant registration requirements (as discussed in paragraph 7.2). This means that where a person who has been approved as a foster parent by the local authority or an independent fostering service provides childcare for another foster parent's foster child, they are currently required to register as a childminder under the 2006 Act. If the child is aged 5 years or less, then the foster carer is required to register on Ofsted's Early Years Register and deliver the Early Years Foundation Stage (EYFS) to the child. If the child is aged 6 or 7 years, then the foster carer is required to register on Ofsted's general childminding register and they are not required to deliver the EYFS.

7.5 Fostering services need to have flexibility to be able to support a fostering placement and this includes enabling foster carers to support each other and other foster children. The fostering service may wish to allow a foster carer to look after another foster carer's foster child, for example while the foster carer who the child has been placed with attends a training course. In some cases a fostering service may wish to offer financial recompense for such activity. Under the current regime such arrangement will require the foster carer who is providing the temporary care to register with Ofsted as a childminder. The purpose of this instrument is to remove this regulatory duplication and burden on foster carers by formally exempting such arrangements from the requirement to register with Ofsted under the 2006 Act.

7.6 The local authority looking after a child, and the fostering service, must promote the child's welfare and educational achievement. Foster carers must undertake appropriate training to ensure they can meet the child's needs. As a result, approved foster carers are capable of providing appropriate care for other foster children when this is needed, and the additional requirements imposed on registered childminders are considered an unnecessary duplication of regulation that adds nothing substantive to the quality of care provided for the children concerned.

7.7 The foster care regime is heavily regulated. Local Authority foster carers undergo rigorous assessment by their fostering service (either the local authority or a fostering services provider) before a looked after child is placed with them. Background checks on the suitability of a person to be approved as a foster carer, include Criminal Record Bureau checks and checks on the carer's household [which are similar to the checks made of prospective childminders]. Foster carers approval is reviewed at least annually. The foster carer and the foster child are also each supported by a named social worker.

7.8 This Instrument will not exempt foster carers who are childminding for children other than foster children. Further, a foster carer who has temporary approval to foster a particular child will not be exempted from the registration requirements if they wish to provide childcare for any other child.

- **Consolidation**

7.9 This is the second time the 2008 Order has been amended. In each case the amendment has created a narrow exemption for a particular class of persons and does not affect the overall scheme of the Regulations. It is therefore not considered necessary to consolidate the Order at this time.

8. Consultation outcome

8.1 A formal full public consultation on a range of changes relating to fostering, including a proposal for this exemption from childminder registration, ran between 27 August and 19 November 2010. A total of 136 responses were received including from local authorities, independent fostering providers and key third sector children's 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.

8.2 The majority of respondents (80%) considered that foster carers should not be required to register as a childminder on either the early years register or the general childcare register where they care for another foster carer's foster child. Reasons given included that this would facilitate developing a network of support among foster carers

enabling those carers to undertake training, attend meetings, or meet other family commitments. It was argued that foster carers are already vetted, approved and trained, and are used to caring for looked after children. Moreover, they have the expertise to assess and cater for the particular needs of fostered children that other registered childminders may lack. Respondents felt that it is unreasonable to expect a foster carer to comply with two different sets of regulatory requirements that share the same objective – of safeguarding and promoting the welfare of children. The overlap between the regulatory regimes is disproportionate, given that foster carers are subject to an annual review and their care of children is monitored more frequently than that of childminders.

8.3 Respondents were asked whether there should be any restrictions placed on the exemption, such as a maximum number of days per year a foster parent could look after other foster carers' foster children without having to register with Ofsted as a childminder, or a maximum number of children who could be looked after at one time. Just over half (59%) of respondents thought there should be no restrictions on the exemptions, 23% thought there should be some restrictions, and 17% were not sure. Those who were in favour of not restricting the scope said that it should be left to the fostering service to decide what amount of care from another foster parent was appropriate based on careful assessment. As the child's care plan addresses care arrangements and how best to meet the child's individual needs, short term care arrangements should be addressed within this assessment, which would also ensure that local authorities have necessary flexibility to encourage mutual support among foster carers. In addition, it would help promote placement stability through arrangements between carers who know each other and the children. Those in favour of restrictions largely wanted to ensure that arrangements were not left unregulated and were considered in the context of the care planning framework. The Government agreed with the majority of respondents that the exemption should not contain restrictions as there are other systems in place within the fostering regime which would ensure that only appropriate care was offered to another foster parent's foster child. The Government's response to the consultation including a summary of responses has been placed on the Department for Education's website².

9. Guidance

9.1 Ofsted will amend guidance to its inspectors and those enquiring about registration to take account of this exemption. DFE will amend its care planning guidance (The Children Act 1989 Guidance and Regulations, Volume 2: Care Planning, Placement and Case Review) and Volume 4: Fostering Services to reflect these changes and ensure that such arrangements are properly regulated within the care planning framework.

10. Impact

10.1 It is not possible to quantify the number of local authority foster carers who may benefit from the new exemption that removes the requirement to register with Ofsted (and payment of a fee) before providing childminding services. The impact on business, charities, voluntary bodies will be nil or a reduction in burdens.

10.2 This instrument results in a cost saving both to individuals and for the public purse because it will result in a reduction in the number of people whom Ofsted are required

²<http://www.education.gov.uk/consultations/index.cfm?action=conResults&consultationId=1729&external=no&menu=3>

to inspect and regulate. Whilst each registered childminder must pay an annual fee to Ofsted, the actual fee is substantially lower than the cost to Ofsted of providing its regulatory services and the costs are heavily subsidised from public funds. The burdens on fostering services will also be reduced as they will have to support their foster carers applications for registration as childminders in order for them to care for another foster carer's foster child.

11. Regulating small business

11.1 The legislation does not 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 outlined in 10.2. This exemption indirectly increases flexibility for those fostering agencies that operate as small businesses, that previously would have had to ensure their foster carers were also registered with Ofsted as childminders.

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.

11.4 We do not expect this change to have an impact on commercial childcare businesses as arrangements do not extend to exempting foster carers who may wish to operate a childminding business and care for children who are not in the care of the local authority. The exemption only applies to people approved as local authority foster carers.

12. Monitoring & review

12.1 The Government will monitor the impact of the exemption taking account of any:

- enforcement activity by Ofsted in respect of registration requirements;
- feedback from Ofsted inspections of fostering services which assess the quality of fostering providers and the care provided to children and young people;
- feedback from Children in Care Councils (set up by local authorities to obtain views of looked after children and care leavers) as to the views of children affected by this exemption.

13. Contact

13.1 Patrick Towgood at the Department for Education, Tel: 020 7783 8149 or email: patrick.towgood@education.gsi.gov.uk, can answer any queries regarding the instrument.